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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dennis Welker,

Petitioner,

vs. NO: 18 WC 13375

IDOT,

19IWCC0335

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 sole issue of nature and extent 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 November 5, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $770.95 per week for a period of 9-4/7 weeks, representing October 16, 2017 through December 21, 2017, 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 the reasonable, necessary and related medical expenses identified in PX8 pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $770.95 per week for a period of 37.625 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the right leg to the extent of 17.5%.

19IWCC0335

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 Commission notes that Respondent paid $7,379.11 in TTD benefits.

DATED: JUL 1 - 2019
LEC/maw
o05/01/19
43

Stephen J. Mathis

Thomas J. Tyrrell

DISSENT

I view the evidence differently with respect to Section 8.1b(b) factors (ii), and (v). Therefore, I respectfully dissent.

(ii) the occupation of the injured employee

Petitioner continues to work in his pre-injury job as a highway maintainer. The Arbitrator highlighted this job requires Petitioner to use his knee for heavy lifting, climbing, and shoveling and attached more weight to the factor presumably in favor of an increased permanent disability.

Petitioner was able to return to work performing heavy work activities without issue. T. 23. I find this factor weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by the treating medical records

In analyzing the evidence of disability as corroborated by the treating medical records, the Arbitrator highlighted Petitioner's possible need for additional treatment specifically cortisone injections. Certainly, if Dr. Queenan's supposition comes to fruition, such additional medical treatment would properly be considered in the context of a Section 8(a)/19(h) petition. At this stage, however, I believe this is conjecture and have eliminated it from my analysis of this factor. Moreover, I find the medical records do not wholly support Petitioner's subjective complaints specifically at Petitioner's final evaluation the examination noted virtually full range of motion, full strength, and no swelling. PX4. I find this factor weighs in favor of decreased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, I find Petitioner sustained a 15% loss of use of the right leg under Section 8(e).

Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WELKER, DENNIS
Employee/Petitioner

Case# **18WC013375**

IDOT
Employer/Respondent

19IWCC0335

On 11/5/2018, 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 2.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH
2708 N KNOXVILLE AVE
PEORIA, IL 61604

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

61406140 ASSISTANT ATTORNEY GENERAL
JOSEPH L MOORE
500 S SECONDD ST
SPRINGFIELD, IL 62706

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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 5 - 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)SS.

COUNTY OF **PEORIA**)

19IWCC0335

☐ 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 WELKER
Employee/Petitioner

v.

IDOT
Employer/Respondent

Case # **18** WC **13375**

Consolidated cases: **NONE**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA**, on **10/16/18**. 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 **10/05/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,816**; the average weekly wage was $**1,284.92**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

Petitioner was temporarily and totally disabled from October 16, 2017 through December 21, 2017 and entitled to TTD for this period at a rate of $770.95 for 9 4/7 weeks.

Respondent is entitled to credit of $7,379.11 for TTD paid.

Respondent is entitled to credit for any medical bills paid.

ORDER

Respondent shall pay the Petitioner permanent partial disability of $770.95 for 37.625 weeks because the injury sustained caused 17.5% loss of use of the right leg as provided in Section 8(e) and 8.1(b) of the Act.

The Respondent shall pay any outstanding remaining medical bills listed in Petitioner's exhibit 8 pursuant to the fee schedule or negotiated rate.

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

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

D. Glen McEntee

Signature of Arbitrator

10/31/2018
Date

NOV 5 - 2018

DENNIS WELKER)
)
v.) Case # 18 WC 13375
)
IDOT)

IN SUPPORT OF THE ARBITRATOR'S MEMORANDUM OF DECISION, THE ARBITRATOR MAKES FINDINGS REGARDING THE FOLLOWING ISSUES:

- L. What is nature and extent of the injury?

The Petitioner is 59-years-old. He has worked for the Illinois Department of Transportation for 9 years as a highway maintainer. Petitioner's job requires various maintenance and road duties to include removal of debris and animals, from the road, shoveling, road maintenance, culvert maintenance, snow removal and concrete work. Petitioner's job requires him to lift up to 100 lbs. and climb in and out of the truck several times per day.

On October 5, 2017 Petitioner was at the Peoria maintenance garage. A co-worker was moving snow plow blades on a fork truck when the blades fell. Petitioner jumped out of the way and twisted his knee. Petitioner had immediate pain, reported his condition, and sought medical care.

On the date of the incident Petitioner was examined by Dr. Bowers. Dr. Bowers is Petitioner's family physician. Dr. Bowers documented 5 out of 10 pain and a swollen right knee. Dr. Bowers ordered a MRI. The MRI revealed a meniscal tear with knee chondromalacia or arthritis. Dr. Bowers referred Petitioner to Dr. Queenan.

On November 6, 2017, Petitioner was examined by the orthopedic surgeon, Dr. Queenan. Dr. Queenan confirmed the diagnosis of meniscus tear and chondromalacia. Dr. Queenan prescribed surgery.

On November 15, 2017, Petitioner underwent right radial medial meniscectomy, removal of loose body and shaving chondroplasty of the patella and medial joints. Dr. Queenan removed the posterior horn tear of the medial meniscus, loose bodies and the large plica bland. As Grade III and IV arthritic changes in the medial femoral condyle and patella, Dr. Queenan performed synovectomy and shaving chondroplasty. Dr. Queenan noted the arthritic changes of the medial femoral condyle was on the weight bearing porting of the medial compartment. This is the same area that the portion of the medial meniscus was removed.

Dr. Queenan's post-operative diagnosis was right knee medial meniscus tear, chondromalacia, loose body and synovitis. The parties stipulated these conditions were causally connected to the October 5, 2017 incident.

Following surgery, Petitioner was off work until December 22, 2017. Petitioner received outpatient post-operative therapy. On January 2, 2018 Dr. Queenan examined Petitioner for the final time. Dr. Queenan noted Petitioner was 80% better, had slight swelling, a fibrous bump in the knee and good strength. Dr. Queenan released Petitioner to full duty. Dr. Queenan instructed Petitioner to finish out his physical therapy regimen. Dr. Queenan noted that Petitioner may need treatment in the future to include cortisone injections.

On January 12, 2018 Petitioner completed physical therapy. On that date the therapist noted Petitioner was compliant, had zero to one out of ten knee pain and strength had 4-/4 out of 5.

Petitioner has sought no medical treatment since January 12, 2018 for his right knee.

Admitted into evidence was medical bills listed in Petitioner's exhibit 8. These bills were for treatment directed to the work-related right knee injury. Respondent did not dispute liability for the same. Respondent is entitled to credit for any medical bills paid as listed in Petitioner exhibit 8.

Prior to the incident on October 5, 2017 Petitioner had no pre-existing history of treatment or pain in the right knee.

Petitioner responded well to the medical treatment. Petitioner testified that he has daily pain up to a 1 out of 10 in the knee. The pain is located in the medial portion of the right knee. Petitioner testified the knee has been stiffer as the temperature has dropped this fall. It takes an hour or two for the knee to loosen up.

Petitioner's testimony was credible and consistent with the medical records.

Petitioner returned to work full duty without reduction in earning capacity.

In regard to the nature and extent of Petitioner's injury, the Arbitrator must consider the following 5 factors pursuant to Section 8.1(b):

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 treating medical records

The Arbitrator has considered these factors and finds facts as follows:

i. As to the reported level of impairment, the Arbitrator has considered this factor and finds that no impairment rating was submitted.

ii. At the time of the injury, Petitioner was 59 years old and has 8 years left on the expected work life expectancy. The Arbitrator attaches less weight to this factor because the Petitioner is approaching the end of his work life.

iii. The Petitioner's job is highway maintainer. The job requires heavy demand level work and use of his knee for heavy lifting, climbing and shoveling. The Arbitrator attaches more weight to this factor because the Petitioner's job involves exertion.

iv. The Petitioner's future earning capacity is not affected by the injury at this time.

v. The doctor diagnosed a meniscal tear and Grade III to IV chondromalacia of the patella and Grade III chondromalacia of the medial femoral condyle weight bearing surface. Petitioner complained of daily pain in his knee at a 1 out of 10 level. Petitioner reported that an increase in knee stiffness since the weather got cold, it takes Petitioner about 1 to 2 hours to get the knee loosened up. Dr. Queenan removed part of the meniscus over the medial femoral condyle. Dr. Queenan opined that Petitioner is a greater risk of future problems and may need treatment in the future to include cortisone injections. Petitioner still showed a slight strength deficit at his last physical therapy visit. Petitioner's subjective complaints are consistent and corroborated by the medical records. Because of the above, this factor gets more weight.

After considering the 5 factors the Arbitrator finds the Petitioner has sustained the permanent partial disability to the extent of 17.5% loss of use of the right leg.

The Respondent is liable for medical bills listed in Petitioner Ex. 8 with Respondent receiving credit for any amounts paid regarding those bills.

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

Johnny Baggett,

Petitioner,

vs.

No. 12 WC 43173

II in One Contractors,

19IWCC0336

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand[1] from the circuit court, which found the Commission's decision against the manifest weight of the evidence. The circuit court reversed the Commission's decision and directed the Commission to: correct the date of accident and the rate of permanent partial disability benefits; correct the inconsistent findings regarding causal connection; and award permanent partial disability benefits supported by the evidence, explaining how the Commission arrived at its determination. With regard to permanent partial disability benefits, the circuit court noted that *Crittenden v. Workers' Compensation Comm'n*, 2017 IL App (1st) 160002WC and *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721 (2000), support an award of wage differential benefits. The Commission hereby complies with the circuit court's order and directions.

To summarize the pertinent evidence, Petitioner, a 54-year-old union cement mason at the time of the accident, was struck in the stomach area by a buffer machine and pinned against a door frame on November 12, 2012. Petitioner developed cervical and lumbar symptoms and underwent physical therapy, injections, work conditioning and three functional capacity evaluations (FCEs). An FCE performed March 29, 2013, placed him at the medium-heavy physical demand level. A subsequent FCE performed May 6, 2013, placed him at the light-medium physical demand level. Lastly, an FCE performed July 3, 2013, placed him at the light

[1] The appellate court summarily dismissed the appeal, as the circuit court's opinion and order is interlocutory.

physical demand level. Petitioner complained the work conditioning exacerbated his pain. On June 12, 2013, Petitioner's treating spine surgeon, Dr. Sokolowski, recommended surgery. Petitioner declined the surgery. Petitioner's pain management specialist, Dr. Marsiglia, imposed permanent restrictions at the light physical demand level. In September of 2013, Petitioner requested vocational rehabilitation, as no light duty work was available in the cement industry or through his union. Beginning in 2014, Steven Blumenthal performed a vocational assessment at Petitioner's request, and in 2016 Samantha Allen performed a labor market survey at Respondent's request. Mr. Blumenthal opined Petitioner could only get a near-minimum wage job (assuming he could get a job), while Ms. Allen's labor market survey listed jobs in the wage range of $9.00 to $17.31 per hour. The current union scale for a journeyman cement mason is $44.25 per hour. In the meantime, in January of 2015, Respondent's section 12 examiner, Dr. Singh, viewed a surveillance video of Petitioner and opined he could return to work full duty. The video was then forwarded to Dr. Sokolowski, who reexamined Petitioner and opined he continued to require permanent restrictions at the light physical demand level. Dr. Sokolowski causally connected Petitioner's cervical and lumbar spine conditions and permanent restrictions to the work accident. Petitioner, in addition to his ongoing symptoms, testified that: his highest level of education is a GED; he has two remote felony convictions; he smokes marijuana for pain management; he is not looking for work; and he is receiving Social Security and union disability benefits.

Based on the opinions of Dr. Sokolowski and the chain of events, the Commission finds Petitioner's current condition of ill-being is causally connected to the undisputed work accident. The Commission reaffirms its finding that Petitioner sustained a career ending injury. Although the vocational experts disagree as to what Petitioner is able to earn in some suitable employment, there is no question he sustained an impairment of earnings. Accordingly, the Commission is bound by the appellate court decisions in *Crittenden* and *Gallianetti*, and must find that Petitioner is entitled to wage differential benefits. The Commission adopts Ms. Allen's opinion that Petitioner is employable as an auto insurance sales representative at an hourly wage of $17.31 and computes the weekly wage differential benefits as follows: 66 2/3% x 40 x ($44.25 - $17.31) = $718.40.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $718.40 per week commencing April 24, 2015 for the duration of his disability as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing his usual and customary line of employment. As further provided in §8(d)1 of the Act, this award of wage differential benefits shall be effective only until Petitioner reaches the age of 67 or five years from the date the award becomes final, whichever is later.

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.

19IWCC0336

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: JUL 1 - 2019
o-05/01/2019
SM/sk
44

Stephen Mathis

Douglas McCarthy

DISSENT

I respectfully dissent.

Procedural History

On March 10, 2017, the Arbitrator entered a decision finding Petitioner 1) sustained an accident on November 12, 2011; 2) denying a causal relationship between the accident and his current condition of ill-being; 3) awarding a credit of $144,500 for temporary total disability benefits paid; 4) awarding 35% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act at a rate of $695.78 per week; and 5) denying Penalties and Fees. In the body of the decision, the Arbitrator found the date of accident to be November 12, 2012 and further found a causal relationship between the accident and Petitioner's current condition of ill-being. Additionally, in denying benefits pursuant to Section 8(d)1, the Arbitrator found Petitioner less than credible regarding his testimony as to his ongoing physical limitations, therefore, no basis existed to award wage loss benefits pursuant to Section 8(d)1.

On January 5, 2018, the Commission affirmed and adopted the decision of the Arbitrator save for the addition of an award of temporary total disability benefits of 123 and 6/7 weeks stipulated to by the parties.

On July 12, 2018, the Circuit Court of Cook County entered its order reversing the decision of the Commission finding the inconsistencies in the Commission's decision compelled a finding that such decision was against the manifest weight of the evidence. The Circuit Court remanded the matter to the Commission for an entry of a decision with the correct accident date

of November 12, 2012 with the correct corresponding permanent partial disability rate ($712.55). The Circuit Court further directed the Commission to 1) make a consistent finding as to the causal relationship between the accident and Petitioner's current condition of ill-being and 2) provide an explanation in support of its prior award of 35% loss use of the person as a whole pursuant to Section 8(d)2 presumably assuming a finding of causal relationship.

The matter is presently before the Commission pursuant to the Circuit Court's remand order following the Appellate Court's dismissal of the appeal due to lack of jurisdiction.

Conclusion of Law

In arriving at its decision, the majority misapprehends the mandate of the Circuit Court. "'The trial court may only do those things directed in the mandate.' [Citation omitted]." *Quincy School District No. 172 v. Ill. Educ. Labor Rels. Bd.*, 366 Ill. App. 3d 1205, 1209, 853 N.E.2d 440 (2006). The Circuit mandated and remanded the matter to the Commission for 1) "a determination that the Current Condition of Ill Being is or is not causally related to the Accident… 2) explanation as to how the Commission determined that Plaintiff was eligible for an 8(d)(2) award and not an 8(d)(1) award." *Circuit Court Decision*, p. 16.

Petitioner testified he was a cement mason who sustained injury when he was struck by a malfunctioning trowel machine. T. 23. Accident was not in dispute. MRIs of both the lumbar and cervical spine were undertaken which were negative for herniations. PX6 & PX8. Petitioner underwent conservative medical treatment consisting of physical therapy and injections. PX4 & PX5. An initial FCE was performed on March 29, 2013 which assessed Petitioner's abilities to be at a medium-heavy capacity. Work conditioning was instituted, but due to Petitioner's pain complaints, on April 22, 2013, Dr. Foreman referred Petitioner to a spine specialist. PX8.

On April 24, 2013, Petitioner sought treatment with Dr. Sokolowski who recommended a further FCE in order to determine Petitioner's base-line functional abilities. Dr. Sokolowski requested Petitioner provide the MRI films for review in order to determine additional treatment options. PX1. On May 6, 2013, Petitioner underwent an FCE which assessed Petitioner's abilities to be at a medium level. PX8.

On May 20, 2013, Petitioner was evaluated by Dr. Singh pursuant to Section 12 of the Act at Respondent's request. Dr. Singh diagnosed Petitioner with cervical and lumbar sprains and recommended two to four weeks of work conditioning. RX1, Dep. Ex. 2. On June 4, 2013, a work conditioning evaluation was performed which indicated Petitioner was capable of

performing 77.8% of the physical demands of his job duties. Work conditioning was instituted. PX7.

On June 12, 2013, Dr. Sokolowski re-evaluated Petitioner who complained of increased pain upon resumption of work conditioning. Given Petitioner's subjective complaints of pain, Dr. Sokolowski recommended cessation of work conditioning; placed Petitioner at maximum medical improvement; and released Petitioner to return to work within the parameters of the May 6, 2013 FCE. PX1. On July 3, 2013, Petitioner underwent an FCE which assessed Petitioner's abilities to be at a light level. PX2.

On August 5, 2013, Dr. Singh re-evaluated Petitioner and again recommended work conditioning with validity assessment noting five out of five positive Waddell findings. RX1, Dep. Ex. 3. On January 26, 2015, Dr. Singh authored an addendum report after reviewing video surveillance obtained on November 29, 2014; December 3, 2014; and December 5, 2014. Dr. Singh placed Petitioner at maximum medical improvement and released Petitioner to return to work without restrictions. RX1, Dep. Ex. 4.

On September 1, 2015, Dr. Sokolowski re-evaluated Petitioner and reviewed the video surveillance. Dr. Sokolowski placed Petitioner at maximum medical improvement and released Petitioner to return to work within the parameters outlined in the FCE of July 3, 2013. PX1.

On October 22, 2015, Dr. Sokolowski provided his opinions via deposition testimony. Dr. Sokolowski testified consistently with his medical records and reports. Dr. Sokolowski testified Petitioner suffered from cervical and lumbar radiculopathy caused by his work accident. PX3, p. 14-15. Dr. Sokolowski testified the basis of his opinion "was the temporal onset reported by the patient and the correlation between the inciting work event and the onset of symptoms, and negative past medical history with the exception of report of a 1995 neck injury that resolved thereafter." *Id.*, p. 15. Dr. Sokolowski reviewed the video surveillance which he stated did not alter his opinion regarding Petitioner's ability to return to work with the permanent restrictions previously prescribed. *Id.*, p. 26. Dr. Sokolowski explained the activities documented in the video surveillance appeared consistent with the restrictions. *Id.*, p. 27.

On December 12, 2015, Dr. Singh provided his opinions via deposition testimony. Dr. Singh testified consistently with the three reports he previously authored. Dr. Singh testified Petitioner suffered from cervical and lumbar strains. RX1, p. 14. In arriving at the diagnosis, Dr. Singh reviewed the actual MRI films in conjunction with performing a physical examination. *Id.* Dr.

19IWCC0336

Singh testified that on both occasions in examining Petitioner, the exam findings were normal, but Petitioner exhibited Waddell findings. RX1, p. 17. Dr. Singh testified after reviewing the video surveillance coupled with Petitioner's "normal neurological examination, the relative paucity of finds on the MRI, I felt that the patient was capable of returning back to work without restrictions." *Id.*, p. 21. Dr. Singh went on to explain the impact of the video surveillance on his opinion stating:

> Mr. Baggett reports, on my last encounter of August 5, 2013, during my examination, he's unable to bend forward more than 5 degrees, which is a simple slight bend, bend backwards 5 degrees, axial rotation 5 degrees. He's severely limited by movements and activities.
> He states that, in May 2013 encounter, he's unable to sit, stand, or walk for any duration of time, in particular, 30 minutes. Sitting, standing, all of those cause him discomfort. On the video he's doing all of those things: brisk walking, bending forward, bending over, placing objects into and out of his car, entering and exiting his car, which would all suggest significant improvement.
> In light of that, as well as his normal neurological examinations, as well as minimal radiographic degenerative change at L5-S1, the natural history is of improvement. The video suggests that he is improved. In the absence of a neurological deficit and a normal range of motion, I felt that he's capable of returning back to his old job. RX1, p. 36.

I would find Petitioner not credible. The Arbitrator found Petitioner's pain complaints embellished and too unreliable to make a determination as to Petitioner's actual physical limitations. Moreover, such findings were affirmed by the Commission in its initial decision. The evidence supports such a finding particularly in light of the video evidence which highlights Petitioner's fluid mobility as he climbs in and out of large trucks as well as his unrestricted gait and lifting abilities. The majority's current decision completely ignores its prior findings regarding Petitioner's credibility or lack thereof. The Commission's initial decision was certainly internally inconsistent given this finding of credibility and the permanency amount awarded based upon a loss of trade. The majority, though, in its present decision, fails to undertake the necessary independent review of the facts instead entering an award of benefits pursuant to Section 8(d)1 predicated on the Circuit Court's reasoning.

I would afford greater weight to the opinions of Dr. Singh over those of Dr. Sokolowski. Dr. Singh reviewed the actual MRI films which evidenced degenerative disc disease and no acute findings. Dr. Singh testified Petitioner's physical examination findings were normal, and Petitioner exhibited Waddell findings. Dr. Singh gave Petitioner the benefit of the doubt and recommended work conditioning with validity assessment which Petitioner failed to complete.

Dr. Singh thereafter reviewed the video surveillance which evidenced Petitioner's clear improvement in his symptoms and functionality leading Dr. Singh to release Petitioner to return to work without restrictions.

In contrast, Dr. Sokolowski failed to review the actual MRI films which he requested in order to provide the appropriate treatment recommendations. Without review of the films, Dr. Sokolowski apparently discussed possible surgery which Petitioner declined. Dr. Sokolowski reviewed the video surveillance but failed to address Petitioner's subjective complaints and limitations which were not evidenced on the video surveillance. Dr. Sokolowski's opinions are based solely on Petitioner's subjective complaints which are not to be believed given Petitioner's lack of credibility. An expert's opinion is only as valid as the facts upon which it is based. *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC.

As such, I find Petitioner suffered from cervical and lumbar strains which resolved allowing him to return to work without restrictions. I find Petitioner's current complaints of pain not related to his accident. Further, I would vacate the award of 35% loss of use of the person as a whole and award 10% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act. For the reasons stated above, I respectfully dissent.

Elizabeth Coppoletti

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan D. Ehrich,

Petitioner,

vs. NO: 16 WC 7366

State of Illinois Logan Correctional Center,

19IWCC0337

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 the nature and extent of Petitioner's 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, 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.

DATED: JUL 1 - 2019
TJT:yl
o 6/18/19
51

Thomas J. Tyrrell

Maria E. Portela

19IWCC0337

DISSENT

I view the evidence differently with respect to Section 8.1b(b) factors (ii), and (v). Therefore, I respectfully dissent.

Permanent Disability

I view the evidence differently with respect to Section 8.1b(b) factors (ii), (iv), and (v).

(ii) the occupation of the injured employee

Petitioner returned to work in his pre-injury job as a correctional officer. The Arbitrator highlighted this job would have exposed Petitioner to increased pain and threat of injury due to altercations with inmates.

I believe analysis of this factor must also include Petitioner's unrebutted testimony that he returned to work on April 10, 2017 and continued to work until September 6, 2017. T. 24. During such time, Petitioner failed to return for any additional medical treatment save one date where he was denied requested opioid medication due to a prior discrepancy on his drug test. PX1. Additionally, Petitioner was able to perform his job duties during this period. T. 35. I find this factor weighs in favor of decreased permanent disability.

(iv) the employee's future earning capacity

Petitioner returned to work in his pre-injury job as a correctional officer for five months with no loss of income. The Arbitrator highlighted Petitioner's decision to leave his employment allegedly due to ongoing pain complaints but found any reduction of earnings speculative. The Arbitrator gave little weight to the factor.

I believe analysis of this factor must include Petitioner's ability to return to work at his former occupation without any loss of earning capacity. As the Arbitrator noted finding a reduction of earning capacity is speculative. I find this factor weighs in favor of a decreased permanent disability.

(v) evidence of disability corroborated by the treating medical records

Petitioner testified at trial to ongoing complaints of pain and weakness. Petitioner testified to experiencing pain on a daily basis which he rated as 7.5 out of 10. T. 37. The Arbitrator found the treating medical records corroborated this testimony. I find the medical records do not wholly support Petitioner's subjective complaints specifically at Petitioner's final evaluation the examination noted virtually full range of motion without tenderness. Moreover, when Petitioner was last evaluated by his treating surgeon, Dr. Payne, he noted "he is a muscular guy so not being able to really appreciate mild amounts of weakness are going to be difficult." PX1. I find this factor weighs in favor of decreased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, I find Petitioner sustained a 20% loss of use of the person as a whole under Section 8(d)2.

Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EHRICH, NATHAN D
Employee/Petitioner

Case# **16WC007366**

16WC007367

LOGAN CORRECTIONAL CENTER
Employer/Respondent

19IWCC0337

On 1/28/2019, 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:

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

6140 ASSISTANT ATTORNEY GENERAL
JOSEPH L MOORE
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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

JAN 28 2019

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

19IWCC0337

STATE OF ILLINOIS)
)SS.
COUNTY OF MACON)

- [ ] 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

Nathan D. Ehrich
Employee/Petitioner

v.

Logan Correctional Center
Employer/Respondent

Case # 16 WC 7366

Consolidated cases: 16WC7367

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of Bloomington, on December 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. [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. [ ] 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 **July 31, 2015 and September 7, 2015**,Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**64,704.00**; the average weekly wage was $**1244.31**, based upon the stipulation of the parties.

On the date of accident, Petitioner was **43** years of age, married with **8** 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.

The parties stipulated that all TTD due for these claims was paid through payment of extended benefits, and there is no claim for credit for any overpayment.

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

ORDER

Though the issue was not disputed, unpaid medical bills were submitted into evidence as Petitioner's Exhibit 5. Respondent shall pay reasonable and necessary medical services of $39,593.00, as provided in Sections 8(a) and 8.2 of the Act, subject to reductions under the medical fee schedules and any applicable 8J credits.

Respondent shall pay Petitioner permanent partial disability benefits of $746.59/week for 135 weeks, because the injuries sustained caused the 27% 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.

D. Dylan McCarty

Signature of Arbitrator

1-23-2019

Date

JAN 28 2019

In considering the disputed issues in these claims, the Arbitrator considers the following facts:

Petitioner testified that on July 31, 2015, he was employed by the Illinois Department of Corrections at the Logan Correctional Facility as a correctional officer and had been so employed since May 8 1995. Petitioner testified that this was a maximum security women's prison and on that date there was a confrontation with an inmate in the chow line and he had to physically grab her and take her to the ground. Petitioner testified that in the process he injured his right arm with loss of strength and electric type pain from his neck through his right arm. Petitioner testified that he made an incident report but did not seek treatment at that time as his symptoms did not become severe until after his second incident. Petitioner testified that on September 7, 2015, while entering the gym in the prison, he had to pull on an old cell door that was very difficult to open. After pulling on it forcefully very hard a couple of times with his right arm, he experienced sharp pain down his neck and arm and experienced weakness in the arm. Petitioner testified that he is left hand dominant. Petitioner testified that after reporting this second incident, he saw his primary care physician, Dr. Ellenberger.

Records from Springfield Clinic show that Petitioner was seen on September 16, 2015 complaining of an injury to his right shoulder. (PX 1, pp. 240-241) Petitioner provided a history of breaking up a fight on July 31, 2015 that caused some pain but it had gotten better until he pulled on the heavy steel door at the gym. Petitioner reported to the doctor that now he could barely lift his right arm. Petitioner described the pain as 6 – 10/10 in intensity and worsening. On examination, Petitioner had pain in his right shoulder and restricted motion due to pain. X-rays were ordered and a referral to an orthopedic doctor was planned. An x-ray of the right shoulder on September 19, 2015 was normal. (PX 1, p. 371)

On October 21, 2015, Petitioner was seen by Dr. Mark Greatting, an orthopedic surgeon at Springfield Clinic for his right shoulder complaints. (PX 1, pp. 235-236) Petitioner described both incidents, indicating that he thought he injured his right shoulder in the altercation, but when pulling on a door at the exercise facility at work several times that had to be forcefully pulled open, he had increasing pain in his right shoulder. Petitioner stated that he had not had previous problems with his right shoulder. Petitioner reported weakness in his right arm and pain in the shoulder radiating down his biceps with numbness and tingling into his forearm and hand. Upon exam, Petitioner was tender over his AC joint and anterior shoulder area. Petitioner had limited active range of motion with pain. He had a positive apprehension test. Dr. Greatting opined that he had a significant right shoulder injury with possibly either a rotator cuff or labral injury and recommended an MRI. He also recommended an EMG/NCV due to the complaints of numbness and tingling. Dr. Greatting stated that Petitioner's current symptoms and problems appeared to be related to the injuries that he related in his history. EMG testing on December 18, 2015 by Dr. Gelber revealed a moderately severe acute right C6 radiculopathy with evidence of ongoing nerve root irritation and very mild (incidental) right carpal tunnel syndrome. (PX1, p. 221) An MRI done on the same date showed a tear of the posterior inferior glenoid labrum with an adjacent inferior projecting paralabral cyst, tendinopathy of the supraspinatus and subscapularis without tear or retraction seen and a mild glenohumeral and acromioclavicular joint osteoarthritis. (PX 1, p. 368) Petitioner returned to Dr. Greatting on December 22, 2015 for follow up on his right arm and shoulder complaints. (PX 1, pp. 219-220) He noted that Petitioner had some mild shoulder pain but his main complaint when last seen was weakness in his arm, particularly when trying to do weight lifting with his biceps. Dr. Greatting briefly reviewed the Petitioner's history and noted the EMG result showing an acute moderately severe C6 radiculopathy as well as the result of the right shoulder MRI. Dr. Greatting indicated that he felt that most of the Petitioner's symptoms were related to his C6 radiculopathy and suggested that Petitioner see Dr. Payne, who had previously done cervical spine surgery on Petitioner.

Petitioner did see Dr. Payne on January 7, 2016, reporting pain, numbness and tingling in the right upper extremity with some "bothersome" pain. (PX 1, pp. 214-215) Petitioner reported progressive weakness and atrophy of the right biceps, and reported that he was now having some profound weakness in his right arm to the extent that he could not even curl 15 pounds. On examination, Dr. Payne noted significant wasting of the

right biceps but no physical signs of a biceps rupture. Strength of the right biceps was rated at 3/5 or 4/5. Plain x-rays showed a solid fusion at C5, C6 and C7 with no loosening of past hardware. Dr. Payne noted some adjacent level degeneration at C4/5, and also noted the EMG positive for C6 radiculopathy. Dr. Payne diagnosed a C6 right upper extremity cervical radiculopathy noting the pathology at C4/5, and suspecting a bit of abnormality in innervations and distribution of nerve roots. He recommended a cervical MRI for further evaluation.

Petitioner testified at Arbitration that he had undergone previous fusion at C5/6 and C6/7 in 2008 due to spinal stenosis. Petitioner testified that follow that previous surgery he had not been having difficulty with his neck or right arm or shoulder and had been working full time as a correction officer without restrictions until these new accidents.

An MRI taken January 19, 2016, showed mild disc bulge with bilateral uncovertebral hypertrophy and facet hypertrophy with mild spinal canal stenosis and severe bilateral neural foraminal narrowing at C3/4, mild disc bulge superimposed on a central disc protrusion that indented the ventral cord and resulting in mild spinal canal stenosis and severe bilateral neural foraminal narrowing at C4/5. (PX 1, p. 359). At C5/6 there was no disc protrusion or spinal canal stenosis but bilateral uncovertebral hypertrophy and facet hypertrophy was present with moderate bilateral neural foraminal narrowing. At C6/7, there was no disc protrusion but bilateral uncovertebral hypertrophy and face hypertrophy with mild right and moderate left neural foraminal narrowing, without

Petitioner returned to Dr. Payne on February 4, 2016 who reviewed the results of the MRI. (PX 1, p. 211-213) Petitioner was reporting weakness in his biceps and severe pain radiating in to his right shoulder. He indicated that he was very uncomfortable and was seeking a surgical solution. Epidural steroid injections were discussed but Petitioner indicated that those had not helped him in the past. Dr. Payne noted some wasting in the right biceps, and noted some weakness in the deltoid and biceps on the right, noting that Petitioner was a "very strong guy". Dr. Payne diagnosed a C4/5 disc herniation with severe neural foraminal stenosis and recommended surgical intervention at that level with a discectomy and cage, and utilization of a fusion stimulator after surgery.

Petitioner did see Dr. Narla on March 22, 2016 reporting a history of both incidents, stating that he did not feel much after the altercation with an inmate, but had sudden pain shooting into his right arm while trying to open the door. (PX 1, pp. 204-207) The risks and benefits of an epidural steroid injection were discussed but Petitioner declined to proceed, indicating that he was waiting for an independent examination regarding Dr. Payne's recommendation for surgical intervention.

On May 9, 2016, Petitioner was seen by Dr. David M. Anderson at the request of Respondent for a Section 12 examination. (PX 3, RX 2) Dr. Anderson reviewed Petitioner's records of prior treatment. Petitioner provided a history of the two incidents in the course of his employment, indicating that he had some symptoms of pain in his right upper extremity after the altercation with an inmate that was not horribly miserable but bothersome, and then the onset of sharp pain while pulling the door as well as the onset of weakness in the right arm at that time. Dr. Anderson noted that Petitioner had undergone a previous cervical fusion in 2008. Petitioner complained of right shoulder pain as well as right arm weakness with atrophy to the biceps. Petitioner indicated that he was continuing to work but had been moved to a less demanding desk job. Petitioner noted that he had attended chiropractic treatment for four weeks that had helped his symptoms somewhat. Dr. Anderson conducted a physical examination that included findings of decreased cervical range of motion, pain in the right trapezius with Spurlings testing and atrophy in the right deltoid and biceps. His diagnosis was right upper extremity radiculopathy and diffuse right shoulder pain with MRI evidence of posterior labral tear and paralabral cyst. Dr. Anderson opined that there was a causal connection between the Petitioner's work incidents and his current objective findings in his cervical spine. He causally related the acute

C6 radiculopathy diagnosed by EMG to be related to these injuries. He also opined that one or both of these incidents at least aggravated the labral tear found in Petitioner's right shoulder. He also opined that the surgical plan that the Petitioner described of removing hardware at the C5 and C7 level and performing a fusion at C4/5 was reasonable. He opined that Petitioner's shoulder would need to be re-evaluated once the cervical surgery was completed. He opined that Petitioner could continue his sedentary job and affirmed that Petitioner was not at MMI for his cervical and shoulder conditions.

Petitioner thereafter underwent surgery on October 24, 2016 at St. John's Hospital consisting of an anterior cervical discectomy and fusion at C4/5 with insertion of an interbody cage and anterior plating with segmental fixation, as well as removal of screws at C5. (PX 2, pp. 12-14)

Petitioner followed up with Dr. Payne post-operatively on November 10, 2016 who indicated he was doing "pretty good" and refilled his prescription of hydrocodone. (PX 1, pp. 49-51) Petitioner returned again to Dr. Payne on December 8, 2016, six weeks post-op, "having a lot of problems" reporting 10/10 pain in his neck and that he had been cut off of his medications related to "drug test problems". (PX 1, pp. 44-45) Petitioner reported 10/10 pain and weakness in his shoulder. Petitioner was referred to physical therapy and was given a slip to remain off work for 6 weeks.

Records from Memorial Industrial Rehabilitation Center contained with the Springfield Clinic records show that Petitioner underwent an initial evaluation for therapy on December 19, 2016. (PX 1, pp. 134-138) At that time, Petitioner was complaining of right sided neck, scapular and shoulder pain.

Petitioner returned again on February 2, 2017, reporting that he had been going to therapy and doing a lot of strengthening in his upper extremities. (PX 1, pp. 40-43) Dr. Payne indicated that he would transition him to work hardening to try to get him back to work after the next visit. Petitioner was given a slip for 6 weeks of work hardening. Dr. Payne indicated that Petitioner had been receiving therapy at MOHA. Dr. Payne noted that his strength in his upper extremities has been limited with overhead activities and that manual testing that day showed 4/5 strength in all motor groups in the upper extremities. Dr. Payne noted that he had giving way due to pain. Petitioner was directed to return in six weeks. Petitioner returned to Dr. Payne on March 30, 2017, who noted that Petitioner had missed three sessions of work hardening that he wanted to complete. Dr. Payne gave him a return to work of April 10, 2017. No examination notes are present on this date. Dr Payne released him from care PRN. Petitioner testified on cross examination that he was released without restrictions at his request because that was required to allow him to return to work, though he felt that he probably should not have been.

Petitioner attended a final therapy session on April 6, 2017. (PX 1, pp. 76-78) At this final session Petitioner reported persistent pain of 6/10 though he felt that his strength had improved and he was ready to return to work. The therapist noted that the Petitioner worked hard when he attended sessions though he had missed some appointments. He indicated that Petitioner was currently lifting 50 pounds functioning at the upper levels of medium physical demand as required for a correctional officer. Overall, the therapist felt that he had "progressed nicely".

Petitioner was seen by Ashley Kaesebier (Sherman) APN/CNP to Dr. Kellenberger on April 13, 2017 reporting right shoulder pain and was prescribed Prednisone. A visit with Dr. Payne was offered, as it was thought that the pain might be radicular, but Petitioner declined. Petitioner reported that he had just returned back to work and started lifting two days ago and that both shoulders were both sore. He reported severe pain after being required to carry a heavy double back up to the top of the tower. Significant pain to palpation and limited motion was noted in Petitioner's right shoulder.

Records from the Veteran's Administration show that the Petitioner consulted with a physical medicine and rehabilitation doctor, Chitra Gowda, on July 23, 2018. (PX 4, pp. 32-37) Petitioner was complaining of bilateral hand tingling and weakness in the right arm. It was noted that these complaints were also involved in a worker's compensation case. It was noted that he had undergone two surgeries on his neck and reported that he still had weakness and pain in his right upper arm that was constant. He denied numbness and tingling at that time and was not interested in stronger pain medications other than the Ibuprophen that he was taking as needed. He reported being able to perform his daily activities and that physical therapy had not helped in the past. He reported that he was in the process of going to truck driving school and wanted to know if he had any restriction or worsening on his x-rays. On examination, it was noted that the muscle bulk in his right upper extremity was somewhat reduced and his strength on the right was 4+/5 compared to 5/5 on the left side. It was noted that he is left handed. Petitioner was advised to continue to manage his pain with Ibuprophen.

Petitioner testified that he has continued to suffer pain and weakness in his right upper extremity. Petitioner testified that he has never recovered his previous strength in his right arm and does not work out like he used to. Petitioner testified that he has pain at the base of his skull and the top of his neck similar to a migraine headache. Petitioner testified that he's unable to take prescription pain medication because he is allergic to opioids. He testified that he does take over-the-counter Ibuprofen but avoids it as much as he can as it can have side effects. Petitioner testified that he notices the difficulties with strength in his right arm with activities like vacuuming a floor and swimming. Petitioner testified that he experiences weakness in his right arm with lifting. He testified that he can lift a gallon of milk but not to put it on the top shelf of the refrigerator. He testified that he is particularly limited with lifting above the chest level. Petitioner testified on re-direct that he sometimes experiences numbness in his right arm and feels tingly like it is asleep. He testified that this happens once or twice a week and does not occur in his opposite left arm. Petitioner testified that he continues to have pain in his right shoulder from the time he wakes up until he goes to bed, which is worse with activities such as vacuuming a floor, raising his arm above chest level, mowing a yard or walking a dog. He testified that he experiences the migraine-like headaches three or four times per week that last from a couple of hours to a full day. He testified that this pain sometimes causes him to stop the activities that he is doing. Petitioner testified that the rotation of his neck left to right is less since his surgery "but not drastically". To look behind himself, he has to turn his whole body. Petitioner testified that he had none of these problems prior to his work related injuries.

Petitioner that he left his job at the prison on September 6, 2017, which he indicated was related to his inability to sleep and his pain while working a lot of overtime. Petitioner testified that he had since going to Lincoln Land Community College for training in truck driving and was waiting on a call from an employer in Alabama to begin driving flatbed trucks. He testified that he had already worked as a truck driver for another employer briefly before the engine of his truck "blew up". He testified that in this job he takes longer than it should to do many things because of his ongoing weakness and pain, like securing a load, tarping a load or just getting in and out of a truck. He testified that he can

Based upon the foregoing facts, the Arbitrator makes the following findings:

1. **Medical expenses:** Unpaid medical bills were submitted into evidence as Petitioner's Exhibit 5, though liability for those bills was not disputed. The medical bills submitted into evidence are shown by the Petitioner's testimony and the medical records offered into evidence to be related to the Petitioner's injury. The medical bills are awarded subject to reductions allowed under the Medical Fee Schedules and with credit as allowed under Section 8J.
2. **Nature and extent:** Accident and causation were not disputed. The Petitioner suffered tears to the labrum of his right shoulder that was not surgically treated, and injuries to the discs in his cervical spine resulting in a fusion. In addressing an award of permanent partial disability, the Arbitrator must address the factors set forth in Section 8.1b of the Act:

a. AMA impairment evaluation: No AMA impairment evaluation was offered so this factor is given no weight.
b. Occupation of the injured employee: Petitioner initially returned to work as a corrections officer which would have exposed him to exacerbation of his pain and threat of further injury from altercations with inmates. He therefore left that facility and has sought out alternative employment as an over the road truck driver, though he has not fully returned to that type of work. Petitioner testified that his ongoing problems with pain and weakness of his right upper extremity forces him to perform certain tasks more slowly. This factor is given significant weight.
c. Age of the employee at time of injury: Petitioner was 43 years old at the time of his injuries and would therefore be expected to suffer the effects of his weakness and pain in the work place for more for more than 20 years of anticipated work. This factor is given significant weight.
d. Employee's future earning capacity: Petitioner was released to return to his former employment without restrictions at his request, so would have been earning as much as he had previously. Petitioner did leave that employment in part due to his ongoing pain related to his injuries, but has not yet successfully returned to his chosen alternative work in truck driving so any assessment of decreased earnings in that employment would be speculative at this point. This factor is given little weight.
e. Evidence of disability corroborated by medical records: Petitioner testified to ongoing pain in his neck and right upper extremity as well as weakness in his right arm. These complaints are corroborated by the nature of the injuries that the Petitioner sustained, the complaints of pain and weakness when Dr. Payne recorded his examination findings on February 2, 2017, Petitioner's persistent complaints of pain at his last therapy session on April 6, 2017, Petitioner complaints of pain and limitation of motion in his right shoulder in follow-up with his principal care provider on April 13, 2017, as well as complaints of pain and findings of weakness and reduced muscle bulk in the right upper extremity when examined at the VA on July 23, 2018. Petitioner testified credibly regarding difficulties with lifting and range of motion in his daily activities as well as his new profession as a truck driver.

Based upon the foregoing factors, the Arbitrator awards permanent partial disability of 27% of a man-as-a-whole, attributing 25% man as a whole to the Petitioner's neck injury resulting in fusion and 2% man-as-a-whole for injury to Petitioner's right shoulder.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brendon Gibson,

Petitioner,

vs. NO: 18 WC 14825

19IWCC0338

State of Illinois/IYC Harrisburg,

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, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 10, 2018, 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.

DATED: JUL 1 - 2019

TJT:yl
o 5/7/19
51

Maria Elena Portela

Maria E. Portela

Deborah L. Simpson

Deborah L. Simpson

19IWCC0338

DISSENT

I believe Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on 4/20/18. I also believe, based on the opinion of Dr. Paletta, as well as a chain of events theory, that Mr. Gibson proved a causal relationship existed between the accident and his subsequent right knee injury and need for treatment, including the recommended surgery.

More to the point, I believe that this is yet another example of this particular Arbitrator imposing a much higher standard of proof than the law requires. The evidence shows that Petitioner had no pre-existing history of injury, treatment or lost time from work with respect to his right knee, and that he was working without restrictions up through the date of injury. Respondent's own video shows that the unit was dealing with a serious situation involving an obviously disturbed and combative young man. As a result, the guards were required to respond with force, after which Petitioner immediately reported the injury. Furthermore, his fellow guards more or less backed up his claim that he injured his knee as a result of this altercation, although they weren't exactly clear on every detail. Then again, they were involved in the physical encounter themselves, more concerned about their own well-being, and could not be expected to be completely aware of the circumstances surrounding Petitioner's injury. And yet all the witnesses were aware of the fact that Mr. Gibson had injured his right knee at that time. Furthermore, Petitioner sought immediate treatment and was subsequently diagnosed with a torn ACL, and surgery has been recommended. Finally, there is absolutely no evidence that Petitioner injured his knee any other way, or even that it was the result of a pre-existing degenerative condition. Indeed, there is not even an opposing medical opinion to suggest such a thing, since Respondent never bothered to get a §12 examination.

For all practical purposes, the Arbitrator is requiring Petitioner to prove his case "beyond a reasonable doubt" and not the "preponderance of the evidence" standard that is at the very heart of our workers' compensation system. Admittedly, there are conflicting details in the histories offered by the various witnesses, including Petitioner, and the video does not clearly show Petitioner being struck in his knee or reacting in kind. However, given the nature of the skirmish, Petitioner's actions are difficult to make out amongst the crowd of fellow guards. Furthermore, there was no camera in the cell to either prove or disprove his claim that he was kicked by the youth once they got him inside. For that matter, video surveillance is not going to show someone's knee popping, especially when they are in the middle of a scrum.

Moreover, as a former Chicago Police Officer, I know firsthand the nature of such violent confrontations, and understand completely how one may not immediately know that they've been hurt, let alone the mechanism of injury, until the adrenalin subsides and you've had a chance to consider what just happened. None of this would be seen on a video. And when did we start requiring conclusive video proof of an accident before we award compensation anyways?

In any event, I believe a reasonable person, viewing the evidence in its totality, would find that Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on 4/20/18, and that a causal relationship existed between said accident and Petitioner's current condition of ill-being.

Thus, I would reverse the Arbitrator and award benefits accordingly, including reasonable and necessary medical expenses that have been incurred and the surgical recommendation by Dr. Paletta.

For the above reasons, I dissent.

Thomas J. Tyrrell

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

GIBSON, BRENDON
Employee/Petitioner

Case# **18WC014825**

SOI/IYC HARRISBURG
Employer/Respondent

19IWCC0338

On 8/10/2018, 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:

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SPRINGFIELD, IL 62794

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

AUG 10 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0338

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BRENDON GIBSON
Employee/Petitioner

v.

STATE OF ILLINOIS/IYC HARRISBURG
Employer/Respondent

Case # **18** WC **14825**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin,** on **June 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, **April 20, 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 **$86,604.00**; the average weekly wage was **$1,645.46**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **1** dependent child.

Respondent ***has*** 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 general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on April 20, 2018 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to the alleged accident. Petitioner's claim for compensation is denied and 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.

Nancy Lindsay
Signature of Arbitrator

August 6, 2018
Date

ICArbDec19(b)

AUG 10 2018

Gibson v. SOI/IYC Harrisburg, 18 WC 014825 (19(b))

FINDINGS OF FACT and CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner is a shift supervisor at Respondent's facility in Harrisburg, Illinois. He has worked for the Illinois Department of Corrections for 20 years, the last 5 of which have been spent working for Respondent. On April 20, 2018 Petitioner was allegedly injured while responding to a call in Unit 11 involving a combative youth.

The Employer's First Report of Injury was completed on April 20, 2018. In response to the question, "How Did the accident occur?" it states, "EE was escorting combative youth to room, EE was trying to get him to cooperate talking to him and youth became combative and EE injured his right knee while escorting him; soreness in knee." (RX 1, p. 6).

A Supervisor's Report of Injury or Illness described the accident as "attempting to escort combative youth." The description of injury is "right knee area." The "Supervisor's Report" also contains a section entitled "From whom notice received" and lists Petitioner by name. (RX 1, p. 9) The report lists a number of witnesses.

Included in RX 1 is document from Tristar Risk Management called "Notification of Injury." Under the section listed as "Incident location description" the words, "Unit 11" are listed. (RX 1 pp. 7-8)

The "Tristar Workers' Compensation Employee's Notice of Injury" form states, in Petitioner's own handwriting, that the accident happened while, "escorting a combative youth to his cell." (RX 1, p. 10)

A "Tristar Witness Report" filled out by Jamie Miller specifically lists the IYC HRB Unit 11 as the location of what occurred. Jamie Miller wrote, "The youth was kicking and flailing around and kicked Gibson in the write [sic] knee." (RX 1, p. 11)

Nick Bates also filled out a "Tristar Witness Report" stating:

> I witnessed a youth flail and kick Supervisor Brendon Gibson in the right knee. Myself and Supervisor Gibson were performing duties required of security staff at the time. The youth was being aggressive towards staff and it was decided the youth had to be escorted to his cell. Supervisor Gibson, myself, and responding staff were charged with securing the youth. During the escort, the youth injured Supervisor Gibson. *Id.*

Nick Bates listed the location of the incident as the IYC Harrisburg Unit 11 dayroom. (RX 1, p. 12)

James Williams also completed a "Tristar Witness Report." He wrote,

While staff were [sic] attempting to restrain a youth, the youth became aggressive and combative. He had his hands flailing and legs kicking. At that time is when the youth kicked Brendon Gibson in the knee resulting in pain and discomfort. *Id.*

He gave the location as "Unit 11 Dayroom." (RX 1, p. 13)

On April 20, 2018, Petitioner refused to sign an Authorization to Use or Disclose Information. (RX 1, p. 14)

At approximately 3:25 p.m. Petitioner was examined in the Medical Department at IYC and a preliminary medical report was issued. The nurse wrote under subjective information, "I was kicked in my knee." Petitioner was complaining of pain in the back and sides of his right knee. Range of motion was within normal limits. No bruising or swelling was noted at the time. There was no deformity and his skin was intact. (RX 1, pp. 15-16, 18)

An "Incident Report" was completed by "A D---opp" on April 20, 2018 at 7:31 p.m. He indicated that the youth in question threatened this particular officer, noting "Youth Austin continued to threaten this JJS with calling the hotline on me so I would get kicked off the wing until he finally went into his room where he continued to yell racial slurs at this JJS." (RX 1, p. 17)

Five "Physical Intervention Incident Reports" were completed. None of them indicate their authors (RX 1, pp. 19 – 23).

The first Physical Intervention Report states the incident occurred at 2:35 p.m. It states that JJS Miller was struck in the face but says nothing about Petitioner being kicked. It further states: "Youth was then escorted by staff to his room and used the chuckhole to remove the restraints." (RX 1, p. 19)

The next Report indicates that the incident began at 2:40 p.m. It does not indicate Petitioner was kicked by the youth at any time. (RX 1, p. 20)

The next "Incident Report" indicates the incident began at 2:40 p.m. The report is typewritten. It states that JJS Miller was struck in the face and Petitioner was kicked in the right knee while the youth was being walked to his cell. The author was also in the cell and said nothing about Petitioner being kicked while they were in the cell. He wrote, "...This R/O along with JJS Miller attempted to escort Youth Diel but Youth Diel became very combative and began flailing his arms and legs attempting to assault staff. At this time Youth Diel struck JJS Miller in the face and kicked JJS Gibson in the right knee." With regard to the cell activities, the author states, "Youth Diel's aggression exceeded the capabilities of the high level CPI hold that was utilized. At this time Youth Diel was placed in mechanical restraints in order to avoid further injury to staff. After mechanical restraints were applied this R/O along with JJS Berkley held Youth Diel in place while

staff removed all items from Youth Diel's cell that could be used to hurt himself or others. After the items were removed Youth Diel was escorted to his cell. Upon entering the cell Youth Diel was stripped down due to his history of concealing improvised weapons and hurting himself. Mechanical restraints were removed via the chuck hole..." (RX 1, p. 21)

The next "Incident Report", also typewritten, states the incident began at 2:40. It references that the youth scratched JJS Miller's fact and further referenced that Petitioner was hit in the knee while escorting Petitioner to his cell. There is no mention of Petitioner being kicked in the knee while the youth was in his cell. (RX 1, p. 22)

The final "Incident Report" found in RX 1 has "2:40" written by hand in the upper left corner. It says nothing about Petitioner being kicked or struck in the knee. (RX 1, p. 23)

Petitioner presented to the Harrisburg Medical Center Emergency Room on April 20, 2018. (PX3) The triage history shows, "Pt was IYC work scuffling with an inmate pain in rt knee pain radiating to lower leg tingling no numbness [sic]." *Id.* Yet another history, indicates that Petitioner was a county employee who suffered a twisting injury X-rays were negative for fracture and showed no significant degenerative joint disease. *Id.* The hospital noted that there were no prior right knee x-rays with which to compare the current ones. Petitioner was given an ace wrap which he requested he be allowed to put on at home and then he was discharged. *Id.*

Petitioner worked Saturday, April 21, 2018. April 22 and 23, 2018 were his regular days off. (RX 1, p. 1)

On April 30, 2018, Petitioner saw Dr. George Paletta, an orthopedic specialist. (PX4, 4/30/18) According to the Patient Health Questionnaire completed by Petitioner, Petitioner was complaining of right knee and calf pain that began with "escorting a combative inmate." Petitioner also indicated he exercised 5 times a week doing cardio and light weights. (PX 4) Dr. Paletta took the following history of the injury as follows:

> On that date he was escorting a combative inmate. They basically had to wrestle the guy to control him. He injured the right knee. He is unsure of the exact mechanism but states, "I came of [sic] lame." He was actually seen at the local emergency room where x-rays were negative. He was discharged. Since that time, he has had continued complaints of pain in the knee mainly along the lateral joint line and, "under the knee cap." He denies any prior history of right knee problems . . . *Id.*

Dr. Paletta's left knee examination was normal; however, his right knee examination showed a positive McMurray's sign at the lateral joint line and meniscal rotary signs to the lateral compartment. Dr. Paletta's impression was that of a probable lateral meniscus tear of the right knee or atypical patellofemoral pain. He recommended an MRI and allowed Petitioner to continue working without restrictions. Dr. Paletta stated that, based on the mechanism of injury, the current

symptoms, physical exam findings, and the fact that Petitioner's x-rays showed the absence of any significant arthritis, Petitioner's condition was related to the incident of April 20, 2018.

The MRI was completed on May 1, 2018, and the report from Dr. Cizek read as follows:

1. Somewhat small ACL with intrasubstance signal. This may in part be due to previous partial tear and perhaps superimposed acute injury but without full thickness tear or retraction.

2. Small joint effusion.

3. Intact menisci. (PX5; PX 4)

On May 7, 2018 TriStar advised Petitioner, in writing, that his claim was being denied on the basis of "accident." (RX 1, p. 5)

In a note dated May 9, 2018 Dr. Paletta commented on his review of the MRI. He felt it showed an effusion and somewhat truncated ACL, small in size, with some intra-tendinous signal abnormality, consistent with a probable partial tear. He felt there might be a small superimposed acute injury but there was no complete tear. The diagnosis was that of a partial ACL tear without evidence of a complete tear. He recommended an injection to the right knee and no change in work restrictions or level of activity – ie., he could work full duty. (PX4)

Petitioner signed his Application for Adjustment of Claim herein on May 10, 2018, alleging injury to his right leg and knee while "escorting" a combative youth. (AX 2)

The injection was done on May 31, 2018 per Dr. Blake, who noted Petitioner had been kicked in the right knee. (PX 6)

Respondent offered video coverage of the alleged incident within the Unit 11 Dayroom as Respondent's Exhibit #2. There are two different viewings of the same incident. In the first viewing the video is 26.50 minutes in length but the altercation doesn't really begin until the 22:50 mark. The guards very methodically and slowly surround and move the youth to his cell. These actions appeared to keep the youth from flailing or kicking. At 25:16 Petitioner can be seen walking from the cell without difficulty. There is no change in his gait and he appears to be walking with a normal and deliberate stride. In the same section of frames Petitioner can be seen walking almost the length of the dayroom and back, all without apparent difficulty or a disturbance in his gait. (RX 2)

As for the second part of the video it does not appear that the youth in question was flailing or kicking. Between 23:00-13 the youth actually seems to stiffen his legs to make it more difficult to move. At one point the youth's leg may be resting upon Petitioner's right knee but nothing else was observed. The Arbitrator notes that the video does not

show Petitioner while he is in his cell and Petitioner did go into the youth's cell with him. There are also things being thrown out of the room. (RX 2)

Petitioner's case proceeded to arbitration on June 14, 2018 pursuant to Petitioner's Petition for Immediate Hearing. Terri Reed was present as Respondent's representative. Petitioner was the sole witness testifying at the hearing. The disputed issues included accident, causal connection, medical bills, and prospective medical care. (AX 1)

Petitioner testified that he works for Respondent as a shift supervisor. Respondent is a juvenile detention center for youth aged 13 to 20 who have committed petty, or more serious, crimes. He testified that on April 20, 2018 between 2:30 p.m. and 2:45 p.m. he was called down to Unit 11 because a youth was "refusing to go up." Petitioner asked him to go up and he refused. Petitioner then got on the phone and called a "DAO" (duty administrative officer), Brice Hampton and asked for instruction. When asked to come with him, the youth was located toward the back wall on Unit 11 with a piece of mailbox he had ripped off the wall in his hand. Petitioner was advised to begin crisis prevention intervention ("CPI") at a low level and do what was necessary to get him into his room.

Petitioner testified that he and the other ERTs attempted to grab the youth by the elbows and escort him to his room but he was combative and flailed his arms. A couple of times while doing the latter, the youth "shook Petitioner off" and Petitioner went backwards and he heard his knee pop.

Petitioner testified that he reviewed all of the different incident and witness reports/statements prepared by himself and his co-workers and they indicate he was kicked in the knee which was correct as he was kicked in the knee while in the cell with Petitioner. At that time Petitioner was in restraints on his stomach and he was still being combative and flailing and he kicked Petitioner.

Petitioner also acknowledged reviewing the videotape of Unit 11 furnished by Respondent and he testified that it did not portray the incident where he was kicked in the knee. When asked why it wasn't on the video, he replied that it was because he was kicked in the cell which wasn't on the video.

Petitioner denied any prior right knee problems. He has been going to Dr. Paletta and has undergone an MRI. His next appointment with Dr. Paletta is June 22, 2018.

Petitioner testified that the witness statements and reports are accurate.

Petitioner testified that after incidents like the one he was involved in, he has the opportunity to press charges against the youth that committed the act. After leaving the ER that night he went to the Harrisburg County Jail and pressed charges. They are pending. Petitioner

further testified that the youth involved in this incident has a history of doing just what he did and was currently just released on bail for assaulting another of Respondent's workers.

On cross-examination Petitioner reiterated that when they were trying to escort the youth to his cell, he heard his knee pop and you can see in the video where he got "shook off" a couple of times because the youth was being combative. Thereafter, when the youth was in his cell, he was on his stomach and became combative again and kicked Petitioner.

Petitioner acknowledged that Mr. Williams' statement indicates the incident occurred in the day room. The report of Mr. Bates states the same thing. Petitioner also acknowledged that his own detailed statement stated that the injury occurred while escorting a combative youth to his cell.

On redirect examination Petitioner acknowledged that there were two incidents – one occurred while escorting the youth and he felt a pop in his knee and the other one occurred in his cell when he was on his stomach and kicking his knee backwards. On further cross-examination Petitioner acknowledged that he failed to report the "second" accident in any of the documentation.

Proofs were closed only to be re-opened on July 27, 2018 for the sole purpose of allowing the Arbitrator to view RX 2 and to number the pages of RX 1. A record was made and proofs were again closed.

The Arbitrator concludes:

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

Petitioner failed to prove he sustained an accident on April 20, 2018 that arose out of and in the course of his employment with Respondent.

Petitioner testified that he heard his knee pop and that, later, in Petitioner's cell, he was kicked in the knee. He did not testify that he was kicked in the knee while escorting the youth to his cell.

Petitioner's testimony is not corroborated by the witness reports (RX 1) or the video (RX 2). While Petitioner testified that the reports were accurate, none of them referenced that he sustained a pop to his knee while escorting a youth to his cell or that he was kicked in the knee while in the youth's cell. None of the reports indicate Petitioner was on the ground restrained while in his cell. While some reports reference that Petitioner was kicked in the knee while escorting Petitioner in the Unit, Petitioner denied that that was the location where he was kicked. The video doesn't reflect Petitioner being struck in the knee while in the Unit 11 dayroom. On top of all this, Petitioner told Dr. Paletta he wasn't sure how he injured his knee.

Petitioner's testimony regarding the alleged accident was comprised of two events, not just one. His testimony was not corroborated by the witness reports or the video. He failed to indicate to anyone, prior to the arbitration hearing which was held after he had viewed the videos of the incident, that he popped his knee while escorting the youth and then the youth kicked in his right knee while he was in the cell. Petitioner acknowledged that he failed to report to anyone that he was kicked in the knee while in the youth's cell. Petitioner failed to meet his burden of proof as to accident. Petitioner's claim for compensation is denied.

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

Even assuming, arguendo, that Petitioner did sustain an accident on April 20, 2018 that arose out of and in the course of his employment with Respondent, he failed to prove that his current condition of ill-being in his right knee is causally related to the alleged accident. Petitioner's treatment at the ER was very minimal. At most, he was given an ace wrap for his knee and which he declined to have put on at that time. Then, he presented to Dr. Paletta and indicated he was unsure of how he injured his right knee. While Dr. Paletta expressed a causation opinion in his office note, based upon his lack of knowledge of the details concerning the mechanism of injury, that opinion carries little, if any, weight. Additionally, the Arbitrator notes that Petitioner's history at the ER referenced a fall in the last three months prior to being seen and Petitioner noted to Dr. Paletta that he worked out five times a week engaging in cardio and light weights.

Petitioner's claim for compensation is denied and no benefits are awarded.

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?

Given the Arbitrator's liability determination set forth herein, and incorporated herein by reference, Issues (J) and (K) are moot.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

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)
CHAMPAIGN		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Penny Nichols,

Petitioner,

vs. NO: 15 WC 34165

Dollar General,

Respondent.

19IWCC0339

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses, temporary total disability, prospective medical treatment and §8(j) credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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).

The Commission corrects the Arbitrator's decision at p.3, third paragraph, to show that Petitioner saw Dr. Sheikh on August 28, 2015, not March 28, 2015.

The Commission also allows Respondent a credit for any and all amounts paid on account of this injury pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act provided Petitioner is held harmless for payments to providers concerning the subject of this credit.

All else otherwise affirmed and adopted.

19IWCC0339

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/4/18 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitoiner the sum of $185.00 per week for a period of 129-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses as set forth in PX4 – PX6, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the treatment prescribed by Dr. Glock, including surgery, 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 $30,000.00. 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: JUL 1 – 2019
o:5/7/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Deborah L. Simpson

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

NICHOLS, PENNY
Employee/Petitioner

Case# **15WC034165**
15WC042306

DOLLAR GENERAL
Employer/Respondent

19IWCC0339

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.

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

0157 ASHER & SMITH
CRAIG SMITH
1119 N MAIN ST PO BOX 340
PARIS, IL 61944

1886 LEAHY EISENBERG & FRAENKEL
MICHAEL MEHLICK
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

19IWCC0339

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

- [ ] 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)

Penny Nichols
Employee/Petitioner

v.

Dollar General
Employer/Respondent

Case # **15** WC **34165**

Consolidated cases: **15 WC 42306**

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 **Urbana**, on **3/15/18**. 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. [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 _____

19IWCC0339

FINDINGS

On the date of accident, **8/27/15**, 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 $**9,620.00**; the average weekly wage was $**185.00**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **1** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $655.40, as set forth in Petitioner's exhibits 4 - 6, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $185.00/week for 129 1/7 weeks, commencing 9/24/15 through 3/15/18, as provided in Section 8(b) of the Act.

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

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

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

Michael K. Nowak, Arbitrator

5/29/18
Date

ICArbDec19(b)

JUN 4 - 2018

FINDINGS OF FACT

The parties stipulated that Petitioner was an employee of Respondent on August 27, 2015. On that date, Petitioner was lifting a box of vegetable oil off the top shelf, using a ladder, when the box gave way on her right wrist. At that time, she felt a pop and immediate pain. She continued to bring the box to the floor and left it on the floor. At that time, she went to the register to check out a customer, because she was the only worker at the store at that time.

As soon as her relief arrived at the store, she called her Manager, Doug Lewis, and told him what had happened and how she had injured herself. Mr. Lewis did not know how to report to Corporate. So, he told the Petitioner to get the information from the District Manager, which she did then next day. Petitioner then made an appointment with her family doctor, Dr. Sheikh, who she saw on August 28, 2015. (PX1) Dr. Sheikh noted that she had pain in her right hand and wrist when she twisted it and heard a pop. He noted that she had right hand and wrist pain, and that he would go ahead and order a MRI of the right hand and wrist. Petitioner followed up with Dr. Sheikh on September 14, 2015, where he noted that the MRI was done on her right hand and wrist, showing a dissection of a ganglion cyst. At that time, he elected to refer her to a hand surgeon, and placed her on work restrictions of not lifting more than 10 pounds until she is cleared. (PX1)

Petitioner reported her injury to Doug Lewis, the Manager, on the day of the accident, and after seeing Dr. Sheikh on March 28, 2015, took Dr. Sheikh's doctor's note to Mr. Lewis. The following day, she also reported her accident to the Corporate office nurse by telephone.

Petitioner was seen by Dr. Glock on October 8, 2015, as a result of the referral from Dr. Sheikh. On that date, Dr. Glock noted that on August 27, 2015, she was lifting a box at work from a high shelf and something in her wrist popped. Dr. Glock further noted that Petitioner had pain in her right wrist in the ulna r aspect, worse with gripping, grasping, and twisting. She has been on work restrictions of less than 20 pounds with the right hand, and she has been using a wrist brace but it has not helped. Dr. Glock reviewed the MRI and noted that it shows very clearly the cyst and the triquetrum, but it also shows partial tear of the ulnar insertion of the TFCC without frank disruption consistent with ulnocarpal impaction syndrome. (PX2)

Dr. Glock's plan of treatment was injections of steroids and surgical intervention. He recommended the use of a wrist brace that fits her more properly (which was applied for at that office visit). He further recommended an injection of a steroid into the right wrist at TFCC, which was performed on that date. She was also provided with a work status reflecting no work with the right hand, use the splint as needed, and follow-up in four weeks, if not better, consider surgical treatment. (PX2)

The Petitioner turned in her work restriction to the Respondent. Prior to seeing Dr. Glock on October 8, 2015, the Petitioner has been under work restrictions by Dr. Sheikh, consisting of no lifting more than 10 pounds. On September 23, 2015, the Respondent informed the Petitioner that they would not provide work within her restrictions. Therefore, the Petitioner did not return to work after September 24, 2015. Petitioner was placed on FMLA, and following twelve weeks of being off work, she was terminated from her job by Respondent.

Petitioner returned to Dr. Glock on November 5, 2015, at which point she stated that the injection helped a lot with her pain for three days, but then wore off quickly. She was wearing the brace which helped but is

difficult to live with. Dr. Glock further noted that because of numbness and tingling, he wanted to obtain an EMG of the right upper extremity to evaluate the possibility of nerve compression of the ulnar nerve either at the elbow or the wrist. On November 5, 2015, her work restrictions stated that she was to use the splint at all times, no lifting over 10 pounds, and to followup on November 30, 2015. (PX2 and 3)

She returned to the Doctor on November 30, 2015, after having an EMG performed. The EMG was consistent with moderate right carpal tunnel syndrome and mild right ulnar nerve compression at the elbow. At that time, she was continuing to have numbness and tingling to the thumb, index, and middle fingers of her right hand; she also had aching at the ulnar side of the wrist. Dr. Glock noted that the injection of the steroid in the past made her no better. His impression was right wrist carpal tunnel syndrome, ganglion cyst of the lunate, TFCC tear, and ulnocarpal impaction syndrome with right elbow paraclinical cubital tunnel syndrome. His plan at that time was to inject the steroid into the carpal tunnel to find out what was the dominate problem. Dr. Glock wanted the Petitioner to focus on how much of her symptoms were improved and if the injection was taking care of the numbness and tingling component. (PX2)

She followed up with Dr. Glock on April 8, 2016. At that time, Petitioner had noticed that the most recent injection to the carpal tunnel helped quite a bit and was still helping, and the injection provided earlier into the TFCC area was no longer helping. She was noticing pain with resistant grip and ulnar deviation of her wrist, such as cutting a pizza. Dr. Glock told the Petitioner about the detailed steps for surgery to do wrist arthroscopy, treatment of the TFCC, and treatment of the ulnocarpal impaction syndrome. Dr. Glock recommended proceeding with surgery for the right wrist arthroscopy with treatment with the TFCC and ulnar shortening osteoplasty. He was going to set up surgery in the future.

Dr. Glock was deposed on June 2, 2017. It was his opinion that when Petitioner was lifting a box and felt a pop that that caused an aggravating condition of his diagnosis of partial tear of the ulnar insertion of the TFCC, consistent with ulnar carpal impaction syndrome. (PX7, pp. 6 & 7) At his first visit with Petitioner on October 8, 2015, Petitioner elected to proceed with the use of her wrist brace and home protocol, in addition to an injection of steroid into the location of the TFCC to ascertain the effectiveness of this combination of treatments on her symptoms. (*Id.* at 7)

He testified that he next saw her on November 5, 2015. At that time, his physical examination showed that she had no significant nerve compression findings at the elbow, but he thought that she did have findings in the area of the carpal tunnel. He also felt that this could have been due to a pinched nerve at the wrist involving the median or ulnar nerve. His impression was that she had persistence of the TFCC tear with secondary arthritic changes and a ganglion cyst and a new diagnosis of some component of ulnar nerve compression in the right upper extremity. He elected to obtain an EMG due to the numbness and tingling into her hand. (PX7, pp. 9-10)

He next saw the Petitioner on November 30, 2015, and testified that the EMG showed a moderate carpal tunnel syndrome with mild nerve compression above the elbow. At that time, her dominate issue was numbness and tingling now in the thumb, index, and middle fingers, and she had pain ongoing on the side of her wrist. He performed a physical examination which showed that she had pain on the ulnar aspect of the wrist with positive ulnar carpal impaction tests; she had a Tinel's sign now, which was positive at the carpal tunnel, as well as carpal tunnel compression test with numbness and tingling now to the distribution of the median nerve. At this

point, her elbow was negative Tinel's sign and negative elbow flexion test. His impression was that she still had TFCC tear with ulnar carpal compaction syndrome and right wrist carpal tunnel syndrome, with the possibility of a paraclinical cubital tunnel syndrome. (PX7, pp. 10-11)

It was Dr. Glock's opinion was that the aggravation of the TFCC tear and the ulnar carpal impaction syndrome were related to her work injury. At that time, his medical plan was to focus on two problems, the carpal tunnel component and an injection of a steroid, which was done that day. (PX7, p. 12)

Dr. Glock testified that the next time he saw the Petitioner was on April 8, 2016. He noted that the carpal tunnel injection was still helping after many months later. Petitioner was still having pain with resisted gripping and ulnar deviation. He performed a physical examination and noted the carpal tunnel compression test showed median nerve at the wrist to be significantly improved from before. Most of Petitioner's discomfort was on the ulnar side of the wrist, and she pointed to the area of the TFCC. She had a positive ulnar carpal impaction test, and pain upon palpation of the TFCC at the time. His impression was right wrist carpal tunnel syndrome improved, and right wrist ulnar carpal impaction syndrome with a TFCC tear, which was persistent. He recommended that they proceed with treating the right wrist ulnar carpal impaction syndrome with the TFCC tear. His recommendation was surgery for right wrist arthroscopy with treatment of the TFCC and ulnar shortening osteoplasty. It was Dr. Glock's opinion that the surgery that he recommended was related to the work injury. He stated that it was clearly related both in time and consistency with patient complaints that her examinations at each of those four visits were consistent with ulnar carpal impaction syndrome with a TFCC tear, which was historically related to her incidents at work where she had done things to aggravate that condition. (PX7, pp. 15-17)

Dr. Glock also reviewed the IME report of Dr. Lawrence Li and noted that he found that the report contained many flaws in logic. One of the main flaws was that Dr. Li did not come to the conclusion that her history was classic for TFCC tears. Dr. Glock stated that in reading the IME report, it was clear that Petitioner had told Dr. Li that she had classic history for TFCC, and that Dr. Li demonstrated that she had pain in the correct location. However, Dr. Li mistakenly contributed this to ECU and was relying on the findings of a MRI read by radiologist who was also not likely to be well versed in TFCC tears. He also noted that Dr. Li did not interpret the MRI himself, but merely read the report. (PX7, pp. 19-23)

Dr. Glock further stated that it was not clear in Dr. Li's report whether he had done other examination maneuvers, stating that it would have been helpful if he had performed an ulnar carpal impaction test, which is a measure for confirming pain in the ulnar side the wrist, referable to the TFCC. Dr. Glock did perform those examinations which were a routine part of the Petitioner's examinations during his treatment. (PX7, p. 22)

Dr. Glock also noted that Dr. Li opines that the treatment that had been provided was reasonable and necessary. But that includes the opinion that TFCC was not an appropriate diagnosis. Dr. Glock's treatment was clearly directed at the TFCC. Therefore, in Dr. Glock's mind that created a paradox. Either Dr. Glock's diagnosis was correct and it was for appropriate treatment, or was not correct and was not necessary. However, Dr. Li stated in his report that the treatment that had been provided was reasonable and necessary. Therefore, it can be inferred that Dr. Glock's diagnosis and treatment was reasonable and necessary. (PX7, pp.22-23)

Dr. Glock indicated that the last work restriction on November 30, 2015, would continue on if the Petitioner had not received surgery as of the date of his deposition. It was also his opinion that she should have surgery as of the date of his deposition if her symptoms were the same, and her examination was the same. Further opining, the surgery he is recommending is causally connected and needed as a result of her work injury. (PX7, pp.24-26)

Dr. Li, the section 12 medical examiner, was deposed on September 25, 2017. He acknowledged during his deposition that he did not review the actual MRI. He stated that the images were not available to him and only reviewed the report itself. He also stated that it is rare for him not to actually review the images themselves if he is going to go into surgery. (RX2, pp.22-23)

It was Dr. Li's opinion that Petitioner had a ganglion cyst which was not related to her injury. He did feel that she suffered a wrist strain on August 27, 2015. It was further his opinion that Petitioner's TFCC was not torn. He further opined that the medical treatment to date that he reviewed had been reasonable, necessary, and appropriate. He felt that the Petitioner would reach MMI three months after her injury. In his opinion, she had a AMA rating of 1% whole person impairment. (RX1)

CONCLUSIONS

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

Issue (E): Was timely notice of the accident given to Respondent?

Based upon the evidence presented at trial, the Arbitrator concludes that Petitioner did establish that she sustained an accidental injury that arose out of and in the course of her employment by Respondent. Petitioner testified that on August 27, 2015, she was lifting a box of vegetable oil off the top shelf to bring it down to a lower shelf to restock the lower shelf. At that time, the box gave way on her right wrist, and she felt a pop and immediate pain. She left the box on the floor and left that aisle going to the register to check out a customer because she was the only worker at the store at that time.

When her relief showed up at work, she called her Manager, Doug Lewis, and told him about her injury. He did not know how to report it to Corporate, and told her to get the information from the District Manager. Petitioner had to wait until the next day get the information from the District Manager to report it, which she did. She also reported it to the Corporate Office Nurse by telephone.

The Petitioner went to her family doctor, Dr. Sheikh, the next day, and on that day took her Doctor's note to her Manager, Doug Lewis.

She followed up with Dr. Sheikh following her MRI. At that time, Dr. Sheikh referred her to Dr. Glock, a board-certified orthopedic hand specialist in Terre Haute, Indiana. Petitioner first saw Dr. Glock on October 8, 2015, and had three follow-up appointments which consisted of injections and a final recommendation for surgery. Dr. Glock opined that within a reasonable degree of medical certainty that when Petitioner was lifting the box and she felt a pop that would aggravate her diagnosis of partial tear of ulnar insertion of the TFCC, consistent with her right wrist ulnocarpal impaction syndrome with TFCC tear.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that Petitioner did sustain an accidental injury while working for the Respondent on August 27, 2015 and that Petitioner gave timely notice of the accident to Respondent as required by the Act.

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

On the issue of causation, there are two conflicting medical opinions. Dr. Glock testified that there is a causal relationship between his diagnosis of right wrist ulnocarpal impaction syndrome with TFCC tear and the need for surgery, and Petitioner's accident of August 27, 2015. Dr. Li, Respondent's section 12 examiner, believes that Petitioner sustained a wrist sprain on August 27, 2015.

Dr. Glock has testified that Petitioner's work injury is causally connected to her condition of ill-being. He has also testified that the need for surgery is a result of the work injury on August 27, 2015. The Arbitrator finds that Dr. Glock's extensive examinations at every appointment and his interpretation of the actual MRI images, together with his specialty in the area of hand, and wrist orthopedics gives his opinions credibility. While it is true that Dr. Li does not agree with the diagnosis that Dr. Glock has stated, Dr. Li did acknowledge that Petitioner did sustain an injury on the date, and that all of her medical treatment to the point of his examination on July 7, 2016, was necessary and reasonable. Therefore, it can be inferred that Dr. Li agrees that Dr. Glock's diagnosis and treatment to that date were correct. In short, the Arbitrator finds the testimony and opinions of Dr. Glock more persuasive than those of Dr. Li.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner has met her burden of establishing that her current condition of ill-being is causally related to her accident of August 27, 2015.

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?

The care and treatment Petitioner received by Dr. Glock represents reasonable and necessary treatment for her work injury on August 27, 2015. Medical was disputed only on the basis of liability, and the Arbitrator incorporates his above findings into this issue. Respondent shall pay reasonable and necessary medical expenses of $655.40 as provided in Sections 8(a) and 8.2 of the Act as reflected in Petitioners's Exhibits 4 through 6.

On the issue of prospective medical care, the Arbitrator incorporates the findings stated above, and further states that Dr. Glock's recommendation of surgery is to be allowed, provided that the Doctor believes that Petitioner's current condition warrants the surgery he recommended in his deposition on June 2, 2017. Respondent shall authorize and pay for said treatment as provided in Sections 8(a) and 8.2 of the Act.

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

The Petitioner's testimony and the medical records and testimony of Dr. Glock indicate that Petitioner was temporary totally disabled from September 24, 2015, through the date of June 2, 2017, the date of Dr. Glocks Deposition. In his deposition, Dr. Glock indicated that if Petitioner had not received her surgery as of

that date, that she would continue to have the same restrictions. Therefore, the Arbitrator finds Petitioner is entitled to TTD benefits from September 24, 2015, through the date of hearing, March 15, 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 CHAMPAIGN	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Penny Nichols,

Petitioner,

vs. NO: 15 WC 42306

Dollar General,

19IWCC0340

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 4, 2018, 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.

19IWCC0340

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: JUL 1 - 2019
TJT:yl
o 5/7/19
51

Thomas J. Tyrrell

Maria E. Portela

Deborah L. Simpson

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

NICHOLS, PENNY
Employee/Petitioner

Case# **15WC042306**
15WC034165

DOLLAR GENERAL
Employer/Respondent

19IWCC0340

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.

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

0157 ASHER & SMITH
CRAIG SMITH
1119 N MAIN ST PO BOX 340
PARIS, IL 61944

1886 LEAHY EISENBERG & FRAENKEL
MICHAEL MEHLICK
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

19IWCC0340

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

- [ ] 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)

Penny Nichols
Employee/Petitioner

v.

Dollar General
Employer/Respondent

Case # **15** WC **42306**

Consolidated cases: **15 WC 34165**

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 **Urbana**, on **3/15/18**. 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. [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 _____

19IWCC0340

FINDINGS

On the date of accident, **4/9/15**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**9,620.00**; the average weekly wage was $**185.00**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given 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 establish that her current condition of ill-being is related to the accident of 4/9/15 benefits are denied.

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

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

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

Michael K. Nowak, Arbitrator

5/29/18
Date

ICArbDec19(b)

JUN 4 – 2018

FINDINGS OF FACT

The parties stipulated that the Petitioner was an employee of the Respondent on April 9, 2015. On that date, she was unloading a truck when she twisted her right wrist.

She told her Manager, Doug Lewis, that she had injured her wrist and that she was going to go and see her doctor.

On that date, she saw Dr. Sheikh who noted that she reported that while at work she was unloading a truck and twisted her right wrist. Dr. Sheikh's assessment was right hand contusion, right wrist sprain. He had x-rays done on her right hand and wrist, and treated her with a splint to be used for a few hours. He further restricted her from lifting more than ten pounds until she was re-evaluated.

Her x-rays came back unremarkable. Petitioner did not have any follow-up treatment, and testified that her wrist healed on its own.

CONCLUSIONS

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

Issue (E): Was timely notice of the accident given to Respondent?

Based upon the evidence presented at trial, the Arbitrator concludes that Petitioner established that she sustained an injury that arose out of and in the course of her employment by Respondent. Based upon the evidence presented at arbitration, the Arbitrator concludes that Petitioner gave notice of the accident within the time limits stated in the Act.

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

Following the accident, Petitioner saw Dr. Sheikh only one time and did not require any follow-up treatment. At the time of the visit, she had an x-ray which was unremarkable. Dr. Sheikh treated her with a splint. Petitioner testified that the wrist healed on its own. While the evidence shows that Petitioner sustained a right wrist sprain, she also testified that the wrist healed on its own. Therefore, the Arbitrator believes that Petitioner's current condition of ill-being is not causally connected to this injury or exposure.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner has failed to meet her burden of proof regarding causal connection. Petitioner's claim for compensation is therefore denied, and no benefits are awarded.

All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ENRIQUE GUERRERO,

Petitioner,

vs. NO: 16 WC 38002

GA PAVING and POWER PAVING,

Respondents.

19IWCC0341

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent GA Paving and Petitioner and notice given to all parties, the Commission, after considering the issues of employer/employee relationship, accident, notice, causation, medical expenses, temporary 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner is a member of Union Local 1 and was working as a construction laborer on a paving job on December 1, 2016. T. 10. His assignment was directing the construction traffic. T. 11. As Petitioner was directing the trucks, he was struck by a GA Paving steamroller, sustaining significant injuries to his left leg and pelvis. The threshold issue herein is which entity was Petitioner's employer. The Commission affirms the finding that an employer-employee relationship existed between GA Paving and Petitioner. In so doing, we emphasize Petitioner and George Angelillo, co-owner of GA Paving, both testified Petitioner first worked for the company in 2012, and his current stretch of employment with GA Paving dates back to 2014. While Angelillo testified Petitioner was laid off as of November 28, 2016, the Commission does not find this testimony credible as it is contradicted by GA Paving's own records. Emily Ultsch is

GA Paving's bookkeeper and she is charged with completing the company's monthly union reporting. The December 2016 report reflects Petitioner worked 37 hours. Ultsch testified those hours were actually worked in November: she explained Petitioner was issued checks on December 2, 2016 and December 9, 2016; the December 2 check covering Petitioner's work from November 20 through 27, and the December 9 check covering hours worked after November 28. The Commission observes, however, the very existence of a paycheck issued to Petitioner on December 9, 2016 establishes Petitioner worked for GA Paving between November 28, 2016 and December 2, 2016. In sum, there is no credible evidence Petitioner's employment with GA Paving terminated prior to his accidental injury. However, this does not end our inquiry.

Throughout the course of the proceedings, Antonio Cefalu has insisted Petitioner was working solely for Power Paving on the date of accident. Cefalu is the sole owner of Power Paving. T. 56. The evidence clearly establishes there are close personal ties between Angelillo and Cefalu and professional ties between their businesses. The friendship between Angelillo and Cefalu dates back 15 years. T. 65, 117. Professionally, Cefalu dispatches and organizes Angelillo's crews, and Cefalu leases equipment as well as laborers from GA Paving. Cefalu testified he has keys to GA Paving's yard but denied he has permission to take GA Paving equipment when he needs it without asking. T. 91. Despite this denial, Cefalu did just that on the date of accident: "His roller was in my yard at the time; and, yeah, it was in a pinch. Mine was not working, so we did bring it, yes." T. 91. That GA Paving roller hit Petitioner. T. 76. Cefalu testified Power Paving has "very few" regular employees so when he needs labor for the jobs, "I know people from over the years of work that I can call; and, you know, I called them up. They come to the job, and I pay them via check and sometimes cash." T. 57. He hires individuals based on the needs of the job. T. 57–58. Angelillo echoed this testimony, stating Cefalu borrows employees from other companies and uses them on his jobs. T. 139. Significantly, Angelillo conceded this was commonplace between GA Paving and Power Paving: "[Cefalu] has jobs that needed union employees. He paid their wages above and beyond their wages, and we leased them out to him for the day." T. 139. For the reasons detailed below, the Commission finds GA Paving had a loaning and borrowing employer relationship with Power Paving on the date of accident.

An employee in the general employment of one person may be loaned to another for the performance of special work and become the employee of the person to whom he is loaned while performing the special service; the primary factor for whether such a transfer of employment occurs is whether the special or borrowing employer has the right to control the employee with respect to the work performed. *A. J. Johnson Paving Co. v. Industrial Commission*, 82 Ill. 2d 341, 347-8, 412 N.E.2d 477 (1980). Further, "the loaned-employee concept, as applied to cases under the Act, requires the existence of a contract of hire, either express or implied, between the employee and the special employer before such employer may be held liable for compensation." *Id* at 348. The inquiry required for the determination of the existence of the loaned-employee status is, therefore, two-fold: (1) whether the special employer had the right to direct and control the manner in which claimant performed the work; and (2) whether there existed a contract of hire between claimant and the special employer. *Id.*

Cefalu testified that beginning on November 29, 2016, Power Paving was working a job at Meacham Corners in Schaumburg. T. 57. Power Paving was hired for the job by one of

Cefalu's regular clients, Pavement Management. T. 58. Cefalu explained how he obtained employees to work the Schaumburg job: "It was a last minute job. It had to be thrown together very quickly…so I just made out--sent some texts out to a few guys that I needed; and we started the stone work I believe two or three days before the December 1st; and I just--that was it, sent a couple texts out, told guys where to go; and that was it." T. 59-60. Petitioner was one of the individuals he contacted. T. 60. Cefalu stated Petitioner has worked as a laborer for Power Paving dating back to 2012. T. 61, 95. He always paid Petitioner with a company check which Petitioner would pick up at Cefalu's home. T. 96. The last time Petitioner worked for Power Paving prior to November 2016 was at some point in August 2016. T. 61, 81. As to the November 29, 2016 project, Cefalu testified Petitioner's job was as a laborer. T. 62.

When he contacted Petitioner about working the Schaumburg job, Cefalu instructed Petitioner to "grab the tool truck and head to the job." T. 63. He explained, "I have my own box truck that pulls my tools and fuel tanks and stuff like that. He brought it, you know, to pretty much all my jobs." T. 63. Cefalu agreed he trusted Petitioner to go to Power Paving's yard and pick up his tools and equipment, and further stated Petitioner had a key to the yard. T. 63. Cefalu agreed that on the morning of November 29, 2016, Petitioner was to go to Power Paving's yard, pick up the truck and bring it to the Schaumburg job site, and Petitioner did so. T. 64. Cefalu further stated Petitioner was responsible for bringing the truck back to the yard at the end of the day. T. 64. Cefalu knew "for sure" Petitioner brought the truck to the jobsite on the day of the accident. T. 64. The Commission finds this is clear evidence of Power Paving's right to direct and control Petitioner. As to the second element, a contract of hire between Power Paving and Petitioner, the Commission finds Cefalu text messages directing Petitioner to be at Remington and Meacham, in Schaumburg, at 7:00 a.m. with the box truck, and Petitioner's subsequent appearance at the jobsite constitutes a contract for hire.

Section 1(a)4 provides, in pertinent part, as follows:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. Where any benefit is provided or paid by such loaning employer the employee has the duty of rendering reasonable cooperation in any hearings, trials or proceedings in the case, including such proceedings for reimbursement. *820 ILCS 305/1(a)4.*

The Commission finds GA Paving and Power Paving to be loaning and borrowing employers under Section 1(a)4. Pursuant to that provision, GA Paving and Power Paving are jointly and

severally liable for the benefits due Petitioner. The Commission accepts Mr. Cefalu's assertions at trial as his stipulation for Power Paving to be added as a party-respondent, and we *sua sponte* amend Petitioner's Application for Adjustment of Claim to conform thereto. *Caterpillar Tractor Co. v. Industrial Commission*, 215 Ill. App. 3d 229, 238, 574 N.E.2d 1198 (1991) (An amendment of an application for adjustment of claim is allowed where the amendment was to conform the pleadings to proof presented in the record.)

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Power Paving is added as a party-respondent, the case caption having been amended to so reflect, and Respondent GA Paving and Respondent Power Paving are jointly and severally liable as provided in §1(a)4 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2018, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall pay to the Petitioner the sum of $800.00 per week for a period of 37 4/7 weeks, representing December 2, 2016 through August 21, 2017, 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 Respondents pay reasonable and necessary medical expenses in the sum of $273,407.93 as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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 Respondents pay to Petitioner interest under §19(n) of the Act, if any.

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

Bond for the removal of this cause to the Circuit Court by Respondents is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall

19IWCC0341

file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 1 - 2019

LEC/mck

O: 5/1/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

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

GUERRERO, ENRIQUE
Employee/Petitioner

Case# **16WC038002**

GA PAVING
Employer/Respondent

19IWCC0341

On 3/1/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0154 KROL BONGIORNO & GIVEN LTD
RANDALL W SLADEK
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602

1596 MEACHUM & STARCK
JAMES JANNISCH
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Enrique Guerrero
Employee/Petitioner

v.

GA Paving
Employer/Respondent

Case # **16** WC **38002**

Consolidated cases: _____

19IWCC0341

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **6/21/17 and 8/21/17**. 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. [x] 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. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **12/1/16**, 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 $**62,400.00**; the average weekly wage was $**1,200.00**.

On the date of accident, Petitioner was **54** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay Petitioner $**273,407.93**, which is an amount equal to the total unpaid medical bills for the reasonable, necessary, and related medical services rendered to Petitioner, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**800.00**/week for **37-4/7** weeks, commencing **12/2/16** through **8/21/17**, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

2-28-2018
Date

ICArbDec19(b)

MAR 1 - 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

Enrique Guerrero

v. Case # 16 WC 38002

GA Paving

19IWCC0341

Findings of Fact

Petitioner testified that he was working as a construction laborer on December 1, 2016 for GA Paving ("GA"). (T. 10) He testified that he is a union laborer and was directing traffic on the parking lot paving job that day. (T. 10-11) While directing trucks, he was struck by a steamroller on his back side. (T. 12-13) The steamroller ran over his left leg. (T. 13) The machine that struck Petitioner was driven by Salvatore Cefalu. (T. 14)

Petitioner was taken by ambulance to the nearest hospital: Alexian Brothers Medical Center. He was admitted with a crush injury to the left leg and pelvis subsequent to being rolled over by a steam truck. A CT of the abdomen and pelvis indicated extensive pelvic fractures and hematomas. Dr. Rantis diagnosed complex bilateral pelvic fractures with hematoma. Petitioner also had a urethral injury as evidenced by blood in the urethral meatus. He was transferred to Lutheran General Hospital for further care. (Px.1)

He arrived at Advocate Lutheran General as a trauma transfer that evening. He was placed in observation. Six days later, on December 7, 2016, Dr. Jimenez performed open reduction and internal fixation with an anterior pelvic ring disruption with pubic sepsis diastases using a dual plate construct comprised of a single anterior 5-hole 3.5 reconstruction plate, and a superior placed to hold 4.5 symphyseal plate. The post-operative diagnosis was anterior pelvic ring unstable disruption specifically

comprised of a pubic symphysis disruption along with a posterior pelvic ring disruption consisting of a dislocation of the right sacroiliac joint. (Px.2a, 2b, 2c, 2d)

Petitioner was transferred to Rehabilitation Institute of Chicago on January 3, 2017 for acute inpatient rehabilitation. It was noted that he had an unstable pelvic ring post-surgery at Lutheran General. (Px.3) While at RIC, he was taken to the Northwestern Memorial Hospital ER on January 4, 2017 for subprapubic tenderness and a non-draining catheter. (Px.7)

On January 12, 2017, Dr. Jimenez performed a second procedure on the right hip to address an unstable posterior hemipelvis—percutaneous S1 screws through a percutaneous approach 7.3 cannulated using fluoroscopic guidance on a Jackson table. (Px.4)

Following the second surgery, Petitioner was examined by Dr. Jimenez on January 24, 2017. At that time, it appeared the hardware was in good position. Dr. Jimenez recommended non-weight bearing with strength and range of motion therapy to begin. (Px.4)

As of March 21, 2017, Dr. Jimenez noted that Petitioner had improved range of motion in the hips and ankles. An x-ray confirmed that the pelvic ring rupture was well aligned and the hardware was in good position. Petitioner was to increase activity and weight bearing as tolerated. (Px.4)

With regard to his employment, Petitioner testified that he was working for GA Paving on December 1, 2016. (T. 10) He denied that he was working for Power Paving ("Power") on that day but testified that he had previously worked for Power Paving as a mechanic. (T. 19-20) On the date of accident, Petitioner testified, he was working with Fortunato Camacho and Ubaldo (last name unknown). (T. 22) He testified that he had no knowledge of being fired by GA prior to the date of accident. (T. 23)

Petitioner testified that Tony Cefalu is a boss with GA Paving and would give orders for the job. (T. 24) It was Cefalu who had directed him to the job in Schaumburg. (T. 24) With regard to the work in Schaumburg, Petitioner testified that Cefalu called him early in the morning to tell him about. (T. 24)

On cross-examination, Petitioner testified that he had worked for GA Paving from 2012 to 2014 when he left for a job with a different company. (T. 26) He testified that he has worked for both Wallace Paving and Power Paving since 2012. (T. 27) Petitioner further testified that he did not work year-round for Respondent since it is seasonal work. (T. 29) In April 2016, he worked 2 days as a paving laborer for Brothers company. (T. 30)

Petitioner testified that he began working the Schaumburg job, on which he was injured, on November 29, 2016. He confirmed that he was moving equipment that day. (T. 36) He also worked at the same job site on Wednesday, November 30, 2016. (T. 37) However, Petitioner could not remember which project he was working on on Monday November 28, 2016 and could not remember the specifics of the work he was performing on Tuesday, November 29, 2016. (T. 38 - 39)

Petitioner testified that he was told to go to the job site in Schaumburg on November 29, 2016. (T. 40) He testified that he knew Tony Cefalu for 7-10 years and was aware that Cefalu had a company called Power Paving. (T. 41) He acknowledged that Power Paving has an office at Cefalu's house and a yard in Bellville where they park the equipment. (T. 42)

Petitioner testified that he has known George Angelillo, the owner of GA Paving, for about 7 years. (T. 43) He confirmed that he did not see Angelillo at the Schaumburg job site on any of the 3 days he was there. Petitioner testified that Cefalu was the supervisor of the Schaumburg job site. (T. 45)

Petitioner testified that Cefalu visited him in the hospital after the accident. (T. 47) Cefalu also requested that Petitioner sign workers' compensation insurance forms. (T. 49) He agreed that Power Paving had workers' compensation insurance, but for their employees. (T. 49-50)

Petitioner testified that he was not a salesman for Respondent and was not involved with setting up jobs. He would simply show up and work. Petitioner testified that he was not an accountant for Respondent and was not a supervisor at the Schaumburg job site, and he has no knowledge about Respondent's leasing of equipment. (T. 50) Similarly, Petitioner agreed that he was not involved with setting up jobs for Power Paving or their accounting and has never seen their payroll records. (T. 52)

Tony Cefalu was called as a Respondent's witness. He stated he is a contractor and sole owner of the company Power Paving. (T. 56) He testified that his company was performing a parking lot paving job in Schaumburg on the date of accident. (T. 57) He stated that he was subcontracted for the work. (T. 58) As Cefalu described it, the job and coordination thereof came together quickly so he texted a few guys to get the work done. (T. 58-59) One of those texted was Petitioner. (T. 60) Cefalu testified that he has known Petitioner for at least five years and has had him on "so many" of his jobs over the years. (T. 61) Cefalu testified that he had employed Petitioner as a laborer and as a mechanic. (T. 62) He never had any issues with Petitioner's performance. (T. 62) He testified that Petitioner had a key to his yard and that he trusted him to pick up materials and vehicles. (T. 63)

As for GA Paving, Cefalu testified that he would "help him out" and that he had known the owner of GA Paving for 15 years. (T. 65) He would "dispatch and organize his jobs for him because ... he needs the help." (T. 66) Despite that, Cefalu testified, he was not an employee of GA Paving but more like a subcontractor. (T. 66) For job scheduling, he testified, he does not charge GA Paving. (T. 66) On cross-examination, he then testified that he would receive a W2 for his consulting and job arranging work that he did for GA Paving. (T. 86) He did so to make some extra money. (T. 85) He could direct employees to fill up trucks at GA's fuel pumps. (T. 101) On the date in question, according to his testimony, Cefalu was under the impression that GA had "pretty much wrapped up for the year." (T. 90)

On the date in question, Cefalu did have one of GA's rollers on the job. (T. 67) The roller was in his yard so he was able to use it without GA's knowledge. (T. 67) The roller that struck Petitioner was GA's roller. (T. 76) After the accident, Cefalu and GA drew up a lease agreement. (T. 68, 76)

Following the accident, Cefalu visited Petitioner in the hospital to advise that he had workers' compensation insurance. (T. 71) As part of submitting the accident to his insurance carrier, Cefalu completed a wage chart (Px. 9), but was unable to indicate date of hire, address, or social security number. (T. 78) He was unable to submit any pay stubs to his insurance carrier. (T. 80) Ultimately, he received an email from his insurance carrier that indicated they were denying the claim. (T. 93) He was advised that "If you have a pay stub for Enrique or a contract showing the relationship between Power Paving and GA Paving for this job, that too would be helpful." (T. 94)

On redirect examination, Cefalu testified that Petitioner worked for Power Paving as far back as 2012. Cefalu testified that he would pay Petitioner by way of a regular company check and did not need Petitioner's address or social security number because Petitioner would always come to Cefalu's house or Cefalu would pay him on the job. Cefalu has two separate companies: Power Paving Construction and Power Paving Trucking. The Trucking company brokers out trucking for GA, and the Construction company is what he does all his business under. Cefalu testified that he did not have pay stubs for the days Petitioner worked on the Schaumburg job because Petitioner refused payment. Cefalu testified that he said to Petitioner: "hey, I got your money," or whatever, but Petitioner never responded. So, Cefalu never wrote him a check. (T. 95-98)

Cefalu testified that the reason the Berkley Net adjuster closed the claim against Power Paving is that Petitioner wrote that he was employed by GA Paving. (T. 99)

When asked to explain his testimony that he knew Petitioner was available for work because GA Paving had wrapped up for the year, Cefalu responded:

"Well, since I do their - - you know, sometimes I do their - - like I said their dispatch and whatnot. After talking with one of the guys in the office, I knew the scope of work that was - - that they had left; and at the time they said, these are the guys we need; and that's it. We got I think another day; and they're done; and after that he said - - you know, from what he said, these are the guys we're taking to finish this job and then everybody else is done for the year. As he didn't list any specific names of - - he just said, you know, everybody else is done; so he wasn't on that list along with a couple of the other guys. Those are the guys I called, and, you know, can they do the job." (T. 100-101)

On re-cross, Cefalu testified that he told Petitioner to go to GA's yard to fuel the equipment from time to time. He testified that for Power, he would most often drive a box truck, but for GA, he had his own trucks and equipment.

George Angelillo, co-owner with his wife of GA Paving, testified. He stated that he was in charge of hiring, project management, and sales for his company. (T. 112-13) He had inherited Petitioner, as an employee, from previous ownership. (T. 113) He testified that Petitioner last worked for him on November 28, 2016, after which point he was laid off. (T. 115)

As far as his relationship with Cefalu, Angelillo testified that Power Paving provides all of the trucking for GA. (T. 118) He stated that Cefalu is not an employee of GA currently and was not on December 1, 2016. (T. 119) He testified that his company had no interest or control of the job at which Petitioner was injured. (T. 119) He stated he was unaware that his roller was used on the job. (T. 120)

On cross-examination, Angelillo testified that he had terminated Petitioner twice. He could not recall the reason that he terminated Petitioner in 2014, but thought it had to do with Petitioner being in possession of a piece of equipment with a crew. (T. 124) Angelillo testified that he did not know that Petitioner had been re-hired until he actually saw him. (T. 125) He testified that Cefalu would organize the trucking and the labor, but Angelillo would pay him through the trucking company. (T. 129) On re-cross, Angelillo stated that his company does lease out employees and has done so 20 times in the last year. (T. 140-41)

On redirect examination, Angelillo testified that Cefalu hires people from other companies for work he does on the weekends. Angelillo then testified that he actually borrows workers from other companies and uses them on jobs and pays them from Power Paving. Cefalu has borrowed employees from Angelillo for jobs that needed union employees, but that wasn't the situation for the job on Meacham Road at which Petitioner was hurt. Angelillo testified that he has never seen any of the reports in Px.11. (T. 138-140)

On re-cross examination, Angelillo testified that he has leased his employees out to several companies, and that he has probably leased out the fewest number of employees to Power Paving. Angelillo testified that he was sure that he did not lease out his employees to Power Paving on December 1, 2016. (T. 140-141)

Respondent's final witness was Emily Ultsch. She testified that she is a bookkeeper for the Respondent. According to her testimony, she handles the union reporting. She was specifically questioned about Px. 11, which shows the union hours reported by employees for Respondent. The exhibit indicates hours worked by Petitioner for GA Paving as follows:

Hours worked in July 2016	225.5
Hours worked in August 2016	179.0
Hours worked in September 2016	203.5
Hours worked in October 2016	168.5
Hours worked in November 2016	146.5
Hours worked in December 2016	37.0

Ms. Ultsch explained that although the records indicate that Petitioner worked for Respondent in December 2016, she insisted that Petitioner did not actually work for GA Paving that month. She testified that his November hours were included in the report. Px.11 shows that GA Paving filed 2 reports with the union ("LPWF") for hours worked in December 2016. One report was received by LPWF on December 16, 2016, and the other report was received on January 11 and 12, 2017. The remainder of Px.11 consists of one report for each of the other months for the second half of 2016.

On cross-examination, M. Ultsch testified that she does not have the last date Petitioner worked for GA Paving. She believed it was in November.

Conclusions of Law

In support of his decision with regard to issue (B) "Was there an employee-employer relationship?", the Arbitrator finds as follows:

The threshold issue in this case is that of employee-employer relationship. Petitioner has named GA Paving as his employer on the date of accident and GA has stated he was not their employee that day. Further, GA has presented Power Paving and Tony Cefalu as the employer. Extensive testimony was given on the issue of employment. The Arbitrator notes that it is unusual for an employer to come forward and accept liability when it is at odds with the testimony of the injured worker.

There is no documentation to suggest that Petitioner became an employee with Power Paving on or before the date of accident. Both parties agree that Petitioner did occasional work as a mechanic for Power, but was not a payroll employee. Documentation was requested by Power's insurance carrier and Cefalu was unable to produce same. In fact, he did not have Petitioner's address, social security number or date of hire. Despite Cefalu's request to accept liability, his insurance carrier declined.

The question then is why an employer would, in this case, Power Paving and Tony Cefalu, readily accept liability for an accident. Section 5(a) of the Act, the Exclusive Remedy Provision, provides

guidance and understanding. Petitioner was struck and injured by Salvatore Cefalu of Power Paving. To avoid suit against his company and his father, Tony Cefalu may be compelled to claim Petitioner as his employee. Then, under the Exclusive Remedy Provision, Petitioner is an employee of Power Paving and cannot bring an action against either Salvatore Cefalu or Power Paving beyond a workers' compensation claim.

Further, it is clear that there is a close relationship between Power and GA. Throughout the testimony of Cefalu and Angelillo, it is difficult to conclude that Cefalu does not work for GA, given his coordination of projects and access to equipment. Cefalu and Angelillo struggled to consistently describe their arrangement. The compensation for Cefalu appears to come through payment for truck leasing, but again, no documentation was provided to support the testimony of these two.

Ultimately, the Arbitrator finds that it is more likely than not that Petitioner was in the employ of GA Paving on the date of accident, given his testimony that he was consistently scheduled by Cefalu for GA jobs. This is supported by the union records completed by GA and submitted to the union on a monthly basis. In fact, the union records indicate that Petitioner worked for GA in December 2016. It is true that Petitioner was injured on the morning of December 1, 2016, and has not worked since that time. Therefore, he could not have put in 37 hours with GA Paving in the month of December 2016. Given that there was carryover from November 2016, it would mean that Petitioner was working for GA at the very end of November 2016. Thus, it would be more plausible that he was working for GA Paving than for Power Paving on the date of accident. Again, no documentation, such as pay stubs, was produced to substantiate that Petitioner was a Power employee or that the job in question was contracted to Power.

Based on the foregoing, the Arbitrator finds that an employee-employer relationship did exist on the date in question.

In support of his decisions with regard to issues (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", (E) "Was timely notice of the accident given to Respondent?", and (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds as follows:

The Arbitrator finds that no real controversies or disputes were presented on these issues. Petitioner sustained a traumatic injury to the left leg and hip within the course of his employment. Testimony indicates that the employer was made aware of the injury shortly after it occurred. There is no evidence presented to dispute causation.

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Indus. Comm'n*, 442 N.E.2d at 911 (1982).

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

Based on the foregoing, the Arbitrator awards the following medical benefits for the reasonable, necessary and related medical services rendered to Petitioner, pursuant to Section 8(a) and subject to Section 8.2 of the Act:

Alexian Brothers Medical Center (Px. 1(a), 14)	$15,463.00
- Dates of treatment: 12/1/16	
Advocate Lutheran General Hospital (Px. 2(d). Px.8)	$171,901.53
- Dates of treatment: 12/1/16-3/14/17	
Rehabilitation Institute of Chicago (Px. 3(a))	$47,505.75
- Dates of treatment: 12/30/16-1/18/17	
Illinois Bone and Joint (Px. 5)	$13,240.00
- Dates of treatment: 12/1/16-4/7/17	
Athletico (Px. 13)	$9,553.00
- Dates of treatment: 2/15/17-8/16/17	

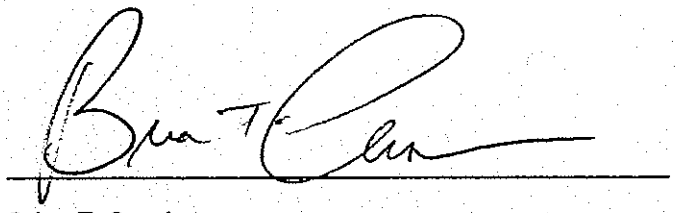
Uropartners (Px. 7, 8)	$2,927.00
- Dates of treatment: 12/5/16 – 3/15/17	
Midwest Diagnostic Pathology (Px. 8)	$269.00
- Dates of treatment: 12/2/16-12/20/16	
Northwestern Medicine (Px. 8)	$7,944.05
- Dates of treatment: 1/4/17	
Schaumburg Fire Department (Px. 8)	$677.80
- Dates of treatment: 1/4/17	
Superior Ambulance Service (Px. 8)	$2,576.50
- Dates of treatment: 12/1/16, 1/4/17	
Suburban Surgical Care Specialists – Dr. Rantis	$371.00
- Dates of treatment: 12/1/16	
Integrated Imaging Consultants (Px.8)	$301.00
- Dates of treatment: 12/6/16	
Elk Grove Radiology (Px.8)	$473.00
- Dates of treatment: 12/1/16	
Alliance Laboratory Physicians (Px.8)	$133.80
- Dates of treatment: 12/1/16	
Prism Health Care Services, Inc. (Px.8)	$71.50
- Dates of treatment: 1/24/17	

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

Based on the medical records, which includes the treatment rendered by Dr. Jimenez, and Petitioner's testimony, the Arbitrator finds that Petitioner was temporarily totally disabled from 12/2/16 through 8/21/17. There is no evidence that Respondent requested that Petitioner present for a Section 12 examination. There is no evidence that Petitioner has been released to return to work. Therefore, the Arbitrator finds that Petitioner is entitled to TTD benefits for the above period.

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

The Arbitrator finds that penalties and attorney's fees are not warranted in this case.



2-28-2018

Brian T. Cronin

Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATSY COLE,

Petitioner,

vs. NO: 14 WC 12579

ILLINOIS DEPARTMENT OF HUMAN SERVICES,

19IWCC0342

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 temporary total disability (TTD) and permanent partial disability (PPD), and being advised of the facts and applicable 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 has considered the record in its entirety and has 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, and modifies the TTD and PPD award.

The Commission finds that Petitioner is entitled to TTD benefits from July 4, 2013 through July 23, 2013 only. Per the Application for Adjustment of Claim, Petitioner alleged a return to work date of "July 24, 2013 with additional lost time." On the Request for Hearing form, Petitioner alleged an entitlement to TTD benefits from February 15, 2015 to March 16, 2017. Respondent claimed that Petitioner was entitled to TTD benefits from July 4, 2013 through July 23, 2013, which Respondent has alleged they paid in full.

In his decision, the Arbitrator noted:

There is little coherent testimony or evidence as to specifically when Petitioner became totally incapacitated and unable to return to work. There is even less as to the specific period of temporary total disability. The medical records on this issue are disorganized and not really helpful, with nothing of value past July 21, 2014.

TTD benefits are available from the time an injury incapacitates an employee from work until such time as the employee is as far recovered or restored as the permanent character of the injury will permit. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007). A claimant seeking TTD benefits must prove not only that he did not work, but that he was unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828 (2002). The dispositive inquiry is whether the employee's condition has stabilized, that is, whether the employee has reached MMI. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582. The factors to consider in assessing whether an employee has reached MMI include a release to return to work, medical testimony or evidence concerning the employee's injury, and the extent of the injury. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170 (2000). Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067 (2004).

The Commission vacates the award of TTD and finds that Petitioner is entitled to TTD benefits from July 4, 2013 through July 23, 2013, the period of TTD to which Respondent stipulated. The Commission declines to award any TTD benefits thereafter as Petitioner failed to prove that she was unable to work due to her restrictions.

Petitioner testified that she was working within the light duty work restrictions as prescribed by Dr. Romeo. T.23-24. She testified, however, that she stopped working in February 2015 due to pain. T.38. When questioned specifically whether Dr. Romeo took her off work entirely, Petitioner testified "No. He did give me permission to do light duty, but even when I tried to do that it just like I kept getting sent home during the day from pain." *Id.* When the Petitioner voluntarily decided to stop working, the Respondent was accommodating her light duty work restrictions. There were no changes in her work restrictions and there is no evidence supporting Petitioner's testimony relative to her condition and her inability to work. The Commission finds that Petitioner failed to prove that that she was unable to work as a result of her work injury. Therefore, the Commission finds that she is not entitled to TTD benefits after July 23, 2013.

The Commission further modifies the Decision of the Arbitrator and awards Petitioner 7.5% person-as-a-whole for her work-related injury. The Arbitrator awarded Petitioner 2.5% loss of use of the arm. However, the Commission notes that Petitioner sustained a left rotator cuff tear, which is compensated under 8(d)(2) of the Act.

The Commission weighed the five factors listed under Section 8.1b of the Act as follows:

(i) Impairment Rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of Injured Employee: The Commission gives some weight to this factor noting that she continues to work as a Personal Aide.

(iii) Petitioner's Age: The Commission gives some weight to this factor noting that Petitioner was 37-years old at the time of the accident. She has a longer career ahead of her in which she will encounter the effects of her injury.

(iv) Petitioner's Future Earning Capacity: The Commission gives no weight to this factor noting that she currently earns $2.00 per hour more.

(v) Evidence of Disability: The Commission give some weight to this factor noting that there is little evidence in the record supporting Petitioner's ongoing subjective complaints. While the record reveals that Petitioner sustained a left rotator cuff tear as the result of her injury, she received minimal treatment and does not need surgery.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission finds that a PPD award of seven-and-a-half percent (7.5%) loss of use of the person-as-a-whole is more appropriate and in line with the totality of the evidence in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 19, 2018, 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 $310.66 per week for a period of 2-6/7 weeks, July 4, 2013 through July 23, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act. The Respondent is entitled to a credit of $264.13 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $279.60 per week for a period of 37.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 7.5% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services, pursuant to the medical fee schedule to Dr. Labanauskas, Accelerated Rehabilitation Centers, and Dr. Anthony Romeo, as provided in Section 8(a) and 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $4,796.98 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

19IWCC0342

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: JUL 1 - 2019

DDM/tdm
O: 6/19/19
052

D Douglas McCarthy
Douglas McCarthy

L Elizabeth Coppoletti
L. Elizabeth Coppoletti

Stephen J. Mathis
Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COLE, PATSY
Employee/Petitioner

Case# **14WC012579**

ST OF IL (DEPT OF HUMAN SERVICES)
Employer/Respondent

19IWCC0342

On 6/19/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% 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:

1071 VASILATOS & COTTER LLC
ELLINA KHOTIMLYANSKY
555 W JACKSON BLVD SUITE 700
CHICAGO, IL 60661

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUN 19 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0342

TE 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

Patsy Cole
Employee/Petitioner

v.

State of Illinois (Department of Human Services)
Employer/Respondent

Case # **14** WC **12579**

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 **May 4, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 17, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**$24,232.00**; the average weekly wage was $**$466.00**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **5** 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 $**264.13** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**264.13**.

Respondent is entitled to a credit of $**4796.98** under Section 8(j) of the Act.

ORDER

MEDICAL BENEFITS

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES, PURSUANT TO THE MEDICAL FEE SCHEDULE OF TO DR. LABANAUSKAS, ACCELERATED REHABILITATION CENTERS, AND DR. ANTHONY ROMEO, AS PROVIDED IN SECTIONS 8 (A) AND 8 (J) OF THE ACT.

RESPONDENT SHALL BE GIVEN A CREDIT OF $4796.98 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.

TEMPORARY TOTAL DISABILITY

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $310.66/WEEK FOR 108 ½ WEEKS, FEBRUARY 15, 2015, THROUGH MARCH 16, 2017.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $310.66/WEEK FOR 2 AND 6/7 WEEKS, JULY 4, 2013, THROUGH JULY 23, 2013.

RESPONDENT SHALL BE GIVEN A CREDIT OF $264.13 FOR TEMPORARY TOTAL DISABILITY BENEFITS THAT HAVE BEEN PAID.

PERMANENT PARTIAL DISABILITY

WITH REGARD TO SUBSECTION (I) OF SECTION8.1B(B), THIS ARBITRATOR NOTES THAT NO PERMANENT PARTIAL DISABILITY IMPAIRMENT REPORT AND/OR OPINION WAS SUBMITTED INTO EVIDENCE. THIS ARBITRATOR THEREFORE GIVES NO WEIGHT TO THIS FACTOR.

WITH REGARD TO SUBSECTION (II) OF SECTION 8.1B(B), THE OCCUPATION OF THE EMPLOYEE, THIS ARBITRATOR NOTES THAT THE RECORD REVEALS THAT PETITIONER WAS EMPLOYED AS A PERSONAL AIDE AT THE TIME OF THE ACCIDENT AND THAT SHE IS ABLE TO RETURN TO WORK IN HER PRIOR CAPACITY AS A RESULT OF SAID INJURY. THIS ARBITRATOR NOTES SHE DID RETURN TO WORK DOING THE SAME WORK, ALBEIT FOR DIFFERENT CLIENTS. I GIVE SOME WEIGHT TO THIS FACTOR.

WITH REGARD TO SUBSECTION (III) OF SECTION 8.1B(B), THIS ARBITRATOR NOTES THAT PETITIONER WAS 37 YEARS OLD AT THE TIME OF THE ACCIDENT. BECAUSE THAT IS A RELATIVELY YOUNG AGE, THIS ARBITRATOR GIVES NO WEIGHT TO THIS FACTOR.

WITH REGARD TO SUBSECTION (IV) OF SECTION 8.1B(B), PETITIONER'S FUTURE EARNINGS CAPACITY, THIS ARBITRATOR NOTES PETITIONER WAS MAKING $2.00 AN HOUR MORE AFTER HER RETURN TO WORK AFTER THE ACCIDENT STILL WORKING AS A PERSONAL AIDE. I GIVE SOME WEIGHT TO THIS FACTOR.

WITH REGARD TO SUBSECTION (V) OF SECTION 8.1B(B), EVIDENCE OF DISABILITY CORROBORATED BY THE TREATING MEDICAL RECORDS, THIS ARBITRATOR NOTES THE ABSENCE OF MEDICAL RECORDS FOR THE LAST NEARLY FOUR YEARS. I GIVE NO WEIGHT TO THIS FACTOR.

BASED ON THE ABOVE FACTORS, AND THE RECORD TAKEN AS WHOLE, THIS ARBITRATOR FINDS THAT PETITIONER SUSTAINED PERMANENT PARTIAL DISABILITY TO THE EXTENT OF 2.5% OF AN ARM AS A RESULT OF THE INJURY.

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

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

Signature of Arbitrator

June 15, 2018
Date

JUN 19 2018

Patsy Cole v. State of Illinois (Illinois Department of Human Services), No. 14 WC 12579

Preface

The parties proceeded to Trial May 4, 2018. The Request for Hearing indicates the following disputed issues: whether Petitioner sustained accidental injuries that arose out of and in the course of employment; whether Respondent was given notice of the accident within the time limits stated in the Act; whether Petitioner's current condition of ill-being is causally connected to this injury; what was Petitioner's average weekly wage; whether Respondent is liable for any unpaid medical bills; whether Petitioner is entitled to TTD and/or wage differential; and what is the nature and extent of the injury. Arbitrator's Exhibit 1. Neither party ordered a transcript of the proceedings.

Findings of Fact

On June 17, 2013, Patsy Cole (Petitioner), a 37 year old female, was working as a Personal Aide for the Illinois Department of Human Services (Respondent) providing assistance with household tasks and personal care to people who need help with daily living activities in their home. Cole testified she worked Monday through Friday, nine hours a day and was paid $15.00 an hour. The parties stipulated her earnings during the year preceding her injury was $24,233.00.

Petitioner testified on June 17, 2013, she was coming back from a doctor's appointment with her client in a Cook-DuPage Transportation transit van seated behind her client who was wheelchair bound. The van made a sudden stop causing the wheelchair to hit her left shoulder, front, and arm. Petitioner testified she had pain right away and noticed left shoulder swelling. She testified she made a phone call to Kendra Bridgeport, her supervisor with Ada S. McKinley. That is the agency that placed her with the client through one of Respondent's programs, as well as a "Ms. McNeal" at Respondent.

Petitioner further testified she went home that day. She said she went to the emergency room at Holy Cross Hospital. There is no evidence as to when, or documentary support of the visit, diagnosis or treatment. She testified she saw her primary care physician who sent her to Dr. Labanauskas. There is no documentary support of this visit, diagnosis or treatment, and no record of the referral. She testified before seeing Labanauskas she managed her swelling and pain with ibuprofen, heating pads and rubs.

The records of Dr. Ignas Labanauskas are largely illegible. What can be gleaned from the records indicates Petitioner first saw him over three months after the accident, on September 25, 2013. The office notes of Dr. Labanauskas note she was involved in a motor vehicle accident

June 17, 2013; she had to date, no x-rays, treatment, or MRI; and there is a positive impingement sign. Labanauskas thought Petitioner needed an MRI of her left shoulder and noted she complained of persistent pain and had difficulty with abduction and elevation. He told her to take ibuprofen. An MRI of the left shoulder was done October 19, 2013, four months after the accident. The record of the MRI contained in the records of Labanauskas is incomplete containing only the first page. What is submitted indicates Petitioner had no fracture or dislocation, her tendons were intact, and there was a partial undersurface tear of the insertional fibers of the anterior supraspinatus. The impression was: small partial undersurface tear at the insertional aspect of the anterior supraspinatus and intrasubstance tear of the infraspinatus. The records of visits on January 24, 2014, and March 21, 2014 are illegible. There is a Progress Report to Dr. Labanauskas from Katharine Albright of Accelerated Rehabilitation Centers dated February 26, 2014. The Report indicated, contrary to Labanauskas' records, Petitioner had x-rays and saw an orthopedic doctor who ordered an MRI on October 25, 2014. The report indicated Petitioner continued working full duty until the MRI revealed a small tear, then on light duty, with restrictions. The Report indicated she had attended seven appointments, cancelled two, and had three scheduled appointments. Petitioner had made moderate gains in therapy and has a good rehabilitation potential. Although the Report thanks Dr. Labanauskas for the referral of Petitioner, I can find no definitive corroboration of this. Petitioner's Exhibit 1 (unpaginated).

The records of Accelerated Rehabilitation Centers indicate Petitioner was first seen February 27, 2014, eight months after the accident. Petitioner's testimony was virtually silent on physical therapy except to say she had 12 weeks of physical therapy. Petitioner's last visit to Accelerated was April 3, 2014. The records indicate steady progressive improvement and notes Petitioner was working full time with restrictions February 26, 2014, and March 19, 2014. By her last visit, Petitioner, observed the reporting therapist, continues to benefit from additional therapy to improve objective and functional defects. Petitioner's Exhibit 2 (unpaginated).

On July 1, 2014, Petitioner submitted to an independent medical evaluation by Dr. James C. Cohen. We know nothing about the qualifications of Dr. Cohen. Cohen reviewed Petitioner's MRI of October 19, 2013, and said there was evidence of tendinitis of the supraspinatus and possibly an undersurface tear. Cohen said he could not give a specific diagnosis as Petitioner has complaints he could not relate to a specific anatomic structure. He said it is difficult to imagine Petitioner would have the constellation of symptoms she described from the injury she stated. He found Petitioner's symptoms to be magnified. He could not relate the findings on her MRI to her clinical complaints. Cohen offered treatment he thought would be helpful, but recommended against surgery. Cohen said she should continue with restrictions. He felt, although there was significant symptom magnification, his recommendations were related to the accident. Respondent's Exhibit 1.

Petitioner testified she was referred by Dr. Labanauskas to Dr. Anthony Romeo. There is no documentary support for this. In fact, in a Patient Details report of July 21, 2014, under Physician Information, the answer to the question "Is there a referring physician?" is "No." Curiously, Romeo directed a "to whom it may concern letter" to Tri-Star, apparently the vendor tasked by Respondent to review bills in this matter. Romeo's records indicate he saw Petitioner

once, July 21, 2014, over a year after the accident. There is no indication he was aware of the IME done by Dr. Cohen. Romeo incorrectly identified Petitioner as "...a home healthcare professional with CDT transportation." Romeo assessed Petitioner with a left shoulder rotator cuff tear of the supraspinatus and intrasubstance tear of the infraspinatus. It was his plan to continue with conservative treatment, using anti-inflammatory medicines, injections, and physical therapy. I do not find he recommended surgery take place in the future, clearly, he envisioned conservative management of Petitioner. Petitioner wanted different treatment, and Romeo mentioned a left shoulder arthroscopy with rotator cuff repair. He maintained Petitioner at light duty. Petitioner's Exhibit 3 (unpaginated) Petitioner testified she last saw Dr. Romeo on March 24, 2018. There is no evidence of the nature of Petitioner's medical visits or treatments since July 21, 2014.

Conclusions of Law

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.

In support of this finding, I rely on the testimony of the Petitioner that she was injured while doing her job as a Personal Aide for Respondent returning from a doctor's appointment with her client and was involved in a motor vehicle incident.

Disputed issue **E** is was timely notice of the accident given to Respondent. This Arbitrator finds, as a conclusion of law, it was.

In support of this finding, I rely on the testimony of Petitioner she notified her supervisor as well as the client counselor at Respondent.

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

In support of that finding I rely on the testimony of Petitioner as well as the records of Dr. Labanauskas and the IME done by Dr. Cohen.

Disputed issue **G** is what were Petitioner's earnings. The parties stipulated Petitioner's earnings during the year preceding injury were $24,232.00. This Arbitrator finds, as a conclusion of law, the average weekly wage was $466.00. 820 ILCS 305/10.

Disputed issue **J** is whether the medical services that were provided to Petitioner were reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services. This Arbitrator finds, as a conclusion of law, the medical services, though not always effective and seemingly sporadic at times, were conservative and reasonable and necessary and Respondent has not paid quite all the appropriate charges.

In support of this finding, I rely on the testimony of Petitioner, and the medical records of Dr. Labanauskas, Accelerated Rehabilitation Centers, and Dr. Romeo. I also note the absence of

criticism from Dr. Cohen of the services of Petitioner's medical providers except in one instance where he would have been more aggressive. All charges by Dr. Labanauskas, Accelerated Rehabilitation Centers, and Dr. Anthony Romeo, if unpaid, are to be paid by Respondent. Respondent is given credit for $4796.98 for its previous payment of medical bills.

Disputed issue **K** is what temporary benefits are in dispute. Here it is temporary total disability. There is little coherent testimony or evidence as to specifically when Petitioner became totally incapacitated and unable to return to work. There is even less as to the specific period of temporary total disability. The medical records on this issue are disorganized and not really helpful, with nothing of value past July 21, 2014. Petitioner testified she could not work, couldn't "do the job," between February 15, 2015, and March 16, 2017. That is, she became incapacitated 20 months after the accident, and seven months after Romeo had Petitioner on light duty. Petitioner did not explain it, but Respondent did not challenge it in any way whatsoever, and offered no contrary evidence. Based on Petitioner's unrebutted and unchallenged testimony, weak as it is, finding no references in Petitioner's medical records to light duty during that time span, I find Petitioner is entitled to temporary total disability of $310.66 per week from February 15, 2015, through March 16, 2017, 108 1/7 weeks. Temporary total disability was paid July 4, 2013, through July 23, 2013, and I find it should have been paid at $310.66 per week. Respondent is entitled to credit for TTD paid, of $264.13.

Disputed issue **L** is what is the nature and extent of the injury. I find, based on Petitioner's testimony and the medical records submitted and the IME, Petitioner suffered a left shoulder rotator cuff tear of the supraspinatus and intrasubstance tear of the infraspinatus. Petitioner had no injections and no surgery in the nearly five years since the accident. There is no wage differential issue here as Petitioner testified she returned to her usual and customary line of employment.

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 and remains a Personal Aide and returned to work. I give some weight to this factor. Petitioner was 37 years old at the time of the accident, a relatively young age. I give no weight to this factor. No testimony was directly offered as to Petitioner's earning capacity except that she was making $2.00 an hour more after the accident, still working as a Personal Aide. I give some weight to this factor. There is no evidence of disability corroborated by treating medical records. Although Petitioner testified to continuing problems with her left arm, there are no medical records at all in the last nearly four years. I give no 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% of an arm as a result of the injury.

June 15, 2018

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 N/A	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIC RHEINECKER,

Petitioner,

vs. NO: 12 WC 20543

KILIAN CORPORATION,

Respondent.

19IWCC0343

DECISION AND OPINION ON REVIEW

Timely Petition under §8(a), §19(k) and §16 of the Act having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of prospective medical care and penalties and attorney fees, and being advised of the facts and law, finds as follows:

I. FINDINGS OF FACT

Petitioner was a 41-year-old (now 48) laborer for Respondent performing road construction. On November 15, 2011 he and a co-worker were carrying a construction form weighing between 200-300 pounds. As Petitioner stepped down approximately 18", his leg gave way and he landed on his knees. He heard a pop in his right hip, his body twisted as he held onto the form to avoid placing all the weight on his co-worker, and he experienced pain in his low back, right hip and groin.

Petitioner's condition was such that he sought medical care. Upon treatment and referral to physical therapy, Petitioner experienced bladder control issues. Dr. Purvines, an orthopedic surgeon, diagnosed an L5-S1 disc herniation. A lumbar fusion was recommended after conservative care failed.

19IWCC0343

Following additional conservative care, which failed to alleviate Petitioner's symptoms, a second opinion from orthopedic surgeon Dr. Raskas eventually corroborated the recommendation of a lumbar fusion, or in the alternative, a disc replacement at L5-S1. Petitioner opted for the L5-S1 disc replacement surgery, which was performed August 24, 2012.

Petitioner was then referred to Dr. Nunley, who diagnosed severe traumatic osteoarthritic changes in Petitioner's hip. Petitioner underwent conservative care, which failed, and ultimately underwent a total right hip replacement on January 13, 2013.

Post-operatively, Petitioner underwent therapy, injections and was prescribed medications, but he stated that he did not recover well. His back pain did improve, and although an EMG was negative, Petitioner indicated that he developed radicular symptoms in his right lower extremity which eventually required the use of a cane to walk. He was referred to pain management, which failed to alleviate Petitioner's symptoms.

A May 28, 2013 Functional Capacity Exam (FCE) revealed that Petitioner was capable of only light physical demand level work. Both Drs. Raskas and Nunley believed that Petitioner was unable to return to his pre-accident employment. Of note, on June 14, 2013 Dr. Raskas opined that Petitioner would do much better in a sedentary demand level occupation. He restricted Petitioner to 25 pounds lifting, no repetitive lifting/bending, no ladder climbing, no repetitive stair use and the ability to change positions as needed. Dr. Nunley issued a permanent 25-pound lifting restriction, along with restrictions including no kneeling, squatting or twisting.

At the arbitration hearing on April 27, 2016, Petitioner complained of: (1) disabling low back pain severely affecting the range of motion (ROM) of his spinal column; (2) radiating pain to his right leg down to his right foot and to his left leg down to his left knee; (3) numbness of the dorsal aspect of his right foot; (4) a pin-pricking feeling in the plantar aspect of his right foot; (5) severe loss of strength in his right leg, necessitating the need for a cane to ambulate; and (6) pain and discomfort from the right hip to groin. Petitioner also testified that he could only sit/stand for 15-20 minutes, had to frequently change sitting positions to avoid severe back pain, and his right leg would give after that time span. He could only drive for 40 minutes before his back and leg pain increased and his foot went numb. The pain also kept Petitioner up at night and he experienced difficulty dressing himself.

Prior to the arbitration hearing, Petitioner submitted to a §12 examination at Respondent's request. The Arbitrator rendered his decision on September 29, 2016 finding the opinions of Petitioner's treating physicians to be more persuasive than those of the §12 examiner with regard to causation and permanency and, ultimately, found Petitioner to be permanently and totally disabled under an odd-lot theory. The Commission affirmed the Decision on review, with clarifications related to burden of proof, on March 8, 2018.

This matter came before Commissioner Simpson on Petitioner's §8(a) petition on July 11, 2018. In his petition, Petitioner requests prescribed treatment, including a Tempur-pedic adjustable bed, a La-Z-Boy lift recliner, a motorized scooter, a referral to return to Dr. Ryan Nunley, and a referral to Comprehensive Pain Specialists.

19IWCC0343

At the §8(a) hearing, Petitioner testified that he had continued treatment with Drs. Ahmed, Raskas and Nunley since arbitration. He stated that his back, hip and bilateral leg conditions had worsened since then. Petitioner explained that his low back and right hip pain was very intense. Moreover, he began noticing right knee and right upper extremity pains. Petitioner was taking prescription medication prescribed by Dr. Ahmed.

Petitioner's testimony regarding these new issues is corroborated by medical records, which reflect the following in pertinent part:

> ~~On July 25, 2017 Petitioner informed Dr. Chami that he noticed an increase in~~ pain over the last 6 months, and that now his low back pain had become unbearable. He also mentioned new problems such as upper back muscle spasms and right elbow pain. At this time Dr. Chami strongly recommended:
>
> - An adjustable Tempur-pedic bed;
> - A La-Z-Boy lift recliner; and
> - A motorized scooter.
>
> On September 5, 2017 Petitioner informed Dr. Chami that he was having difficulty getting out of bed, thus he concocted a way to help maneuver himself up, which in turn has placed a lot of strain on his elbow. He complained of low back pain as well as worsening right hip, right knee and right elbow pain. On September 6, 2017 Petitioner informed Dr. Ahmed that he ties one end of a rope to his bedroom doorknob and the other end to his bedside so that he can physically pull himself up out of bed and swing his legs over to stand up. This process takes him several minutes. When he stands up he holds onto his walker, which he received after his hip replacement. He stated that using the rope to get out of bed is what led to his upper extremity issues. Petitioner also noted similar difficulties getting out of a chair. He stated that he must lean forward and then lean on his cane while pushing off of the chair armrest. If the chair has no armrest, he must place both hands on his cane and lift himself.

The medical records reflect Dr. Ahmed's belief that Petitioner would benefit from medical equipment. He prescribed a Tempur-pedic bed with adjustable base, a 4-wheel motorized scooter with a 300-pound weight limit, and a lift chair (Big man La-Z-Boy). Dr. Ahmed also referred Petitioner to Dr. Nunley and Comprehensive Pain Specialists.

Petitioner submitted to a §12 examination with Dr. Mirkin at Respondent's request. In a report dated November 27, 2017, Dr. Mirkin diagnosed a lumbar strain and contusion, a disc protrusion based on an MRI and a right hip strain. He opined that, based on Petitioner's hip replacement or disc replacement, there was no medical indication for the use of a cane. After examining Petitioner, Dr. Mirkin received a letter at his office questioning whether Petitioner required an adjustable mattress, a La-Z-Boy recliner and a motorized scooter. Dr. Mirkin opined that there was no medical indication for any of these devices. Instead, he recommended an aggressive exercise program.

19IWCC0343

Petitioner was also evaluated by Brefeld Physical Therapists regarding the necessity of equipment to assist with mobility and pain. On December 14, 2017, Joan Brefeld recommended an adjustable bed for adjustable height elevation and positioning, a lift chair (big man La-Z-Boy), and a power mobility wheelchair that can support 300 pounds. Ms. Brefeld also recommended home modifications for Petitioner of: (1) modification of stair with a ramp to access home; (2) drive way modification for safe access from driveway to home with concrete or black top path; and (3) modification of door way to enter/exit bedroom, expansion.

On January 17, 2018, Petitioner visited Dr. Nunley for a 5-year hip replacement evaluation. Petitioner still had a little right hip, groin and lateral pain, but was still attending pain management for his right knee and elbow pain. Dr. Nunley opined that an adjustable bed, lift chair and wheelchair were reasonable, given Petitioner's difficulties.

On February 21, 2018, Petitioner visited Dr. Nunley for a 5-year surveillance check. His right hip was doing relatively well. He described no hip problems. His biggest issue was right knee pain, which prompted a discussion about right knee physical therapy. However, the workers' compensation insurance carrier had only approved right hip treatment. Since Petitioner's right hip was doing well, and right knee treatment was not authorized, Dr. Nunley stated there was nothing further he could do.

On March 28, 2018, Petitioner visited Dr. Ahmed's office. He saw the Adult Nurse Practitioner (ANP) and reported sciatica. The ANP also noted that Dr. Nunley indicated Petitioner's knee was "going" bad, but that his hip was good. A general examination revealed tenderness in his right hip laterally, with very limited range of motion (ROM) and that Petitioner was walking with a cane. At the time, Petitioner complained of chronic right hip and right knee pain.

On April 25, 2018, Petitioner presented for a follow-up with the ANP relating to his blood pressure. A general examination of the right hip was identical to the March 28, 2018 record. Petitioner again complained of chronic right hip and right knee pain.

On May 2, 2018 the parties presented before the Commission and agreed for Petitioner to treat with Dr. Raskas once again. On May 15, 2018 Dr. Raskas examined Petitioner and diagnosed lumbar back pain and lumbar radiculopathy. Based on these findings, Dr. Raskas recommended a lumbar spine myelogram-CAT scan and pain management with Dr. Barry Feinberg. Dr. Raskas also agreed with the home modifications recommended by Joan Brefeld.

Regarding his current condition of ill-being, Petitioner testified that his conditions prevent him from doing anything with his active 17-year-old son. He has also reached the point where he now calls ahead to grocery stores to make sure they have motorized scooters available.

II. CONCLUSIONS OF LAW

The Commission finds sufficient evidence suggesting a change in Petitioner's condition warranting the requested prospective medical treatment and assistive medical devices pursuant to §8(a). It is clear from Petitioner's testimony and the corroborating medical records that his

19IWCC0343

condition has declined, to the point where several treating physicians have recommended medical devices to assist him in activities of daily living. The aforementioned medical equipment was recommended by Drs. Chami, Ahmed and Nunley, as well as physical therapist, Joan Brefeld. The record also reveals that Petitioner's condition would benefit from the diagnostic testing recommended by Dr. Raskas, as well as the requested referrals to Dr. Ryan Nunley and for pain management to alleviate him from the ongoing effects of his injury at work.

Respondent's denial of the prospective medical care and equipment is based on the opinion of its §12 examiner, Dr. Mirkin, who opined that there was no medical indication for any of these devices. However, the medical records reflect that Petitioner's condition has deteriorated since arbitration. The Commission finds the opinions of Petitioner's treating physicians and physical therapist to be more persuasive than those of Dr. Mirkin, whose conclusions are controverted by objective medical evidence and Petitioner's ongoing clinical presentation as reflected in the record as a whole.

Accordingly, the Commission awards Petitioner an adjustable Tempur-pedic bed, a La-Z-Boy lift recliner and a motorized scooter sought in his §8(a) Petition as well as a referral back to Dr. Ryan Nunley. The Commission also awards Petitioner the diagnostic testing recommended by Dr. Raskas. The Commission, however, does not award referrals to both Dr. Feinberg and Comprehensive Pain Specialists for pain management. Awarding both would be redundant. However, it is clear from the testimony, §8(a) petition and parties' briefs that Petitioner's physicians collectively recommend pain management treatment for his condition. Thus, the Commission awards Petitioner's request for pain management treatment with either provider. Furthermore, the Commission notes that the home accommodations which were recommended by Joan Brefeld and agreed with by Dr. Raskas are not awarded. Such accommodations were not sought by Petitioner in his §8(a) Petition nor in the accompanying brief.

Additionally, the Commission has considered Petitioner's request for §19(k) and §16 penalties and fees, but denies the Petition in this regard. Although the Commission ultimately did not find the opinions of Dr. Mirkin persuasive, Respondent's reliance on his opinions in denying medical benefits are not found to be unreasonable or vexatious.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Respondent authorize and pay for the medical devices mentioned above.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent authorize referrals for Petitioner to treat with Dr. Ryan Nunley and either Dr. Feinberg or Comprehensive Pain Specialists for pain management. Respondent shall also authorize the diagnostic testing recommended by Dr. Raskas.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for §19(k) and §16 penalties and fees is denied.

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

19IWCC0343

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 $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: JUL 2 - 2019
D: 5/8/19
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☐ 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

RICKY SMITH,

Petitioner,

vs.

NO: 17 WC 1006
17 WC 1007

WICC,

Respondent.

19IWCC0344

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, Section 8(j) credit/credit for sick time and/or pay, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Arbitrator's Decision, which is attached hereto and made a part hereof. The Commission only writes to expound on the Arbitrator's analysis relative to the type of risk Petitioner encountered on December 20, 2016, and to strike any language relative to credit for sick leave/sick pay as contained in the Arbitrator's Decision.

The Commission notes that Respondent did not dispute that the December 20, 2016 accident occurred in the course of Petitioner's employment. Respondent, instead, disputed that the accident arose out of Petitioner's employment with Respondent. By its Brief, Respondent argued that Petitioner did not face any increased risk than that of the general public.

In her Decision, the Arbitrator addressed the three categories of risk to which an employee may be exposed, and proceeded to examine these claims first under a neutral risk analysis. The Arbitrator found that Petitioner was exposed to a greater risk than the general public. The Arbitrator further found that Petitioner was exposed to a quantitative increased risk for the following reasons: (1) Petitioner was only allowed to park in a specific employee parking lot owned and operated by Respondent, and not open to the general public; and, (2) Petitioner was required to use this lot on a daily basis, which, according to the Arbitrator, was far more than any

visitor who would park in the "visitor only" section of the lot. The Arbitrator also indicated that there was only one entrance Petitioner could enter from the parking lot, that visitors could not park where Respondent's employees parked, and that on December 20, 2016, the employee section of the parking lot had a lot of ice.

The Arbitrator next evaluated these claims under an employment-related risk analysis, and found that the claims were also compensable under this category. The Arbitrator noted that Respondent owned and operated the subject parking lot, and Petitioner was required to park in the employee lot. The Arbitrator found that Respondent maintained and provided the lot for its employees, and on December 20, 2016, the parking lot was full of ice. Thus, the Arbitrator concluded that Petitioner proved that a relationship existed between the parking lot and Petitioner's employment, and therefore, Petitioner sustained an accidental injury that arose out of and in the course of his employment with Respondent on December 20, 2016.

The Commission writes to emphasize our Appellate Court's previous instructions that when categorizing risk, the "first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk." *Steak 'n Shake v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 150500WC, ¶ 38. Further,

> [W]hen a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. A neutral risk has no employment-related characteristics. Where a risk is distinctly associated with the claimant's employment, it is not a neutral risk. *Young v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130392WC, ¶ 23.

Thus, while it was unnecessary for the Arbitrator to conduct a neutral-risk analysis, the Arbitrator reached the correct conclusion under both risk categories.

Additionally, as to cases wherein claimants had fallen on the employer's ice-covered parking lot, our Supreme and Appellate Courts have found those injuries to be compensable. *Hiram Walker & Sons, Inc. v. Indus. Comm'n*, 41 Ill. 2d 429 (1968) (an employer is responsible for the maintenance and control of a parking lot that he provides for the use of his employees, and that an injury incurred by an employee while on the lot, within a reasonable time before or after work, arises out of and in the course of his employment); *Carr v. Indus. Comm'n*, 26 Ill. 2d 347 (1962); *De Hoyos v. Indus. Comm'n*, 26 Ill. 2d 110 (1962); *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC. As such, a risk-analysis was unnecessary if the injury occurred on an employer's premises due to an unsafe or hazardous condition as was in the case at bar, *i.e.* an employment-related risk. *Archer Daniels Midland Co. v. Indus. Comm'n*, 91 Ill. 2d 210 (1982); *Young v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130392WC.

Finally, the Commission addresses the Arbitrator's discussion and Order relative to sick leave and sick pay. (Arbitrator's Decision, pg. 2 and 13). On Review, and by its Brief, Respondent

does not dispute Petitioner's entitlement to temporary total disability (TTD) benefits from 12/21/16 through 1/17/17, and 5/3/17 through 6/14/17, or 10 weeks. However, Respondent does dispute the Arbitrator's award, as outlined in her Decision:

> Upon receipt of the payment of temporary total disability benefits, as provided in Section 8(b) of the Act, in the amount of $8,988.00, the petitioner shall reimburse respondent for the 10 weeks of sick pay he received up to the amount of $8,988.00, and the respondent shall credit petitioner's sick leave account with the 10 weeks of sick leave he used during the periods of 12/21/16-1/17/17, and 5/3/17-6/14/17, up to the amount of $8,988.00. (Arbitrator's Decision, pg. 2).

Pursuant to Section 8(b) of the Act, the Commission has the authority to award TTD, but no authority to order Petitioner to reimburse Respondent money he received as sick pay, nor does the Commission have the authority to order Respondent to credit Petitioner's sick time account. Thus, the Commission strikes the above-referenced language relative to reimbursement for sick pay and credit for sick time as contained on Page 2, as well as related language on Page 13 of the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 27, 2018, is hereby corrected as stated above, and otherwise 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 other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: JUL 2 - 2019

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 6-4-19
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, RICKY
Employee/Petitioner

Case# **17WC001006**

17WC001007

WICC
Employer/Respondent

19IWCC0344

On 6/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
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
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 27 2018

Brandon A. Rapier
BRANDON A. RAPIER, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **ADAMS,**)

- ☐ 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

RICKY SMITH,
Employee/Petitioner

v.

WICC,
Employer/Respondent

Case # **17** WC **1006**

Consolidated cases: **17 WC 1007**

19IWCC0344

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 **Quincy**, on **6/6/18**. 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 **CREDIT FOR SICK PAY**

FINDINGS

On **12/20/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** sustain accidents 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 accidents.

In the year preceding the injury, Petitioner earned $**70,706.29**; the average weekly wage was $**1,348.20**.

On the date of these accidents, Petitioner was **54** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**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

Respondent shall pay reasonable and necessary medical services for petitioner's right knee from 12/20/16 through 11/14/17, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $898.80/week for 10 weeks, commencing 12/21/16 through 1/17/17, and 5/3/17 through 6/14/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week for 26.875 weeks, because the injuries sustained caused the 12.5% loss of the petitioner's right knee, as provided in Section 8(e) of the Act.

Upon receipt of the payment of temporary total disability benefits, as provided in Section 8(b) of the Act, in the amount of $8,988.00, the petitioner shall reimburse respondent for the 10 weeks of sick pay he received up to the amount of $8,988.00, and the respondent shall credit petitioner's sick leave account with the 10 weeks of sick leave he used during the periods of 12/21/16-1/17/17, and 5/3/17-6/14/17, up to the amount of $8,988.00.

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

6/26/18
Date

ICArbDec p. 2

JUN 27 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 54 year old corrections officer, alleges he sustained accidental injuries to his right knee on 12/20/16, that arose out of and in the course of his employment by respondent on 12/20/16. For clarification, the petitioner alleges he sustained 2 separate injuries to his right knee on 12/20/16. The alleged injury in the morning when he was coming in to work is the basis of claim 17 WC 1006, and the alleged injury in the evening when he was leaving work is the basis of claim 17 WC 1007. Petitioner sought no treatment between these two injuries.

Petitioner has been a corrections officer for respondent for 17 years. Petitioner's job could vary from sitting, standing and walking around, depending on what job duty he was performing. He testified that there are over 25 separate job duties he can be assigned. The actual tasks he performs for each job duty can vary. Petitioner rotates the jobs he performs. Petitioner works the 6:45 am - 3:00 pm shift.

When petitioner arrives at the correctional center each day he parks in the only employee parking lot that there is. Petitioner testified that there is one row in the lot, near the entrance, that is specifically assigned for visitors to park. The rest of the parking lot is for "employees only" and is secured to the extent that if other cars are caught trying to park there they are told by the corrections officers that they must leave. Petitioner stated that visitors are not allowed to park in any spots other than those identified for visitors, and if they do, and someone sees it, they are required to move their car to the visitors section. Petitioner testified that this happens about once each weekday and more often on the weekend. Visitors are also not allowed to remain sitting in their vehicle while another person is in the prison. If they are spotted sitting in their car in the visitors sections a correctional officer will instruct them to leave the lot. Additionally, employees are not allowed to park in the visitors section of the lot. Petitioner testified that the employee parking lot is not open to the general public.

The parking lot is maintained by the state. It is the responsibility of the state to plow the employee parking lot. At times, Clayton will shovel the sidewalk in front of the respondent's facility, that runs parallel to the visitors parking area. Petitioner testified that the employee parking lot is old, bad and nasty.

Petitioner testified that it did not snow on 12/20/16, but there was ice all over the parking lot that day. He testified that he believed it had snowed the night before and the lot had plowed, but ice remained. He testified that there was no salt put down. When petitioner arrived for work on 12/20/16 he entered the lot and parked his car in the employee section of the lot. Petitioner got out of his car, took one step, and slid on some ice. He did not fall, but rather hyperextended his right knee. Petitioner believed something gave way, but he was able to walk. Petitioner walked into the facility. He was assigned to the infirmary that day and placed some ice on his

right knee when he was able to sit. Petitioner did as little as he had to do that day. He noted swelling in his right knee during the day. He reported the incident to his Lieutenant and completed an accident report.

When petitioner completed his shift he walked back to his car in the employee parking lot. Given that petitioner had slipped on the ice directly outside his car earlier that day, he decided he would step up on the concrete island that was directly next to his car and try and get into his car without stepping on the same icy surface he fell on that morning. However, as petitioner stepped up onto the curb of the concrete island he again slipped and fell, injuring his right knee again. He stated that this fall was more severe. Petitioner testified that there was ice on the curb of the island, and that caused his fall. Petitioner testified that his right knee hurt more after this injury than it did following the injury in the morning. Petitioner did not report the incident that evening because he did not want to walk all the way back into the facility. Petitioner testified that this injury was witnessed by Officer Royer and the correctional officer in tower 1. Petitioner stated that Officer Royer was walking behind him.

On 12/20/16 petitioner completed an accident report with respect to his injury in case 17 WC 1006, which is the alleged injury he sustained when he arrived for work on 12/20/17. Petitioner indicated that after he parked in the WICC parking lot, he stepped out of the car, slipped on the ice, and hyperextended his right knee. He complained of stiffness and shooting pain if he overextends his right knee.

On 12/20/16 petitioner presented to MDH Convenient Care. He was examined by nurse practitioner Kay Stone and Dr. Arnold. Petitioner reported that as he was getting out of his car that morning he slipped on the ice and hyperextended his right knee. Petitioner stated that it was getting stiff and he had shooting pains. Petitioner also reported that he then struck his right and left knees on the concrete. His primary complaint was pain in his right knee. Petitioner had a history of Baker's cyst in his right knee unrelated to these injuries. He reported trouble weight bearing if he pivots right or left. He stated that once he starts walking it does not hurt so bad, unless he turns with weight bearing on the right foot. Following an examination petitioner was assessed with a right knee injury. He was referred to orthopedics.

On 12/22/16 petitioner presented to Dr. Drake White, an orthopedic surgeon. Petitioner's chief complaint was right knee pain. Petitioner testified that as he was getting out of his car his foot slipped causing him to hyperextend his right knee. He reported that he did not fall, but noted stiffness throughout the day. He then reported that when he was leaving work that same day he slipped on an icy curb and fell hitting his left knee first and then his right knee. Petitioner reported his current right knee symptoms. He stated that he had a previous right knee arthroscopy in the past, and had some chronic knee pain. His reports of severe right knee pain had only been since the injuries at work. Petitioner stated that he was unable to work since the injuries.

Petitioner reported swelling, lateral pain and a feeling of instability in the right knee. Dr. Drake examined petitioner and reviewed his right knee x-rays. He assessed arthralgia of the right knee, patella, tibia, and fibula, and a right knee injury. Dr. Drake continued petitioner off work until he was reevaluated and sent him for an MRI of the right knee. Dr. Drake also sent petitioner to physical therapy.

On 12/23/16 petitioner completed another accident report with respect to his injury in case 17 WC 1007, which is the alleged injury he sustained when he left work on 12/20/16. He reported that while he was walking in the WICC parking lot he stepped on ice on a curb and injured his right knee, left forearm, and finger on both hands. He noted that the injury was witnessed by Officer Royer.

On 1/11/17 petitioner filed his Application for Adjustment of Claim for cases 17 WC 1006 and 17 WC 1007.

On 1/17/17 Dr. Drake allowed petitioner to return to work without restrictions.

On 1/20/17 petitioner underwent an MRI of the right knee. The impression was patellar chondromalacia; moderate osteoarthritic change of the right knee joint, slightly progressed since prior examination; unchanged large Baker's cyst; abnormal appearance of the posterior and medial meniscus; and findings suspicious for tear involving the posterior horn of the lateral meniscus.

On 3/29/17 petitioner returned to Dr. Drake to review the results of the MRI. Dr. Drake was of the opinion that the MRI showed findings consistent with arthritic changes as well as medial and lateral posterior horn meniscus tears. He assessed localized primary osteoarthritis of the right knee, derangement of the posterior horn of the lateral meniscus of the right knee due to an old tear/injury of the right knee, derangement of the posterior horn of the medial meniscus of the right knee due to an old tear/injury of the right knee, and injury of the right knee. He discussed the risks and benefits of an arthroscopy. Petitioner requested that the operation take place.

On 5/3/17 petitioner underwent an arthroscopic right knee partial lateral meniscectomy performed by Dr. Drake. Petitioner's post-operative diagnosis was right knee primary osteoarthritis, and right knee posterior horn lateral meniscus tear. Dr. Drake took petitioner off work.

Petitioner followed-up post-operatively with Dr. Drake on 5/10/17 and 6/8/17. On 5/10/17 Dr. Drake prescribed a course of physical therapy at CMH Therapy Clinic, which petitioner began on 5/15/17. On 6/8/17 he assessed localized primary osteoarthritis of the right knee, and derangement of the posterior horn of the lateral meniscus of the right knee due to an old tear/injury of the right knee, status post arthroscopic partial meniscectomy, and right knee injury. He released petitioner to work without restrictions on 6/13/17. He instructed petitioner to continue exercises as taught by therapy.

On 6/8/17 the therapist noted that petitioner tolerated the session well. His range of motion and strength both showed progress. It was noted that petitioner was performing higher level activities at home and with recreational activities. Petitioner still had difficulty with reciprocal pattern during stairs. He noted that petitioner would benefit from closed chain strengthening to regain full function. On 6/26/17 petitioner was discharged from therapy after failing to show for three appointments without any call.

On 11/14/17 petitioner underwent a Section 12 examination performed by Dr. Stephen Weiss, at PMRI, at the request of the respondent. Petitioner provided a history of two slipping incidents at work on 12/20/16, with documented right knee pain and swelling. He indicated that the first incident occurred when he was getting out of his car and slipped on an icy pavement and hyperextended his right knee. Following this incident his right knee was swollen and became painful. He indicated that the second incident occurred as he was going home from work that same night. On this occasion, he slipped off a curb in the company parking lot and fell to the ground. Dr. Weiss also reviewed petitioner's medical records following these incidents. Petitioner reported that he no longer takes any medication and continues to work regular duty without restrictions. He stated that he was essentially back to the same condition he was in following his original surgery in 2009.

An examination revealed full, normal bilaterally symmetric range of motion of the knee with flexion from 0 to 110 degrees. Minimal puffiness was noted around the knee with minimal effusion. No joint line tenderness was noted. The knee was stable in the anterior/posterior, varus/valgus, and rotatory planes. Dr. Weiss diagnosed status/post lateral meniscectomy of the right knee secondary to the incidents in question. He opined that the lateral meniscectomy surgery petitioner underwent in March (sic) of 2017 was necessitated by the work incident in question. He further opined that all treatment to date had been reasonable and necessary, but no further treatment was necessary. He opined that petitioner had reached maximum medical improvement.

Petitioner testified that just prior to 12/20/16 his right knee was fine and he could run and work out at the prison. He testified that since the surgery he cannot work as long as he used to. He testified that he is remodeling his home. He also stated that he cannot run because of his right knee. He noted that if he runs he aggravates his right knee and then his pain is exacerbated for about a week before going back to baseline.

He testified that he wants to be a lieutenant, but cannot apply because he would be required to run, and he cannot. Petitioner never applied for lieutenant before 12/20/16. He testified that he was waiting until he was 4 years from retirement because he only needed 4 years at the higher wages in order for his pension to be based on a lieutenant salary.

Petitioner complained of pain in his right knee when running, and being on his right leg for long periods of time. He reported no pain with normal activities. Petitioner admitted that he did not tell the doctor that he could not run. He also testified that he does not want to return to the doctor to have this evaluated. Petitioner also admitted that the doctor did not restrict him from performing any activities, including running. Petitioner testified that he has not returned to Dr. Drake since being discharged from his care, and has no desire to follow-up with Dr. Drake for his current complaints. Petitioner testified that his condition remains unchanged since he was discharged from care by Dr. Drake.

Kathy Rigg, Executive Secretary for Respondent, was called as a witness on behalf of respondent. Rigg is respondent's Work Comp Coordinator. She stated that she did not know of any parking policy. She agreed that if an officer in the tower, or on the grounds, sees a visitor in the employee section of the parking lot, the officer will ask them to move their car. She stated that there are no gate guards. She stated that there is specific signage for the visitor area, but is not sure if the employee area is marked with signage. Rigg had no knowledge regarding snow removal in the employee lot on 12/20/16.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner alleges that he sustained accidental injuries to his right knee that arose out of and in the course of his employment by respondent in 2 separate incidents on 12/20/16. Respondent does not dispute that petitioner slipped and fell on 12/20/16 injuring his right knee, but rather argues that petitioner was not at any greater risk than the general public when he slipped and fell in the parking lot on 12/20/16.

In order for an injury to be compensable, it must arise out of and in the course of the petitioner's employment with respondent. The dispute exists as to whether or not the injury arose out of petitioner's employment with respondent.

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Commission,* 58 Ill.2d 226, 317 N.E.2d 515 (1974); *Warren v. Industrial Commission,* 61 Ill.2d 373, 335 N.E. 2d 488 (1975). "Arising out of" is primarily concerned with causal connection to the employment. The majority of cases look to facts showing an increased risk to which the employee is subjected as compared to the general public. Further, the employee must be performing some task in furtherance of the employer's business or incidental thereto. The mere fact that the worker is at the place of injury because of the employment will not suffice.

The burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Hannibal, Inc. v. Industrial Commission*, 38 Ill.2d, 473, 231 N.E.2d 409, 410 (1967); *Illinois Institute of Technology v. Industrial Commission,* 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). The Workers' Compensation Commission, based on the factual situation presented to it, has the obligation and the duty to draw all reasonable inferences from the facts (*City of Chicago v. Industrial Commission,* 60 Ill.2d 283, 326 N.E.2d 769 (1975)), including determining the credibility of the witnesses *(Allen v. Industrial Commission,* 61 Ill.2d 177, 334 N.E.2d 142 (1975)) and making judgment thereon.

When dealing with "arising out of" the employment must be a causative factor. There are three categories of risk to which an employee may be exposed: (a) risks distinctly associated with the employment, (b) personal risks, and (c) neutral risks that have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Commission,* 314 Ill.App.3d 149, 731 N.E.2nd 795, 247 Ill. Dec 22 (1st Dist. 2000). The first of these types of risk would be compensable, the second would not, but with respect to the third it is not that clear. With regard to neutral risk, the question of whether an injury arose out of the employment rests on a determination of whether the claimant was exposed to a risk of injury to a greater extent than that to which the general public was exposed. The increased risk may be either qualitative, that is when some aspect of the employment contributes to the risk; or, quantitative, such as when the employee is exposed to the risk more frequently than the general public. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission.* 407 Ill. App. 3d 1010 (2011) at 1014.

In the case at bar the petitioner claims he was exposed to a risk of injury to a greater extent than that to which the general public was exposed. Respondent claims petitioner was not exposed to a risk of injury to a greater extent than that to which the general public was exposed.

Petitioner provided unrebutted testimony that the parking lot where he parked each day was restricted to use by respondent's employees only. He further testified that there was a row near the entrance to the respondent's facility in the parking lot that was exclusively reserved for use by visitors that are actually in the facility visiting inmates. This area is specifically marked with signage for visitors only.

Petitioner testified that the remaining area of the parking lot was for the exclusive use of respondent's employees. Petitioner presented unrebutted evidence that this was the only parking lot at respondent's facility, and was the only parking lot where he could park. Petitioner and Rigg both testified that if visitors were caught trying to park in the employee section of the parking lot, they would be forced to move their car. Both of them also testified that the parking lot is maintained by respondent and the state. Petitioner testified that the general

public cannot park in the employee portion of the parking lot. Petitioner testified that the sidewalk adjacent to the visitors parking row was maintained by Clayton.

Petitioner presented unrebutted evidence that on 12/20/16 the employee section of the lot was very icy. He stated that he believed it had snowed the day before and the lot was plowed, and although no snow was present on 12/20/16, there was a lot of ice in the lot, and no salt had been applied.

Given the fact that the employee lot where petitioner parked was not open to the general public; that this is the only parking lot where petitioner can park; that there is only one entrance petitioner can enter from the parking lot; that visitors to the facility are not allowed to park where employees do, and if they try and get caught they have to move their car; that the lot is owned and maintained solely by the respondent and state; that the petitioner must park in this lot when working and walk to and from his car each morning and night; and that on 12/20/16 the employee section of the parking lot had a lot of ice in it, the arbitrator finds the petitioner was exposed to a greater risk than the general public. The arbitrator finds the petitioner was exposed to a quantitative increase risk given that he was only allowed to park in a specific employee parking lot owned and operated by the respondent, and not open to the general public. Additionally, petitioner was required to use this lot on a daily basis, which was definitely far greater than any visitor that would park in the visitor only section of the lot. The arbitrator finds these facts placed petitioner at a greater risk than the general public.

Although the respondent did not specifically dispute it, the arbitrator further finds the petitioner's injury also occurred in the course of his employment by respondent. *DeHoyos v. Industrial Commission,* 26 Ill.2d 110, 185 N.E.2d 885 (1962), and *Carr v. Industrial Commission,* 26 Ill.2d 347, 186 N.E.2d 280 (1962), involved falls by employees on company parking lots. In these cases the court found the injuries to be compensable. They also held that there must be some relationship between the parking lot and the employment. To establish compensability for injuries sustained because of some condition in the parking lot, it must be shown that the employer in some way provided the parking facility where the injury occurred. In this case, it is unrebutted that the respondent owned and operated the parking lot where petitioner slipped and fell on the ice. Although respondent attempts to claim that the petitioner was not required to park in the employee section of the lot, and could park in the visitor's row adjacent to the building, the arbitrator finds this argument without merit given that the visitor section is specifically designated as parking for visitors only. Additionally, the arbitrator finds that although no one could say with any certainty that the employee parking section of the lot was marked with an "employee only " parking sign, the arbitrator finds that this was the only parking area available for employees to park, and if any visitors tried to park there they were told to move their cars. Lastly, in addition to the fact that the petitioner had no other area to park in, the arbitrator finds it unrebutted that the

respondent maintained and provided the lot for its employees. Given that it is unrebutted that the lot was full of ice on 12/20/16, and that petitioner was injured when he slipped on this ice, the arbitrator finds the petitioner's injury in the course of his employment.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained an accidental injury that arose out of and in the course of his employment by respondent on 12/20/16.

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

Having found the petitioner sustained an accidental injury that arose out of and in the course of his employment by respondent on 12/20/16, the arbitrator finds the treatment for petitioner's right knee from 12/20/16 through 11/14/17 was reasonable and necessary to cure or relieve petitioner from the effects of his injury on 12/20/16.

Respondent shall pay reasonable and necessary medical services for petitioner's right knee from 12/20/16-11/14/17, as provided in Sections 8(a) and 8.2 of the Act.

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

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner was temporarily totally disabled from 12/21/16-1/17/17, and 5/3/17-6/14/17, a period of 10 weeks. Respondent does not dispute this period of disability. Respondent's sole dispute with respect to this issue is liability based on its claim that petitioner did not sustain an accidental injury that arose out of and in the course of his employment by respondent on 12/20/16.

Having found the petitioner sustained an accidental injury that arose out of and in the course of his employment by respondent on 12/20/16, the arbitrator finds the petitioner was temporarily totally disabled from 12/21/16-1/17/17, and 5/3/17-6/14/17, a period of 10 weeks, and respondent shall pay petitioner temporary total disability benefits of $898.80 for a period of 10 weeks.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the petitioner was a correctional officer at the time of the injury. Petitioner was released to full duty without restrictions and returned to his regular duty job as a corrections officer. Petitioner has continued in this capacity since being released to work. Petitioner is able to fulfill all his duties. Petitioner testified that he wanted to apply for lieutenant, but has not because he claims his unable to run and would need to in order to be a lieutenant. The petitioner testified that his current condition is the same as it was when he was discharged by Dr. Drake. The arbitrator finds it significant that petitioner never reported any problems with running to Dr. Drake upon discharge, has not contacted Dr. Drake about this problem, and testified that he has no desire to see Dr. Drake about this problem. Additionally, the arbitrator notes that petitioner did not offer into evidence the job description for lieutenant showing that running is a required physical ability. The Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. Following his release from care by Dr. Drake, petitioner returned to full duty work without restrictions with respondent. Petitioner continues to work full duty with restrictions. Petitioner did testify that he wanted to apply for lieutenant by did not because he would be required to run, and cannot. Petitioner provided no credible evidence that lieutenants are required to run, but correctional officers are not, and that he has been restricted from running by Dr. Drake. Therefore, the arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that the petitioner offered no evidence regarding his future earnings capacity, other than his claim that he wants to apply for lieutenant but is unable to because he cannot run. Again, the arbitrator finds petitioner provided no credible evidence that lieutenants are required to run, but correctional officers are not, and that he has been restricted from running by Dr. Drake. Therefore, the arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds petitioner was discharged from care by Dr. Drake on 6/8/17. At that time Dr. Drake assessed localized primary osteoarthritis of the right knee, and derangement of the posterior horn of the lateral meniscus of the right knee due to an old tear/injury of the right knee, status post arthroscopic partial meniscectomy, and right knee injury.

On 6/8/17 the physical therapist noted that petitioner tolerated the session well. His range of motion and strength both showed progress. It was noted that petitioner was performing higher level activities at home and with recreational activities. Petitioner still had difficulty with reciprocal pattern during stairs. He noted that

petitioner would benefit from closed chain strengthening to regain full function. Petitioner missed three appointments and did not call. For this reason he was discharged by physical therapy on 6/26/17.

On 11/14/17, when he was examined by Dr. Weiss, he reported that he no longer takes any medication and continues to work regular duty without restrictions. He stated that he was essentially back to the same condition he was in following his original surgery in 2009. An examination revealed full, normal bilaterally symmetric range of motion of the knee with flexion from 0 to 110 degrees. Minimal puffiness was noted around the knee with minimal effusion. No joint line tenderness was noted. The knee was stable in the anterior/posterior, varus/valgus, and rotatory planes.

At trial, petitioner testified that just prior to 12/20/16 his right knee was fine and he could run and work out at the prison. He testified that since the surgery he cannot work as long as he used to, or run because of his right knee. He noted that if he runs he aggravates his right knee and then his pain is exacerbated for about a week before going back to baseline. The arbitrator notes that petitioner made none of these complaints to Dr. Drake before being discharged from his care. He also never returned to Dr. Drake regarding these complaints. When asked at trial if he would like to follow-up with Dr. Drake regarding these complaints he testified that he did not want to return to Dr. Drake for these complaints. Additionally, the arbitrator notes that petitioner did not offer any credible evidence to support his claim that he is unable to work as long as he used to.

The Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that petitioner sustained a permanent partial disability to the extent of 12.5% loss of use of the right leg pursuant to Section 8(e) of the Act.

O. IS RESPONDENT ENTITLED TO CREDIT FOR SICK PAY?

Respondent is claiming credit for petitioner's use of his accrued sick time while he was off work from 12/21/16-1/17/17, and 5/13/17-6/14/17, a period of 10 weeks. Having found the petitioner is entitled to temporary total disability benefits in the amount of $8,988.00, the arbitrator finds that for the petitioner to receive both temporary total disability benefits and sick leave time for the same period, the petitioner would receive a windfall. Therefore, the arbitrator finds that upon receipt of the payment of temporary total disability benefits in the amount of $8,988.00, the petitioner shall reimburse respondent for the 10 weeks of sick pay he received up to the amount of $8,988.00, and the respondent shall credit petitioner's sick leave account with the 10 weeks of sick leave he used up to the amount of $8,988.00.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL WALZ,

Petitioner,

vs. NO: 12 WC 43135

CITY OF HARVEY,

Respondent.

19IWCC0345

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; credit for claim payment to petitioner; amount of credit for regular salary continuation/PEDA; credit to the award for regular salary continuation/PEDA in excess of TTD," penalties and fees, and nature and extent, and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission reverses the Arbitrator's permanent partial disability award for Petitioner's right eye under §8(e) of the Act because, although he has some residual right eye *symptoms*, he did not sustain an actual eye *injury*.

Petitioner cites a few Commission decisions in support of a specific eye award but they involve an actual injury to the claimant's eye. For example, in *Huffman v Wallace Computer Services, Inc.*, 01 IIC 667, the Commission awarded 2.5% of the eye for chronic dry eye because the petitioner was "accidentally shot in the face with **chemicals from the extinguisher going into both eyes**. Petitioner testified that following this incident, she attempted to wash them out but that they continued to burn. Petitioner was then taken to the John Warner Hospital emergency room where she was found to have reddened and tearing eyes and was diagnosed with a chemical injury or irritation as a result of the fire extinguisher." In *Kenkoff v. Granite*

City Steel, 03 IIC 13, the Commission awarded 5% of the eye for chronic dry eye when "**a metal foreign object fell into his right eye**. Petitioner sought treatment at Veeder Health Clinic where his eyes were cleaned. He then sought treatment at Dr. Daisey's office. On September 27, 2000, Dr. Daisey removed a piece of slag from Petitioner's right eye." In *Demaught v. Illinois State Police*, 05 IWCC 848, the Commission awarded 10% of the eye for chronic dry eye where the claimant suffered a **corneal abrasion with surgery**. *Emphases added.*

The most significant decision that Petitioner points to is *Baum III v. St. Clair County*, 10 IWCC 915. Petitioner claims, "In *Baum*, the Commission not only awarded 15% loss of use of the person as a whole but also awarded 60% loss of the use of the petitioner's eye due to his facial fractures causing, *inter alia*, reduced eyelid function, reduced tear production requiring eye drops, and decreased vision." *P-brief at 10 (Emphasis in original).* However, *Baum* involved an actual eye injury in addition to facial fractures. In addition to orbital fractures, *Baum* was diagnosed, by the respondent's Section 12 examiner, with "work-related damage to the infraorbital nerve and inferior eyelid complex on the left leading to poor left lower lid function and secondary exposure keratitis and secondary to **corneal scarring with irregular astigmatism** and resulting decreased vision on the left." *Emphasis added.* The Commission awarded 60% for the left eye because of *Baum's* decreased vision and eyelid problems and because he had undergone a canthopexy (surgery to correct sagging) of the left lower eyelid. Furthermore, the Commission noted that *Baum* was still seeing his ophthalmologist every six to eight weeks and was regularly using eyedrops because his left eye produced almost no natural tears. Plastic surgery had also been recommended for the repair of the eyelid condition, which *Baum* had chosen not to undergo.

We find that the decisions cited by Petitioner do not support his claim for a specific eye award under §8(e) and that, for the purposes of determining permanent partial disability, the Arbitrator's decision improperly focused on Petitioner's eye *symptoms* and not whether his eye actually sustained any distinct injury.

Petitioner's right eye examination on October 9, 2012, revealed "normal sclera, clear pupils, no conjunctival abnormalities, no foreign bodies, no periorbital contusion, swelling, avulsion, depression, deformity or laceration. Extra ocular muscles are intact, no pain with eye movement." *Px2*. We find that, despite suffering from multiple facial and orbital fractures, there did not appear to be any injury to Petitioner's right eye itself. Petitioner underwent surgical repair of his multiple facial and orbital fractures on October 19, 2012, and experienced some post-operative keratoconjunctivitis and lagophthalmos, as noted by Dr. Kaufman on November 28, 2012. *Px5*. On November 28, 2012, Dr. Kaufmann wrote that Petitioner had a "good surgical result and this is a natural consequence of orbital injuries, VIIn damage and/or healing process." *Id.* On December 6, 2012, Dr. Kaufmann noted Petitioner was "experiencing reflex tearing due to lagophthalmos related to post traumatic reduction in VIIth nerve function." *Id.* We find that Petitioner's reduction in the VIIth cranial nerve function is related to his facial fractures and not any distinct injury to the right eye.

Petitioner testified, at the hearing on February 21, 2017, that since July 2013 his right eye "twitches every now and again" and that he is "having symptoms of dry eye." *T.22*. On cross-examination, he admitted that the last time he used eye drops was "last summer" and they were

"over the counter." *T.26.* Petitioner testified that he had not received any other treatment for his injuries since July 2013. *T.22, 28; Rx5.*

Based on the record as a whole, we find that Petitioner's residual right eye symptoms are related to his facial fractures and not a specific injury to the right eye. Therefore, the Arbitrator's award under §8(e) of the Act is hereby vacated.

The above notwithstanding, we generally affirm the Arbitrator's analysis of the five permanent-partial-disability factors in §8.1b(b) of the Act. However, we increase the award under §8(d)2 from 8% to 9% of the person as a whole to reflect Petitioner's residual right eye symptoms.

The Commission reverses the Arbitrator's awards of penalties under §19(k) of the Act and attorney's fees under §16 of the Act. The question is whether Petitioner's injuries required Respondent to pay statutory permanent partial disability benefits under §8(d)2 of the Act.

In *Lester v. IC*, the Appellate Court applied statutory construction principles to §8(e) of the Act and found "the legislature intended that individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment." 256 Ill.App.3d 520, 523 (1st Dist., 1993). We note that the legislature chose to use language in §8(e) that is different from that used in §8(d)2. For example, §8(e)8 uses the phrase "the compensation *payable*" whereas §8(d)2 refers to "the amount of compensation *allowed.*" *Emphases added.* The Supreme Court in *Ill. State Treasurer v. IWCC* noted that where "the legislature uses certain language in some instances and wholly different language in another, settled rules of statutory construction require us to assume different meanings or results were intended." 391 Ill.Dec. 18, 26 (2015). Therefore, we find that it was not unreasonable and vexatious for Respondent to not pay statutory permanent partial disability benefits pursuant to §8(d)2 for Petitioner's facial fractures.

Respondent argues that it should receive a credit of $66.00 towards Petitioner's medical expenses and permanency award. Respondent introduced evidence that it paid $66.00 on January 10, 2013 directly to Petitioner ("Daniel Walz") for "MILW – Mileage." *Rx1.* Petitioner testified that he did receive that payment but he does not know what it was for. *T.26.* He testified it "could have been" reimbursement for his prescriptions and that he never received any mileage checks. *T.26-27.* We find that Petitioner did not know what this check was for and that his testimony on cross-examination is speculation. Respondent's own evidence clearly indicates that it was for mileage. Under these circumstances, we find that Respondent has failed to prove that it is entitled to a credit for this payment towards Petitioner's medical expenses or permanency award.

To the extent that Respondent's payment of Petitioner's full salary pursuant to the Public Employee Disability Act remains at issue, we find that Respondent is not entitled to any credit for salary payments in excess of his temporary total disability benefits (TTD). The parties entered into a stipulation (ArbX2) that Petitioner was paid $9,743.34 in regular salary and that the §8(j) credit for TTD is $6,495.34. The stipulation was silent on whether Respondent would get any credit for this difference, but §8(j)(2) states:

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, **the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.** *Emphasis added.*

Therefore, we find Respondent's credit for the salary payments is limited to the amount of TTD that was payable.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that, per the parties' stipulation, Petitioner was entitled to temporary total disability under §8(b) of the Act from October 10, 2012 through December 6, 2012, with Respondent being entitled to an equal credit of $6,495.34 under §8(j) for payments made pursuant to the Public Employee Disability Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $705.53 per week for a period of 45 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 9% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(e) of the Act for Petitioner's right eye is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $223.00 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act, directly to the provider.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $44.95 for out-of-pocket medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards of penalties under §19(k) of the Act and attorney's fees under §16 of the Act are hereby vacated.

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, with the exceptions explained above, 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.

19IWCC0345

DATED: JUL 2 - 2019

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

SE/
O: 5/21/19
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WALZ, DANIEL
Employee/Petitioner

Case# **12WC043135**

19IWCC0345

CITY OF HARVEY
Employer/Respondent

On 5/24/2017, 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 1.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
DAVID STARSHAK
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

1295 SMITH AMUNDSEN LLC
GAIL GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 60174

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

DANIEL WALZ
Employee/Petitioner

v.

CITY OF HARVEY
Employer/Respondent

Case # 12 WC 43135

Consolidated cases: _____

19IWCC0345

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 **2/21/2017**. 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 _____

19IWCC0345

CORRECTED FINDINGS

On **10/9/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,145.76**; the average weekly wage was **$1,175.88**.

On the date of accident, Petitioner was **30** 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 **$6,495.34** for **Public Employee Disability Act Payments**, for a total credit of **$6,495.96**.

CORRECTED ORDER

The parties stipulate and agree that Petitioner was entitled to TTD from 10/10/12 through 12/6/12. Respondent is entitled to an 8(j) credit equal of **$6,495.34** for PEDA payments made.

Respondent shall pay Petitioner permanent partial disability benefits of **$705.53/week** for **40 weeks**, because the injuries sustained caused the **8%** loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$705.53/week** for **8 weeks**, because the injuries sustained caused the **5%** loss of the eye, as provided in Section 8(e)(13) of the Act.

Respondent shall pay reasonable and necessary medical services of **$223.00**, as provided in Sections 8(a) and 8.2 of the Act directly to the provider. Respondent shall pay reimbursement of **$44.95** to Petitioner for his out-of-pocket expenses.

Pursuant to Section 19(k), Petitioner is entitled to penalties of **$1,411.06** (50% of $2,822.12). In addition, Petitioner is entitled to Section 16 attorney's fees of **$564.42** (20% of $2,822.12). Respondent shall pay to Petitioner Section 16 attorney's fees of **$564.42**, as provided in Section 16 of the Act and Section 19(k) penalties of **$1,411.06**.

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

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

Signature of Arbitrator

5-24-2017
Date

MAY 24 2017

BACKGROUND

Daniel Walz ("Petitioner") alleged injuries arising out of in the course of his employment with the City of Harvey ("Respondent") on October 9, 2012. Px6. On February 21, 2017, the parties proceeded to arbitration on the following disputed issues causal connection, liability for unpaid medical bills, max respondent credit, nature and extent of the injury and penalties and attorney's fees. Ax1. Each party was permitted to make opening statements. The following is a recitation of the facts adduced at trial.

FINDINGS OF FACT

On October 9, 2012, Petitioner was employed by the Respondent as a police officer. On that date he was on patrol with his partner and they responded to a call about a suspect approaching parked vehicles possibly wielding a firearm. Petitioner testified that they arrived and confronted the individual. The individual began to run and Petitioner chased and tackled the suspect. When he tackled the suspect, the man's head bounced off of the ground and struck the side of Petitioner's face.

Petitioner testified that he felt severe pain immediately after this incident and that the right side of his face felt soft and "spongy." He could not feel any bone on the right side of his face and he could not fully open his mouth. His partner called for help on the radio and more police officers arrived. A fellow officer drove Petitioner to Ingalls Memorial Hospital's emergency room. Px1.

On the same date of the accident, Petitioner arrived at Ingalls Memorial Hospital and reported an injury to his face. *Id.* Physicians reported moderate swelling to his face and that he was seeing double. *Id.* Petitioner underwent a CT scan of his face and head. *Id.* The CT scan of his face revealed comminuted fractures of the right maxillary sinus walls, the right zygomatic arch, and the right orbital floor. *Id.* The CT scan further revealed hemorrhage in the right maxillary sinus and subcutaneous emphysema in the soft tissues of the right face. *Id.* He was diagnosed with a head injury and multiple facial fractures. *Id.* Petitioner was transferred to Advocate Christ Medical Center for trauma care via Kurtz Ambulance Services. Px2. Physicians at Advocate Christ reported a history of injury of a police officer who was hit in the head by another individual's skull while on duty with right facial pain and right jaw pain. *Id.* Petitioner was given morphine and hydrocodone and instructed to follow-up with a specialist. *Id.* He was ordered off of work. *Id.*

Petitioner then presented to Dr. James Schlenker, a plastic surgeon, on October 16, 2012. Px4-5. Dr. Schlenker documented a depression in the right malar region and slight elevation of the right globe relative to the left globe. *Id.* He further documented diffuse swelling and ecchymosis. *Id.* Dr. Schlenker recommended an open reduction internal fixation of Petitioner' fractures and light duty work restrictions. *Id.* Petitioner was unable to return to work at light duty at that time.

Petitioner underwent surgery on October 19, 2012. *Id.* Dr. Schlenker performed an open reduction internal fixation of fracture of the right zygoma using plate, screws and wires, along with an open reduction internal fixation of fracture of the floor of orbit, with a titanium mesh implant. *Id.* Petitioner returned for a follow-up CT scan at Advocate Christ Medical Center on October 29, 2012. Px2.

Petitioner returned to Dr. Schlenker on November 8, 2012. Px4. Petitioner continued to take Norco and complained of headaches. *Id.* He indicated that his eye was watering after his injury. *Id.* Dr. Schlenker referred Petitioner to see eye specialist, Dr. Barry Kaufman. *Id.*

He presented to Dr. Barry Kaufman, ophthalmologist, on November 28, 2012. Px5. Dr. Kaufman diagnosed exposure keratoconjunctivitis and lagophthalmos. *Id.* The doctor noted Petitioner was experiencing 3mm of incomplete relaxed lid closure in his right eye and would need to utilize eye drops and eye gels. *Id.* Dr. Kaufman opined that these diagnoses were a natural consequence of Petitioner's orbital injuries, VII cranial nerve damage and/or the healing process. *Id.* He further opined that Petitioner was experiencing reflex tearing due to lagophthalmos related to post-traumatic reduction in VIIth nerve function. *Id.*

Petitioner returned to Dr. Schlenker on December 12, 2012. Px5. At that time he reported that his right eye was twitching sporadically and complained of right sided headaches lasting for a few minutes at a time. *Id.* He requested to return back to work. *Id.* Dr. Schlenker released Petitioner to return to work. *Id.* On December 28, 2012 Dr. Kaufman stated that Petitioner needed continued maintenance of his OD exposure keratopathy during the winter months, particularly with increased home humidification. *Id.*

Petitioner returned to see Dr. Schlenker on April 17, 2012. Rx5. At that time he complained of continued dry eye symptoms and that he was using gels and eye drops. *Id.* He further reported that he felt increased "pressure" below his right eye. *Id.*

Petitioner saw Dr. Kaufman for the last time on May 2, 2013. *Id.* At that time Dr. Kaufman indicated that Petitioner was suffering from continued dry eye syndrome or keratoconjunctivitis sicca. *Id.* He reported symptoms of burning, itching, redness, foreign body sensation, dryness, mucus discharge and reflex tearing. *Id.* Dr. Kaufman recommended continued use of lubricants in the future. *Id.* Dr. Schlenker saw Petitioner for his final visit on July 16, 2013. Rx5. At that time he reported continued increased sinus pressure since his injury. *Id.*

Petitioner testified that he has not had any treatment for his work-related injury since July 2013. He continues to experience symptoms of dryness and watering in his right eye. He takes over-the-counter eye drops as needed. He does not have any vision problems, although he does experience right eye twitching.

Petitioner further testified that he has constant numbness on the right side of his face. He notices this when he touches his face and when he eats and drinks. He testified that his physicians told him that this numbness is a permanent complication of his VIIth cranial nerve injury.

Finally, Petitioner testified that he has experienced increased problems with his sinuses since his injury. He testified that he's lived in the Midwest for his entire life and experienced symptoms of sinus congestion in the past. Since his injury he has experienced consistently worse sinus symptoms, including sinus pressure and increased congestion. He testified that he installed humidifiers in his home, but still experiences the sinus and eye problems.

Petitioner testified that he was medically unable to return to work as a police officer from October 10, 2012 through December 12, 2012. During this time he received his full salary as a police officer pursuant to the Public Employee Disability Act. 5 ILCS 345/1, Rx2. He testified that he has not received any payments for permanent partial disability since his injury.

On cross examination, Petitioner was asked about a $66.00 payment made in January 2013 from the workers' compensation insurance carrier. Petitioner testified that he did not remember this payment and did not know what it was for. This payment was for mileage. Rx1.

On cross-examination, Petitioner testified that he left the City of Harvey police department in March 2013 and became a police officer for the Village of Crete. He has had no prior or subsequent injuries to his face or right eye.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact as though fully set forth herein. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that his current condition of ill-being relative to his right eye and right facial injuries are causally related to his undisputed work injury on October 9, 2012. Petitioner credibly explained that he had no prior problems to the right facial area or his right eye prior to or immediately prior to the work accident. Petitioner credibly described the mechanism of injury as hitting his head against a suspect's head, resulting in an immediate onset of pain and other symptoms. Petitioner's description is corroborated by all of his medical records. In addition, the Arbitrator reaches this conclusion by relying on the medical causal opinions of Drs. Schlenker and Kaufman, which were unrebutted and otherwise not seriously challenged at trial.

Petitioner testified that he did not have any pre-injury conditions to his eye or the right side of his face. He credibly testified that he has no allergies and life and had experienced sinus congestion before. However, the Petitioner testified that since his October 2012 accident, he has experienced significantly more sinus congestion and right sided sinus pressure. Petitioner further credibly testified that since his accident he has had to buy humidifiers for his home to help relieve his sinus pressure. This testimony is consistent with his injury or a fracture to his right sinus cavity, zygoma, and maxilla bones as well as the medical records from Dr. Schlenker and Dr. Kaufman reporting increased pressure in the right side of his face since his injury. Petitioner further testified that he continues to experience symptoms of dry eye, excessive watering, and eye twitching. He takes over-the-counter eye drops when these symptoms become excessive. Petitioner also testified that he has permanent numbness in the right side of his face. The Arbitrator finds that this is consistent with Dr. Kaufman's opinion that Petitioner suffers from post-traumatic reduction in VIIth nerve function.

Based on the above, as well as the Petitioner's credible testimony that he has not suffered any subsequent injuries to the right side of his face, the Arbitrator finds that the Petitioner's current condition of ill being is causally related to his October 9, 2012 work injury.

ISSUE (J) Were The Medical Services Provided To The Petitioner Reasonable And Necessary And Has The Respondent Paid All Appropriate Charges For All Reasonable And Necessary Medical Services?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that Petitioner's medical services were reasonable and necessary and otherwise causally related to his work injury on October 9, 2012. The Arbitrator bases this decision on Petitioner's credible testimony regarding his injury as well as the medical records from the Petitioner's treating physicians, Drs. Schlenker and Kaufman. The Arbitrator further finds that Petitioner's work injuries necessitated emergency treatment with Ingalls, Advocate Christ, Kurtz Ambulance Services, as well as ongoing continuing care with Drs. Schlenker and Kaufman.

The Arbitrator notes that the Respondent has not provided any evidence disputing the Petitioner's medical treatment and has not submitted any medical opinion, utilization review or Section 12 reports challenging the reasonableness or necessity of the Petitioner's medical treatment.

The Petitioner submitted an outstanding medical bill for Oak Lawn Radiology Imaging Consultants in the amount of $223.00 for the 10/29/2012 CT. The Arbitrator finds that the 10/29/2012 medical bill is reasonable and related to the injury. The Petitioner did not submit the fee schedule for the bill. Therefore, the Arbitrator awards payment of the bill to the provider under the fee schedule. Petitioner paid for two prescription medications out-of-pocket in the amount of $23.17 and $21.78. Petitioner is awarded $44.95 as reimbursement for the out of pocket payments.

In summary, Respondent shall pay directly to the providers the reasonable and necessary medical services of **$223.00**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall pay directly to Petitioner out of pocket expenses totaling **$44.95**. Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ISSUE (L) What is the nature and extent of the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he has suffered permanent partial disability as a result of his work injuries. Petitioner last treated for this work injury in 2013 and therefore the nature and extent of his injury is ripe for adjudication.

Petitioner credibly testified that he continues to experience dryness, and excessive tearing in his right eye. Petitioner further credibly testified that he continues to experience right eye twitching. Petitioner credibly testified that he believes he has permanent numbness and impaired sensation on the right side of his face. Petitioner said he was told it was due to his post-traumatic VIIth nerve injury and dysfunction. Finally, he testified that he continues to have problems of excessive sinus pressure and congestion, requiring him to install humidifiers throughout his home to alleviate these symptoms.

With respect to the Petitioner's facial fractures, the Arbitrator notes that the post-injury CT scan revealed comminuted fractures of the right maxillary sinus walls, the right zygomatic arch, and the right orbital floor. The CT scan further revealed hemorrhage in the right maxillary sinus and a subcutaneous edema in the soft tissues of the right face. *Id.* As a result, Petitioner underwent an open reduction and internal fixation procedure requiring the implantation of screws, wires, plates, and a titanium implant. The Arbitrator finds that the Petitioner's testimony concerning his current conditions in his face and right eye was honest and credible.

The Arbitrator has also evaluated the factors delineated in Section 8.1b in determining the nature and extent of petitioner's injuries. That evaluation is as follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a police officer at the time of the accident. The Petitioner

continued working for the Respondent for a time after the date of accident but transferred to a different police department in March 2015. Although the records and Petitioner's testimony do reflect that the Petitioner continues to have issues with numbness in his face, sinus pressure and congestions, and right eye twitching, dryness, and reflex tearing, the Arbitrator notes that he does not have any formal permanent restrictions. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 30 years old at the time of the accident. Noting Petitioner's younger age and continued issues with his face and right eye, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence to indicate whether this injury has any impact on Petitioner's future earnings capacity. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner continuously complained of increased pressure in his right eye throughout the treatment records. The treating records further reflect post-traumatic VIIth nerve injury and diagnoses of exposure keratoconjunctivitis and lagophthalmos with reflex tearing and dryness. The treating records further reflect the extensive surgery required to cure the Petitioner of his facial fractures. Because the Petitioner testified credibly regarding ongoing issues with his face and right eye and because the treating medical records corroborate that he had ongoing face and right eye symptoms throughout the course of his medical treatment, the Arbitrator gives greater weight to this factor.

Furthermore, based on the above factors, and the record taken as a whole, the Arbitrator additionally finds that Petitioner sustained permanent partial disability to the extent of **8% loss of use of the body as a whole** pursuant to § 8(d)(2) of the Act and permanent partial disability to the extent of **5% loss of use of the right eye** pursuant to § 8(e)(13) of the Act.

ISSUE (M) Should Penalties Or Fees Be Imposed Upon Respondent?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner seeks penalties and fees for Respondent's failure to pay "statutory permanent partial disability" payments for Petitioner's fractures of the zygoma and maxilla facial bones. Px8, Ax1. Petitioner does not allege or seeks penalties and/or attorney's fees for non-payment of TTD. Respondent asserts that the Illinois Workers' Compensation Act does not provide for statutory permanent partial disability and that such permanency is unknown until an arbitrator makes that determination. Rx7.

Section 8(d)(2) of the Act reads, in part: ". . . in the event the employee shall have sustained a fracture of any of the following facial bones: [. . .] zygoma, maxilla, [. . .] the amount of compensation allowed under this Section shall be not less than 2 weeks for each such fractured bone . . ." 820 ILCS 305/8(d)(2). In reading Section 8(d)(2) along with Section 19(k), the Arbitrator concludes that penalties and fees are warranted.

In so concluding, the Arbitrator finds support in the analogous case of *Chorzempa v. Gustafson-Lindberg*, 04 IIC 0052. There, claimant sustained a fracture of the C7 spinous process for which no benefits under 8(d)(2) were paid until 16 months after the undisputed accident. At arbitration, the issues in dispute included causation, nature and extent, TTD and penalties and attorney's fees. In awarding penalties and fees for the delay in such payment, the arbitrator found the injuries to be undisputed, that demand for such payment had

been made and that such payment was tendered well after the date of injury. The Commission subsequently summarily affirmed and adopted the decision of the arbitrator. In the instant case, Petitioner's zygoma and maxilla fractures were known and discovered via CT the same date of his undisputed work accident. Px1. While there is no evidence that Petitioner demanded such payment, neither Section 8(d)(2) nor 19(k) requires such demand. In addition, Petitioner's argues that the injury is undisputed and payment is automatic. Px8. Respondent presented no genuine dispute that such fractures arose out of and in the course of Petitioner's employment. Respondent did not submit any evidence denying compensability of the claim other than indicating on the request for hearing form that it intended to dispute causation and nature and extent of the injury, in part, for the purposes of trial. Ax1.

Also of note, in *Lester v. Indus. Comm'n*, the appellate court addressed whether Section 8(e) provided for automatic compensation involving amputations. Finding that the Legislature intended that individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment, the court reversed the decision of the trial court and reinstated the decision of the Commission. 256 Ill. App. 3d 520, 523 (1st Dist. 1993). Although *Lester* involved Section 8(e), the Arbitrator notes that, similarly here, there is no dispute as to whether Petitioner's fractures arose out of and in the course of his employment with Respondent. The Arbitrator notes that one other case where the Commission has upheld an award of penalties and fees for non-payment of statutory permanency not involving an amputation. See, *Maciasz v. Kojda Remodeling, Inc.*, 09 WC 20744, 11 IWCC 1028 (Commrs. Lamborn, Donohoo, Tyrrell) (8(e) enucleation).

If an employer delays paying compensation, the employer has the burden of showing that it had a reasonable belief that the delay was justified. *Lester*, 256 Ill. App. 3d at 524. Here, Respondent did not contest the Petitioner's diagnosis of facial bone fractures. Nor did it contest that the injury arose out of or in the course of his employment. Indeed, Respondent timely paid the majority of the Petitioner's medical bills for his reasonable and necessary medical treatment. Respondent did not meet its burden of showing that it had a reasonable belief that the delay in payment was justified.

Based on the foregoing and the record as a whole, the Arbitrator finds that Respondent's failure to pay permanent partial disability benefits under Section 8(d)(2) for Petitioner's undisputed facial fractures constitutes arbitrary and vexatious delay of payment under Section 19(k). The Arbitrator notes that Section 8(d)(2) provides for two weeks permanent partial disability for a zygoma fracture and two weeks permanent partial disability for a maxilla fracture, which total 4 weeks or $2,822.12 ($705.53/week x 4 weeks). Pursuant to Section 19(k), Petitioner is entitled to penalties of **$1,411.06** (50% of $2,822.12). In addition, Petitioner is entitled to Section 16 attorney's fees of **$564.42** (20% of $2,822.12).

ISSUE (N) Is The Respondent Due Any Credit?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator notes that the parties stipulated that the Petitioner was entitled to temporary total disability benefits from October 10, 2012 through December 6, 2012. Ax1. This represents 8-2/7th weeks of benefits: $1,175.88 x 2/3 = $783.92 x 8-2/7th weeks = $6,495.34 in TTD benefits. Petitioner received his full salary pursuant to the Public Employee Disability Act. Although the parties placed the issue of credit into controversy, during the trial the parties stipulated that Respondent's 8(j) credit was $6,495.34, thereby removing the question of the amount of the PEDA credit under 8(j). Ax2. The Arbitrator adopts and accepts the stipulation. Therefore, the Arbitrator finds that, per stipulation in Ax2, the Respondent is entitled to an 8(j) credit equal to the amount of **$6,495.34**.p

Signature of Arbitrator

5-24-2017
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ilya Mitkovetskiy,

Petitioner,

vs. NO. 09WC020006

Anmar Painting and Decorating, Inc., and
Illinois State Treasurer as Ex-Officio Custodian of
The Injured Workers' Benefit Fund,

19IWCC0346

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent Anmar Painting and Decorating, Inc. (Anmar) and notice given to all parties, the Commission, after considering the issue(s) of accident, employment relationship, medical expenses, causal connection, notice, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2018 is hereby affirmed and adopted.

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

19IWCC0346

obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Bond for removal of this cause to the Circuit Court by Respondent Anmar is hereby fixed at the sum of $31,500.00. 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: JUL 3 - 2019
SJM/sj
o-6/19/2019
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MITKOVETSKIY, ILYA
Employee/Petitioner

Case# **09WC020006**

ANMAR PAINTING AND DECORATING INC AND THE ILLINOIS STATE TREASURER AS CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

19IWCC0346

On 9/24/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0000 ANMAR PAINTING & DECORATING
4847 LOUISE AVE
SUITE #C
SKOKIE, IL 60077

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

19IWCC0346

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

ILYA MITKOVETSKIY
Employee/Petitioner

v.

ANMAR PAINTING AND DECORATING, INC. AND THE ILLINOIS STATE TREASURER AS CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

Case # **09** WC **20006**

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **AUGUST 13, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0346

FINDINGS

On **January 26, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,600.00**; the average weekly wage was **$800.00**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$4,944.48**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$533.33/week** for **15-3/7th weeks**, commencing **1/27/09** through **5/14/09**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **1/27/09** through **5/14/09**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent partial disability benefits of **$480.00/week** for **37.95 weeks**, because the injuries sustained caused the **15%** loss of use of the **left arm**, as provided in **Section 8(e)** of the Act.

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 finding is hereby entered as to the Fund to the extent permitted and allowed under §4(d) of the Act. Should any recovery by Petitioner occur, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to 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.

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

9-24-2018
Date

SEP 24 2018

19IWCC0346

FINDINGS OF FACT

Background

Ilya Mitkovestskiy ("Petitioner") alleged injuries arising out of and in the course of his alleged employment with Anmar Painting & Decorating, Inc. ("Respondent Employer") occurring on 1/26/09. Ax1, Px1. Petitioner further alleged that on the date of accident, Respondent carried no workers' compensation insurance and amended his application for adjustment of claim to add the Injured Workers' Benefit Fund ("IWBF"). Ax1, Px1. On 8/13/18, by agreement between Petitioner and IWBF, along with notice to Respondent Employer, this matter proceeded to hearing on all issues. Ax1. The matter was previously specially set on July 11, 2018 and the Arbitrator permitted the matter be specially set for trial to August 13, 2018 so that proper notice could be given to Respondent Employer. The IWBF challenged all issues, including whether notice of the trial date was proper and whether Respondent lacked insurance. Also appearing on behalf of the IWBF were Courtney Schoch, David Christiansen and Will Davis. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner, testified via Russian translator/interpreter Lydia Wechsler, that he worked for Respondent Employer as a painter. His duties included painting walls, finishing the walls, tiling walls and floors. Petitioner testified that the jobs were obtained by his boss, Natan and that Petitioner was forbidden from taking other jobs. He first met Natan through a friend, who took Petitioner to go work for him. Petitioner stated that Respondent Employer would direct Petitioner where to go and what to do on a job site. Petitioner worked for Respondent Employer hourly 32 hours per week and was paid $25 per hour. He would start around 7 am and depending on the amount of work, he would end work until 3pm or 5pm. Petitioner stated taxes were not withheld and that he was given a 1099. He was paid by check. He said tools, paint and t-shirts with the company logo were provided by Respondent Employer. Petitioner said he mostly used Respondent's equipment but that occasionally he would buy his own brush. Petitioner stated that he worked for Respondent Employer for approximately 3-4 years before his accident.

Prior to January 26, 2009, Petitioner testified he had no significant medical or surgical history. See also, Px3. On January 26, 2009, Petitioner testified that he was 38 years old, married and had no dependents under the age of 18. On that day, Petitioner was at work on a painting job. Respondent had bid on the job and had all contact with the customer. Petitioner was painting when he fell from the sixth rung of a ladder. Petitioner said he landed on his left arm. There were other workers on the site. Petitioner testified that his boss witnessed his fall. Petitioner informed his boss that he was hurt; Petitioner was then driven to the hospital by the customer.

On January 26, 2009, Petitioner presented to Advocate Illinois Masonic Medical Center on an emergency basis. Px3. He complained of left shoulder dislocation. History noted that Petitioner presented status post fall from a ladder on the sixth step while at work painting. He fell on his left arm and complained of severe upper arm pain, resisting any movement and holding it internally rotated and flexed against the torso. The onset of symptoms was sudden. X-rays of the left humerus revealed fracture to the humeral shaft, non-displaced and transverse. Petitioner was splinted, given medications and discharged. He was ordered to follow up with an orthopedic doctor.

On January 29, 2009, Petitioner was first evaluated by Dr. Curtis Whisler. Px6. He was diagnosed with fracture of the left humerus of the midshaft. Swelling and tenderness were noted. History noted that Petitioner fell off a ladder injuring his left arm. Follow up was ordered. He was prescribed hydrocodone. Px7.

On February 5, 2009, Petitioner was evaluated by Dr. Curtis Whisler. Px6. Redness and swelling were noted. On February 19, 2009, Petitioner presented to Dr. Curtis Whisler. Px6. He was diagnosed with fracture of the humerus. Swelling was noted. He was ordered to follow up. X-rays of the left humerus demonstrated fracture involving a proximal humerus with no significant change in the position of the bony fragments. Px3.

On March 12, 2009, Petitioner presented to Dr. Curtis Whisler. Px6. X-rays of the left humerus re-demonstrated transverse fracture of the midshaft of the humerus with minimal callus formation at the medial aspect of the fracture. There was no significant interval change in the alignment of the fracture fragments. Comparison was made to prior x-ray taken on February 19, 2009. Px3.

On April 16, 2009, Petitioner followed up with Dr. Whisler. Px6. There was no redness and no tenderness. Petitioner was discharged and order to follow up in one month. X-ray results demonstrated transverse fracture through the middle humeral diaphysis with minimal apex lateral angulation. There was a progressive maturation of callus about the fracture site which appeared to be bone bridge fragments. Other partially imaged osseous structures were intact and appeared to be normally aligned. Comparison was made to prior x-rays from March 2009. Px3.

On May 14, 2009, Petitioner followed up with Dr. Whisler. Px6. Petitioner was noted to be doing well. X-rays showed an almost healed fracture. Fracture line was still visible particularly in the lateral aspect. Px3.

Petitioner testified that he eventually returned to working in September 2009 doing the same type of work but for a different company. He returned full duty. Today, he notices he limits heavy lifting and he did not feel he had full range of motion meaning he could not lift and carry a full box of tile. He testified he now takes painkillers like Ibuprofen and Excedrin. He takes these as needed but stated that his pain comes 3-4 times per week. He feels his strength is diminished in his left arm. He testified he is both left and right handed. Petitioner confirmed he had out of pocket expenses with CVS Pharmacy.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only witness to testify at trial. The Arbitrator finds Petitioner to be truthful, candid and forthright regarding what he could recall surrounding the circumstances of his employment, the injury, his treatment and his current condition.

ISSUE (O) Arbitrator's Findings as Adequacy of Notice

No one purporting to be the representative Respondent Employer, D'Agostino, was present at the hearing. Petitioner provided one exhibit to support his contention that notice to Respondent Employer was proper. On July 11, 2018, Petitioner, via his attorney, sent certified mail with return receipt requested to Respondent Employer at 4847 Louise C Avenue, Skokie, Illinois 60077, advising them of the trial set for August 13, 2018. PxA. The certified mail number was 7018-0360-0002-0062-4102 and the item was ultimately not deliverable by the USPS. PxB. The Arbitrator has considered the evidence presented, along with Petitioner's testimony and finds that notice of the hearing was sufficient.

ISSUE (O) Arbitrator's Findings as to Lack of Workers' Compensation Insurance

Regarding lack of insurance, On June 26, 2018, Petitioner confirmed with the National Council on Compensation Insurance, via certification, that records failed to show Respondent Employer carried a policy for workers' compensation insurance on the date of accident. Px2. The Arbitrator finds that sufficient evidence was presented that Respondent did not carry workers' compensation insurance on the alleged date of accident. Px2.

ISSUE (A) Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
ISSUE (B) Was there an employee-employer relationship?

The Arbitrator finds that on January 26, 2009, Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act. 820 ILCS 305/3(1) provides that the Illinois Workers' Compensation Act shall automatically apply to all employers and all their employees engaged in the enterprise of "erection, maintaining, removing, remodeling, altering or demolishing of any structure." Therefore, the Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act. Further, pursuant to the Act, Illinois may acquire jurisdiction over a claim (1) if the contract for hire was made in Illinois, (2) if the accident occurred in Illinois, or (3) if the claimant's employment was principally located in Illinois. 820 ILCS 305/1(b)(2). Petitioner's un-contradicted testimony shows that he was taken by a friend to meet Natan, agent for Respondent-Employer, whose company was located in Skokie, Illinois.

Based upon the above, the Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on January 26, 2009. The Arbitrator finds that Petitioner presented sufficient, credible evidence that on January 26, 2009 an employee-employer relationship existed. Such evidence includes, but is not limited to, the unrebutted testimony of Petitioner that he was hired by Natan, agent for Respondent-Employer, that he was paid $800.00 per week, that he worked up about 32 hours per week, that he was paid weekly by check and that no taxes were taken out, that Petitioner would wear a company shirt provided for by the Respondent-Employer, that he was directed where to meet, which routes to perform and what work was to be carried out and that he used Respondent Employer's equipment for painting but occasionally bought a paint brush. Such evidence demonstrates that Respondent exercised control over Petitioner's method and manner of work, that Respondent controlled the method of payment, that Respondent exercised the right to hire and therefore likely controlled the right to discharge Petitioner and that Respondent provided the tools, materials and/or equipment in Petitioner completing the work for which he was ultimately hired to do.

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
ISSUE (D) What was the date of the accident?
ISSUE (E) Was timely notice of the accident given to Respondent?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner alleges that he injured himself while working Respondent-Employer on January 26, 2009. Specifically, he stated that he was performing painting work at a customer's apartment located in Chicago and that he fell off of a ladder landing, in part, on his left arm. He testified that Natan, his boss was present that day and that he witnessed the accident.

Based on the foregoing, the Arbitrator finds that the date of the accident is January 26, 2009 and that on that date, Petitioner was in the course of his employment as he was on the clock working for Respondent and a location where he was expected to be performing his painting duties. Medical records all corroborate the date of

19IWCC0346

the accident, the mechanism of injury and immediate onset of symptoms to the left arm. In addition, the Arbitrator finds that Petitioner's injury arose out of his employment with Respondent Employer as he was performing duties directly related to his employment, namely, that of painting when he fell off the ladder. Finally, the Arbitrator finds Petitioner gave proper notice when the fall and accident was witnessed by Natan and when Petitioner notified Natan of his onset of pain following the fall.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator finds that Petitioner's current condition of ill-being as it relates to fall and resultant left humeral fracture is causally related to his work accident. Petitioner was in a state of good health immediately before the accident and following the accident, he said he immediately noticed a severe pain in his left arm. Medical records corroborate this history and onset. Respondent introduced no contrary evidence by way of Section 12 exam, utilization review or otherwise. Based upon a chain of events theory, the Arbitrator concludes that his condition of ill-being is causally related to the work accident.

ISSUE (G) What were Petitioner's earnings?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner earned **$800.00** per week at the time of his injury. Petitioner's testimony is instrumental in this regard. Petitioner testified he was paid $25 per hour and that he worked around 32 hours per week. No exhibits or evidence was introduced to dispute Petitioner's testimony. Therefore, the Arbitrator adopts Petitioner's testimony in this regard and concludes Petitioner earned ***$800.00*** per week.

ISSUE (H) What was Petitioner's age at the time of the accident?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner was ***38 years old*** at the time of the accident. Respondent introduced no contrary evidence. In so finding, the Arbitrator relies on Petitioner's undisputed testimony and on his medical records, which corroborate same.

ISSUE (I) What was Petitioner's marital status at the time of the accident?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner was ***married*** at the time of his accident. In so finding, the Arbitrator relies on Petitioner's undisputed testimony. Petitioner alleged he had ***no dependents*** and the Arbitrator finds in favor of Petitioner for same.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Respondent has not yet paid for reasonable and necessary medical services. At trial, Petitioner alleged outstanding bills due and owing as a result of this accident. Ax1. Petitioner testified that he incurred bills as a result of this accident and that he had out of pocket expenses with CVS Pharmacy. Petitioner introduced the following medical bills as part of Respondent's liability:

Px3	Advocate Ill. Masonic Hosp.	$3,877.00 (gross)
Px4	Wellington Radiology	$171.00 (gross)
Px5	Advocate Ill. Masonic Phys. Grp.	$300.00 (gross)
Px6	Dr. Curtis Whisler	$100.00 (net)
Px7	Out of Pocket	$476.48 (gross)

The Arbitrator concludes that Petitioner's medical treatment was reasonable and necessary to treat left arm fracture. No contrary evidence was submitted to challenge the reasonableness and/or necessity of all treatment. Therefore, Respondent shall pay reasonable and necessary medical services of **$4,944.48**, as provided in Sections 8(a) and 8.2 of the Act.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner has proven he was entitled to TTD from 1/27/09 thru 5/14/09, representing the time first lost thru the last date Petitioner treated with Dr. Whisler. Petitioner asked for a greater time period of TTD, but Petitioner has failed to prove entitlement to TTD on the date of his accident and failed to prove entitlement to TTD beyond his last visit with Dr. Whisler.

At that last visit, Petitioner was not issued any work restriction and Petitioner said he simply stopped attending follow up visits. For the purposes of TTD, the Arbitrator fixes the last date of entitlement to same as the last date of medical service or May 14, 2009. Petitioner failed to provide evidence that after voluntarily ceasing treatment he could not work. There was no evidence he contacted his employer and attempted to return to work.

Therefore, Respondent shall pay Petitioner temporary total disability benefits of **$533.33/week** for **15-3/7th weeks**, commencing **1/27/09** through **5/14/09**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **1/27/09** through **5/14/09**, and shall pay the remainder of the award, if any, in weekly payments.

ISSUE (L) What is the nature and extent of the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes that Petitioner has proven he is entitled to permanency for his injury. Petitioner's work accident resulted in a transverse fracture through the middle humeral diaphysis (shaft) with minimal apex lateral angulation to the left arm. Near the time of his last medical visit, there was a progressive maturation of callus about the fracture site which appeared to be bone bridge fragments. Other partially imaged osseous structures were intact and appeared to be normally aligned. There was no fixation for the fracture.

Petitioner last treated on May 14, 2009 and he has not treated since. For the purposes of permanency, the Arbitrator fixes Petitioner's last date of treatment at May 14, 2009 and finds Petitioner has reached maximum medical improvement and that his condition has otherwise stabilized as of then. Accordingly, his claim for any PPD is ripe for adjudication.

The Arbitrator finds that the nature and extent of the injury to be 15% loss of use of the left arm. The medical records and testimony of Petitioner are instrumental in this regard. Petitioner testified that he has no

19IWCC0346

symptoms from this incident. Respondent shall pay Petitioner permanent partial disability benefits of **$480.00/week** for **37.95 weeks**, because the injuries sustained caused the **15%** loss of use of the **left arm**, as provided in **Section 8(e)** of the Act.

Signature of Arbitrator

9-24-2018
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 LA SALLE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kayla Coleman,

Petitioner,

vs. NO. 17WC011396

State of Illinois/DOC-Stateville,

19IWCC0347

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 issue(s) of accident, medical expenses, causal connection, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 8, 2018 is hereby affirmed and adopted.

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

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: JUL 3 – 2019
SJM/sj
o-6/19/2019
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas McCarthy

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

COLEMAN, KAYLA
Employee/Petitioner

Case# **17WC011396**

STATE OF ILLINOIS/DOC-STATEVILLE
Employer/Respondent

19IWCC0347

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:

0924 BLOCK KLUKAS & MANZELLA PC
MICHAEL D BLOCK
19 W JEFFERSON ST
JOLIET, IL 60432

5031 ASSISTANT ATTORNEY GENERAL
JILL OTTE
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

JUN 8 - 2018

DAVID A. PARDO, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
) SS
COUNTY OF LA SALLE)

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

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

Case # 17 WC 11396

Kayla Coleman
Employee/Petitioner

v.

State of Illinois/DOC-Stateville
Employer/Respondent

19IWCC0347

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 **Ottawa on June 28, 2017, New Lenox on August 8, 2017 & Ottawa on September 27, 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. **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. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. **X** Is Petitioner entitled to any prospective medical care?
L. **X** What temporary benefits are in dispute?
☐ TPD ☐ Maintenance **X** TTD
M. **X** Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident **March 14, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$52,615.68**; the average weekly wage was **$1,011.84**

On the date of accident, Petitioner was **29** 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

Petitioner failed to prove she sustained an accident on March 14, 2017, that arose out of and in the course of her employment with respondent.

Petitioner's claim is hereby denied and case is dismissed.

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

06/06/2018

Date

JUN 8 - 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kayla Coleman	)	
Petitioner,	)	
vs.	)	**No. 17 WC 11396**
State of Illinois/DOC-Stateville	)	
Respondent.	)	

19IWCC0347

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

This matter proceeded to hearing under the provisions of §19b/§8a in Ottawa on June 28, 2017, in New Lenox on August 8, 2017 and Ottawa on September 27, 2017. The parties agreed that on March 14, 2107 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree petitioner gave notice of the alleged accident within the time limits stated in the Act. They agree petitioner's wage in the year pre-dating the claimed accident was $52,615.68 and her average weekly wage calculated pursuant to §10 was $1,011.84.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment;
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for medical expenses.
4. Whether petitioner is due TTD.
5. Whether penalties and attorneys' fees should be imposed upon respondent.

STATEMENT OF FACTS

Michael Thomas Bubash Testimony

Michael Bubash testified in behalf of petitioner. Bubash had been employed by respondent as a correctional officer for almost a year. Bubash testified he witnessed an occurrence involving the petitioner on March 14, 2017. Bubash knew petitioner only through work; working only a handful of times on the same shift, but never worked together.

On March 14, 2017, Bubash was working in Bravo House; a quarter unit within respondent's prison. At approximately 12:45 P.M., Bubash was heading from Bravo House to Gate 5 to the Officers Dining Room (ODR) for lunch. Bubash was at Gate 5 as petitioner walked up to gate 5. Respondent was running a drill that day. According to Bubash, it went from level 1 to level 4 lockdown, which allowed some movement of officers. Inmates were also able to move, thus Bubash thought the drill was over. Bubash therefore headed to the ODR to have a break.

As Bubash approached Gate 5, the door officer opened the gate. Officer Medin told Bubash it was tact business and closed the door on Bubash. Bubash sat and waited to see if the drill was completely over in order to go into the ODR when petitioner walked up to Gate 5. Writ officers,

or other officers were being allowed through the gate. Petitioner tried to go in and was told it was tact business; the gate was closed on petitioner and Bubash.

Petitioner got the attention of Lieutenant Burkybile, who gave her the thumbs up and may have said something to the tact members. The gate was not opened. Petitioner said the next time the gate opened she was going through. When the gate was opened to let some officers out, petitioner went in. Officer Medin grabbed petitioner by both shoulder and put her up against the gate or wall. After petitioner cursed at Medin, Medin put his hands to the side. Petitioner then went underneath Medin. As petitioner tried to get into the ODR, another tact member put his foot in front of the door so she was not able to open it. After asking the officers who did they think they are, petitioner then walked into the ODR and Bubash went back to Bravo. Bubash confirmed [the tact unit] was still at the gate when all of this went down.

Bubash completed a report of the occurrence at a later date. Bubash also had a meeting with attorneys from the State on June 13, 2017. Bubash reportedly told the attorneys the same thing to which he has testified. Bubash confirmed he was served with a subpoena by petitioner to appear. Bubash said he had no interest in the outcome of petitioner's case.

On cross-examination, Bubash said he considered petitioner a friend. Although on redirect, Bubash claimed that the friendship was strictly on a professional level. Bubash denied that he discussed petitioner's case with her or her attorney and denied they were Facebook friends.

Bubash indicated he worked in F House about 20 times. As a new officer, Bubash worked in different houses every day. He had never seen tact in the F House. The first time Bubash saw a tact operation was on March 14, 2017. Bubash knew form his training that when a tact was present all other officers stand down. Bubash said he never saw petitioner's head hit the gate. Bubash agreed petitioner confronted him after work on March 14, 2017. Petitioner then asked Bubash if he could fill out a report as a witness. She said [respondent] was filing a report against her so she was filing a report against [respondent]. She told Bubash she needed a witness. She never said she was injured or that her head or neck were hurting. Bubash described petitioner as worried as there was a report being filed against her.

Bubash testified that Officer Starkey pulled him into Internal Affairs Office and asked him to write a report; Bubash spoke and Starkey typed the report. Bubash read it and Starkey signed it. This report was completed ten days after the occurrence.

Bubash had a second meeting with Starkey. At that meeting, Starkey advised Bubash that 20 other witnesses said that the occurrence never happened. Bubash felt he was being pressured to change his story. Outside of the meeting with Starkey, Bubash discussed the matter with the union rep, Sergeant Taylor. Taylor asvised Bubash if what was contained in the report was accurate he should not change anything. Bubash was asked if he could delete a line from the interview during the meeting with Starkey. Starkey advised Bubash he had until the end of the day to change his story and also advised that the Attorney General was coming out the next day. Bubash confirmed that Starkey did not tell him he had to change his story.

Petitioner, Kayla Coleman Testimony

Petitioner, born April 22, 1987, nee Brown, received her BS from Western Illinois University in 2010. From 2010 to 2013, petitioner performed social service work for VFW. In August, 2013 she began working for respondent's DOC. After training, she was assigned to Stateville, a male maximum security prison. She had never been disciplined as a correctional officer.

Petitioner reviewed photos of the area identified as RX.7A through 7F. Photo RX. 7D shows Gate 5 which is where petitioner was coming from; to the right is the ODR and to the left is the hallway where the tactical drill was taking place.

On March 14, 2017, petitioner was working the 7 to 3 shift in the 3 and 5 gallery of Edward House. She was to get a half hour for lunch. Petitioner's unit was understaffed as there were members of her unit were taking part in the tactical drill. At 12:30 P.M., petitioner obtained permission from her sergeant, Sergeant War to go get a tray of food and return to the unit as soon as possible. With petitioner leaving Edward House, only one office remained to attend to all the needs of the inmates in 28 cells.

Petitioner took the tunnel that leads to Gate 5, where she saw Bubash standing. Petitioner saw Officer Chavez holding the keys to the gate. Petitioner saw at least three tact officers performing the drill. Petitioner saw multiple staff moving from ODR into Gate 2. This suggested the ODR was open for lunch and that the drill was taking place in the tunnel.

As petitioner approached the gate, two clerical workers came through the gate. As petitioner moved toward the gate, Officer Medin grabbed the gate, slammed it in petitioner's face and advised petitioner it was tact business. Petitioner looked at Bubash, said okay and nothing else.

Petitioner then saw Lieutenant Burkybile came from the hallway and was heading to the ODR. Petitioner got Lieutenant Burkybile's attention and he waived her to come in. Burkybile pointed to petitioner, said something to Medin, and then entered the ODR. Medin just sat there with his arms crossed. Petitioner told Bubash that she was going to go in the next time the gate opened. She reasoned she had to get back to her post, therefore, she needed to get her food and get back to the unit.

The gate opens and two writ officers came through. Petitioner was determined to get her food. As she went to go through, Medin grabs her and slams her forcibly against the gate and held her there. She yelled obscenities. Medin then put his hands on each side of petitioner to restrict her from moving. She maneuvered around the metal detector. She tried to open the ODR door and Officer Mulvey kicked the door closed and stood there. Mulvey moved so petitioner was able to get through the door and regain her composure. She did not stay in the dining room to eat. She got ahold of the front end sergeant so she had clearance to get back to her unit.

Petitioner testified that after that everything got hazy; she was distraught and confused that the co-worker would treat her like that.

Petitioner had worked with Medin less than a handful of times. She spoke with the assistant tact commander that day. She learned the 434 report had gone up the chain of command and had been filed already. Petitioner took three hours that evening to complete her own 434 report; she delivered it to the warden the next day.

When petitioner arrived at home she had migraine like headache, which continued for four days. She went to the doctor that Friday. She noticed that as she went down the stairs at home she had to grab the rail. She also had to read a sentence five or six times to comprehend it. She had short-term memory problems. When she saw her doctor, she also had neck complaints. She denied previously having neck or upper back injuries, or suffered a concussion. She received prior minimal treatment to her mid or low back; and was fine after that.

Petitioner began seeing her PCP at Lincolnway Medical Associates in 2013. She admitted she had prior treatment for anxiety and depression after the death of her dad and sister. She first saw her PCP, after the occurrence, on March 17, 2017. The diagnosis was concussion and cervicalgia.

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Prior to the incident, she had last treated at Joliet Center for Clinical Research for anxiety and depression on July 6, 2016. Petitioner returned to Joliet Center for Clinical Research on March 20, 2017, where she saw license therapist Anthony Kokalj. The first three visits were because of the March 14, 2017 incident. On April 1, 2017, the therapist wrote a history and diagnosed post-traumatic stress disorder. She continues to see the therapist; he has not released her to return to work. She also saw Amanda Twait at this facility who prescribes medication; she has not released petitioner to return to work.

She also continues under the care of Dr. Mark Christianson and PA Meghan at Lincolnway Medical. She was referred by the medical providers at Lincolnway Medical to neurologist, Dr. Patel Bassel Kazkaz. Dr. Kazkaz recommended petitioner see a specialist for her neck. Dr. Kazkaz diagnosed post conclusion headache and post-concussion syndrome, memory problem and neck pain. He has prescribed medication.

She was seen by Dr. Mark Lorenz of Hinsdale Orthopaedics on April 13, 2017. She had previously gone to Hinsdale Orthopaedics due to a cut right index finger. Dr. Lorenz recommended an MRI and kept petitioner off work. She continues under the care of Dr. Lorenz.

Her headaches were originally migraine-like. Now she has two headaches a week that last only an hour or two. Petitioner said she does not sleep very well; has nightmares and takes sleep medication. She has panic attacks sometimes but are getting better. She is having anxiety attacks thinking about returning to work as she doesn't know who she can trust. She has good neck movement left to right, but not up and down. She is in physical therapy to improve the neck pain.

There was no surveillance video showing the incident.

Petitioner worked three and a half years as a correctional officer. She had worked in F House. Petitioner had seen the tact come into F House about five times. Petitioner knew the tact unit took over when there is an actual emergency.

Petitioner was denied entry to Gate 5 only once. Petitioner confirmed she darted in when the door was open in order to get to the ODR. She was told by the assistant tactical commander that she may need a witness, so she sought out Bubash. Petitioner was questioned as to whether the reason she was trying to reach the assistant tactical Commander Woodcock was to determine if they were filing a report [about the incident with petitioner].

Petitioner confirmed she was scheduled off the following two days after the incident. However, she did return to the respondent's prison to turn in her 434 report. The reason she did not seek any medical treatment until March 17, 2017 was because she did not know what was going on.

Petitioner believed the tact team stuck together; have each other's back. Petitioner had trusted the members of her unit that were part of the tact team before the incident.

Petitioner was aware this was only a drill being carried out away from Gate 5 in a hallway. If it was an actual situation, then the tact team would have had keys to the gates and no inmates would be in the ODR.

Joel Starkey Testimony

Joel Starkey, Stateville chief investigator for almost a year, testified in behalf of respondent. Starkey worked under the direction of Stateville's warden. He investigates malfeasance and crimes that happen inside Stateville; which includes staff misconduct. Prior to working at Stateville, Starkey worked at Pontiac and Menard prisons. He's been employed by respondent's DOC for 17-1/2 years. He received cadet training and special training as an

investigator. As an investigator, Starkey reviews incident reports [434], subpoenas and disciplinary reports.

Starkey identified Respondent's Exhibits 4 through 6, as Stateville 2016 employee handbook, administrative directive on reporting unusual incidents and administrative directive on standards of conduct; all apply to employees of DOC and/or Stateville.

The tactical unit is respondent's internal police force that responds to anything that really threatens the safety and security of the prison. Normally the tact operations respond in the same manner whether it is a drill or a real situation. The officers are trained to assume it is a real situation unless told otherwise. These drills, called critical incidents, involve the entire prison. By policy, there are 16 of them performed annually.

On March 14, 2017, special operations from Springfield appeared at the facility unannounced and gave a note to the warden saying there was a counselor being held hostage. A code came across all radios saying there was a Code 6 in progress which was a hostage situation near Gate 5; inmates must be secure and all employees must be accounted for.

All movement, except for essential/emergency movement, must stop. At the beginning of the drill, all but dire medical emergencies were stopped. Later on, writs were allowed despite the Code 6 lockdown was continuing. During these critical incidents, there is an incident commander who is in charge. During the critical incident tact officers are giving the orders and a correctional officer could not disobey these orders or could be found guilty of misconduct. Writ officers would be allowed in the area of the critical incidents only with the approval of the incident commander. Medical personnel were on standby; staged nearby in the employee dining room.

Starkey confirmed F House, which is a round house that once housed the most violent inmates, was closed the year before. Tact teams often visited F House. All employees are responsible for security within the prison and not allowed to push through a gate without permission.

Starkey was asked by the warden to open an investigation into the three incident reports [434] filed in this incident; submitted by Officers Medin, Mulvey and Coleman. Starkey reviewed the 434's interviewed Sergeant Medin, Officers Mulvey, Chavez, Bubash, Burkybile and Maeticvitch. Starkey identified Respondent's Exhibit 7B as a photo that depicts where the hostage situation was occurring. Non tact members are to stay at their post until the all-clear has been called.

Starkey met with Officer Bubash twice regarding this incident. According to Starkey, Bubash asked Starkey to delete a line from his original interview. Starkey denied he pressured Bubash to change his statement; the statement stands. Starkey was surprised Bubash testified Starkey had pressured him to change his story. Starkey has not closed his investigation as he needs to speak with petitioner.

On cross examination Starkey testified that the line Bubash wanted to change was the line that stated Officer Medin had pushed or shoved petitioner against a wall or bar.

Starkey did not believe having an understaffed area was a safety issue during the lockdown. Although as a security specialist in charge of the front end, Lieutenant Burkybile is normally in charge of the front end; which is from Gate 5 to the front end. However, during the critical incident, the incident commander is in charge of the entire facility through the tactical team.

Jose Chavez Testimony

Jose Chavez, correctional officer at Stateville for 2-1/2 years was called upon to testify in behalf of respondent. Chavez had worked in F House. Chavez had seen tact in F House. Chavez

was present when the tact unit was called in. The sergeants cleared everyone into the office away from the incident and advised when tact is present you have to get out of the way.

Chavez had never worked with petitioner, Sergeant Medin or Officer Mulvey before March 14, 2017. On March 14, 2017, Chavez's post was Gate 5. He was not part of the tactical team. In the photo identified as Respondent's Exhibit 7D, Chavez indicated his post was at Gate 5 to the left of the little table in the photo. As Chavez's post was Gate 5, he was allowed to stay at his post despite the fact that he was not part of the tact team.

While at his post at Gate 5, a Code 6 was called over the radio which was a hostage situation in the placement office right next to Gate 5. Multiple people tried to come through the gate during the code 6 and were denied access. They returned to their assignment and stopped approaching the gate. Petitioner came to Gate 5. Chavez did not allow her to go through. Tact told petitioner she could not go through. A writ officer was allowed to go through. Petitioner had snuck in. Chavez turned around to close the gate. When he turned back, he saw one of the tact officers had his foot on the door while petitioner pulled at it. She was eventually got in. They said they were going to report this. After the incident cleared, petitioner was allowed to exit the dining room and back through Gate 5.

The Command Center had allowed the people to come through. The types of people who are allowed to come through are medical personnel, locksmiths and writ officers. A handful of people were denied access. Petitioner was denied a couple of times by Chavez and also by the tact unit. She waited five to ten minutes to go in. She never received clearance; she snuck in. Tact then created a barricade. She was very upset and agitated she could not get in.

Respondent's Exhibit 7 D shows the metal bars connected to the gate Chavez closed at the same time petitioner claimed she was slammed against it. Chavez said if petitioner had been slammed against the gate he would have seen and heard it. He did not. He saw Sergeant Medin and Officer Mulvey staggered with their arms to the side to block her from entering. Chavez was only two or three feet away. If Medin or Mulvey had touched petitioner, he would have witnessed it. As petitioner walked by Chavez toward the tunnel to go back to the prison, she said to Chavez that she was sorry and she knew he had nothing to do with this. She did not behave as if she was injured. Chavez did not see petitioner leave. He left at 3:00 P.M. Chavez knew that if he had witnessed any physical assault between employees he would be required to complete a 434 report.

Chavez believed Medin was the tact leader. Chavez confirmed he did not see or hear petitioner get slammed into the gate or wall and would have seen and heard it due to the proximity he was to petitioner at the time it purportedly occurred.

On cross-examination, Chavez confirmed he saw Burkybile give petitioner the nod to go through. Chavez held the keys to Gate 5. Chavez was unaware that if it was real hostage situation that the tact officers would take the keys and control the gates. Chavez noted Lieutenant Burkybile walked out of ODR with a tray of food and motioned to petitioner to come in. Petitioner then said to Medin, "hey [Burkybile] said I could go through and Medin responded that [Burkybile] was not his supervisor; he takes his orders from the tact commander. Chavez could not remember what petitioner said, but it would be in his report.

Chavez confirmed he met with the investigator on 3-3-17 (sic), which was about two plus weeks after the occurrence. He also met with the assistant attorney general for a half hour to discuss the case. He confirmed he was with Medin and Mulvey from 9 AM to 4PM in Ottawa when petitioner's case was first set for hearing. This was the first time Chavez spent any time with Medin or Mulvey.

Chavez takes his command from the tact command center only when a Code 6 is called.

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Christopher Medin Testimony

Christopher Medin, who had been employed by respondent at Stateville for eight years, nine months; presently as a correctional sergeant. On March 14, 2017, Medin was a correctional officer. He was promoted on March 16, 2017 and was aware on March 14, 2017 that he was to be promoted. He had worked in F House before. He has been a member of the tact team for eight and a half years. He was required to go through an extra forty hours of training to be part of the tact team. The tact teams purpose is to take control of an unusual situation that may arise inside or outside the institution.

On March 14, 2017, a Code 6, which is a hostage situation, came over the radio at about 10:30 or 10:45 AM. The all clear was not given until 1:15 PM. The all clear came from the incident commander; believed to be the assistant warden of operations. The all clear was conveyed over the radio.

There were about five people who turned around when they saw what was going on at Gate 5. They are trained to turn away as soon as they see the tact team.

Medin completed the 434 (Respondent's Exhibit 8) at about 2:30 PM on March 14, 2017. He remembered the details of the incident without having to refer to his 434 report.

Medin confirmed Lieutenant Burkybile was not part of the tact team. He was the front end lieutenant responsible to clear writs for the inmates to go to court or the hospital. The inmates with writs were cleared to come through the area by the shift commander, Major Laskey. During the drill, Burkybile did not have the authority to authorize people to come and go from gate 5; only the on-site commander, which was Medin, who obtained his authority from the commander center.

Medin told Burkybile that he did not have the authority to clear anyone through Gate 5. Medin successfully denied petitioner clearance once through Gate 5 and the second time is when the incident occurred. According to Medin, she should not have been out of her unit during the drill.

The first time petitioner came up to the gate, Medin was letting in authorized health care members through. Medin advised petitioner she could not come through and closed the gate. Petitioner just stood there. Thereafter two writ officers came up who had clearance and were let through by Medin.

Petitioner barged passed the two writ officers and made her way through the gate. Medin stepped in front of petitioner, put his hands up, and advised petitioner she could not come through. Petitioner said to Medin, don't f-ing put your hands on me, and then shoved Medin. Medin reiterated to petitioner she was not allowed to come through. Petitioner then went past Medin and around the metal detector and flung open the dining room door. Medin was turning around to the left and caught the door. Officer Mulvey was standing behind the door and apparently the door caught Officer Mulvey's foot, bounced back and Medin doesn't know what happened after. Petitioner then went into the dining room. Medin pulled the gate closed.

Medin confirmed Lieutenant Burkybile gave petitioner a nod, even though he lacked the authority to let petitioner through and Medin advised him so. In demonstrating, Medin reiterated petitioner shoved him out of the way. After petitioner went into the dining room, Medin noticed she was talking to Sergeant Kitchen and Sergeant Prado, who were already inside the dining room.

Medin filed a 434 report regarding the incident as petitioner had disobeyed a direct order by a tactical member and had breached security in the affected area during the Code 6 drill. Even though it was later determined to be a drill, it was to be treated as a real situation.

Medin denied that he or Mulvey touched petitioner. He also indicated that he never saw the door to the dining room touch the petitioner.

On cross-examination Medin denied he conferred with Mulvey before he completed his 434 report.

Medin confirmed he had the ability to cuff and take a staff member in the area to be interviewed by Investigations if the staff member violated the rules.

Thomas Carli Testimony

Thomas Carli, an investigator, testified in behalf of respondent. Carli had been employed by Frasco for nine months and an investigator for 19 years. He conducted an investigation of petitioner at respondent's request. There were several days of surveillance and videos of petitioner's activities videoed during the days of video.

Kay Herzog Testimony

Kay Herzog, respondent's correctional officer, was called upon to testify in behalf of petitioner. Herzog confirmed she was a friend of petitioner. She had met with petitioner on occasion and talked to her on the phone. She noticed petitioner had not been herself since the March 14, 2017 incident.

Nelson Holman Testimony

Nelson Holman was called upon to testify in behalf of petitioner. Holman had been employed as a correctional officer for respondent for 21 years. He admitted he was friends with both Medin and petitioner. He encountered petitioner shortly after the claimed incident and found petitioner to be upset and crying. Petitioner told Holman she had been pushed against the wall by Medin and was hurt. He was never questioned by Internal Investigations.

Petitioner, Kayla Coleman, Rebuttal Testimony

Petitioner testified she ran into Nelson Homan within four to five minutes after the incident. She testified her neck restrictions were an inability to look up, not to look from side to side. Petitioner testified that her PTSD is was more affected by her work environment then her outside environment.

Petitioner had seen her therapist the day before she testified on September 27, 2017. She was kept off work due to her PTSD and not her neck injury. Petitioner testified she wants to return to work but the incident but feels the incident has affected her motivation and feels her goals have been ripped from her.

On cross-examination petitioner confirmed she tested for the lieutenant position the day after the incident in Chicago. She claimed she had problems comprehending the questions and had to read them five or six times. She originally testified she had ridden with a co-worker to Chicago to take the lieutenant's test and later said she met him halfway there. She also testified she was blacking out as she drove.

Petitioner testified that respondent apparently got lucky when they videotaped her as those were her good days.

Lincolnway Medical Records (PX.1 & PX1.A)

These records begin with the visit of October 7, 2013 when petitioner was seen by Dr. Christensen. Petitioner wanted a pap test for STD; birth control pills and a referral to a dermatologist for acne. She had a history of ADHD and was taking Adderall. (8-10)

Petitioner was seen for a variety of unrelated conditions from January 13, 2014 through April 2, 2015 (13-31).

On August 20, 2015, petitioner was seen for facial pressure; was under stress; has no motivation; feels down; recent shift change from nights to days; planning a wedding; doesn't want to go out; wishes she was happier; cries easily; sees a counselor once a month for years; changed Adderall prescription (32-34).

On September 30, 2015 seen for medication refill. Petitioner and fiancée had gone to Florida which helped her stress. Her fiancée lost his job so stepdaughter around more and caused increased stress. (36-39).

She was seen on October 14, 2016 due to anxiety from lost dog and unable to work. Petitioner was given a note for work. (59)

On February 4, 2017, petitioner was seen for meds check [Adderall]. Petitioner was concerned with remaining on Adderall as she was trying to have a baby.

Petitioner was seen by PA Megan Suligoy on March 17, 2017 after reportedly being slammed against gates at work on March 14, 2017. Her complaints included major headache in frontal lobe; feels spacy; having problems sleeping; neck and upper back sore and light sensitivity. The history detailed was consistent with petitioner's testimony. Diagnosis was concussion and cervicalgia (67-68).

On March 31, 2017, petitioner followed up PA Suligoy for ongoing back and neck pain and having difficulty concentrating. Petitioner reportedly was scheduled to see a Neuro on March 26th. A brain and cervical CT scan were ordered. (72-73)

PA Megan Suligoy completed a form on March 17, 2017 for respondent regarding the diagnosis and petitioner's disability (70-71; PX.1A)

On April 17, 2017 she reportedly continued to have neck pain and less neck pain. Neuro wants her to have head CT scan. Petitioner had seen orthopedic surgeon, Dr. Lorenz, who has ordered an MRI of her neck. Diagnosis was concussion, cervicalgia and post concussive syndrome. (76-77)

On May 15, 2017 petitioner was seen by PA Suligoy mainly for acne and to obtain refill on Adderall (78-79).

Joliet Center for Clinical Research Records (PX. 2; PX.2A)

According to these records, petitioner was initial seen by therapist Anthony Kokalj for adjustment disorder with depressed mood. She followed up with Therapist Kokalj on November 26, 2013, December 3, 2013, December 10, 2013, December 17, 2013, December 23, 2013, January 8, 2014, January 15, 2014, January 29, 2014, February 12, 2014, February 19, 2014 and then not until October 15, 2014, when she was released PRN.

Petitioner returned on March 25, 3015, then May 18, 2015, June 2, 2015, June 8, 2015, June 15, 2015, June 29, 2015 and July 6, 2016 for adjustment disorder with mixed anxiety and depressed mood.

Petitioner next returned to Therapist Kokalj on March 20, 2017 with identical history, findings and diagnosis as when she was last seen by Therapist Kokalj on July 6, 2016. When she returned on March 28, 2017 the complaints, findings and diagnosis remained the same, as well as on April 4, 2017.

It was not until the visit of April 11, 2017 that petitioner complained of PTSD which she related to an incident in which she indicated she as attacked by a co-worker during a drill. She reported seeing a neurologist for her concussion, difficulty concentrating, memory impairment, muscle soreness in neck and shoulders. The diagnosis was adjustment disorder with mixed anxiety and depressed mood, along with posttraumatic stress disorder, by history only.

On April 17, 2017, petitioner's history included a DUI at age 22 and substance abused five years earlier after drinking heavily for a year. The diagnosis was adjustment disorder with mixed anxiety and depressed mood. The problem list included posttraumatic stress disorder with an onset of April 12, 2017 by history only.

Petitioner was seen by Amanda Twait, ARPN on April 18, 2017 and Paxil and prazosin was prescribed.

She was seen by Therapist Kokalj on May 2, 2017 and May 3, 2017 for PTSD by history, as well as May 9, 2017, May 16, 2017and May 17, 2017.

She was seen on May 25, 2017 by Therapist Kokalj and on June 13, 2014 by Amanda Twait ARPN.

Northwestern Medicine/Dr. Bassel Kazkaz (PX.3; 3A)

Petitioner was seen by Dr. Bassel Kazkaz, of Northwestern Regional Medical Group, Neurosciences, on April 10, 2017. Diagnosis was post-concussion headache, post-concussion syndrome, memory problem and neck pain. CT scan was to be considered if not improved. (96-100).

On May 3, 2017, Dr. Kazkaz indicated petitioner's migraines improving. She was not anxious or nervous and did not have insomnia. Dr. Kazkaz authored a letter indicating petitioner was to reman off work for the next two to three weeks.

Hinsdale Orthopaedics/Dr. Mark Lorenz (PX.4; 4a)

Petitioner was first seen by Dr. Lorenz on April 13, 2017 due to neck and upper back pain. Under neurologic complaints, Dr. Lorenz indicate petitioner denied frequent headaches. Under psychiatric, Dr. Lorenz indicated petitioner denied insomnia, confusion/memory loss, anxiety or substance abuse. The neurological exam and X-rays were normal.

Petitioner returned to Dr. Lorenz on June 1, 2017 after obtaining an MRI. [Unfortunately, the results of the MRI as interpreted by Dr. Lorenz was illegible and there was no MRI report introduced into evidence.]

Kayla Coleman's Incident Report [434] (PX. 5)

Petitioner completed this report on March 14, 2017 at 7:30 P.M. Petitioner's report of the incident matched her testimony.

Kayla Coleman's Employee's Notice of Injury (PX.6)

Petitioner completed this report on March 17, 2017 wherein she stated her head, neck and upper back was injured on March 14, 2017 when she was slammed into the bars by Officer Medin when trying to enter Gate 5 to obtain her lunch.

Kayla Coleman's Initial Workers' Compensation Medical Report (PX.7)

This is included as part of Petitioner's Exhibit 1, p. 80.

Petition for Penalties, Attorneys' Fees, Hearing under Section 19b (PX.8)

Petitioner filed this Petition for penalties, fees and a hearing, which is a pleading.

Lincolnway Medical Associates Bills (PX.9; 10; 11)

The March 17, 2017 bill is in the amount of $158.00 (PX9)
The March 31, 2017 bill is in the amount of $138.00 (PX.10)
The April 17, 2017 bills is in the amount of $138.00 (PX.11)

Joliet Center for Clinical Research (PX.12)

The bill for services rendered from March 20, 2017 through June 13, 2017 totals $3,000.00.

Dr. Bassel Kazkaz Bill (PX.13; 14)

The April 10, 2017 bill is in the amount of $386.00 (PX.13)
The May 3, 2017 bill is in the amount of $194.00 (PX.14)

Hinsdale Orthopaedics Bill (PX.15)

The April 13, 2017 bill is in the amount of $701.00
The May 1, 2017 bill is in the amount of $2,390.00
The June 1, 2017 bill is in the amount of $171.00
The June 15, 2011 bill is in the amount of $930.00

Joliet Center for Clinic Research/Anthony Kokalj June 27, 2017 Report (PX.16)

Therapist Kokalj wrote a letter covering petitioner's PTSD cause from the work incident of March 14, 2017; the need for treatment and ongoing disability.

Illinois Department of Corrections System Check Policy (PX.17)

Physicians Statement (PX.18)

Amanda Twait, MSN completed a report on August 8, 2017 indicating petitioner continued under her care and treatment and that petitioner was temporarily and totally disabled from all employment.

C. Medin Incident Report (PX.19)

Christopher Medin filed this report on March 14, 2017 at 2:35 P.M.

C. Mulvey Incident Report (PX.20)

C. Mulvey filed this report on March 14, 2017 at 3:10 P.M.

Workers' Compensation Employee Notice of Injury and Form 434 (RX.1)

This is duplicate of Petitioner's Exhibit 5 & 6.

Initial Workers' Compensation Medical Report (RX.2)

This is duplicate of Petitioner's Exhibit 7 and included in Petitioner's Exhibit 1, p. 80 and 70-71.

Respondent's Payments (RX.3)

These records show petitioner was paid on March 15, 2017, March 31, 2017, April 14, 2017, April 28, 2017 and May 15, 2017.

Respondent's 2016 Employee Handbook (RX.4)
Illinois Department of Corrections Reporting of Unusual Incidents Policy (RX.5)

Illinois Department of Corrections Standards of Conduct Policy (RX.6)

Photos of Area (RX. 7A-7F)

These pictures depict the area of the incident.

Video Surveillance from June 3, 2017 and June 4, 2017

The video shows petitioner removing a carpet cleaning machine from the back of her vehicle and washing another vehicle.

Video Surveillance from June 20, 2017

This 51-minute video show petitioner washing her vehicle.

CONCLUSIONS OF LAW

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

C. With respect to the issue of whether an accident occurred that arose out of and in the course of petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

There was clearly an incident/confrontation between petitioner and co-worker Medin on March 14, 2017. The question is whether the incident rose to the level of accident, resulting in injury to petitioner, that arose out of and in the course of her employment with respondent.

The Arbitrator considered the testimony of Jose Chavez, who was manning Gate 5 at the time of the confrontation. Chavez confirmed that at the time of the confrontation, as there was a Code 6 called, he took his orders from the Tact commander. Petitioner was denied access originally by the Tact Commander to pass through Gate 5 to get to the ODR. Petitioner then snuck through Gate 5 when others were allowed by the Tact commander to pass through. Chavez confirmed he was closing the gate when petitioner was purportedly slammed against it. If petitioner had been slammed against the gate, Chavez would have seen or hear it. He did not.

Christopher Medin testified petitioner was initially denied access through Gate 5. Thereafter, two writ officers came up and were given clearance and let through by Medin. This is when petitioner barged through. Medin put his hands up to stop petitioner, who then shoved Medin and flung open the ODR door. The door apparently caught the other Tact Officer Mulvey's foot and bounced back. Medin testified neither Medin or Mulvey touched petitioner, or that the ODR door touched petitioner.

The only witness who supported petitioner's position that she was slammed against the bars was Michael Bubash who was present at the time of the incident. However, his testimony was equivocal as he couldn't remember if she had been shoved against the wall or the bars. He also did not see her head hit the gate. Furthermore, Bubash filed a report at petitioner's request after she confronted him after work on March 14, 2017 advising him that respondent was filing a

report against her. At the time petitioner approached Bubash after work on March 14, 2017, she did not appear hurt or injured; she was only concerned as she was being written up.

Bubash completed a report ten days after the incident for Investigating Officer Starkey. According to the testimony of Bubash and Starkey, they met again to discuss a line in Bubash's report wherein Bubash stated that he saw petitioner being shoved against the wall or bars. According to Bubash's testimony, Starkey was pressuring him to delete that line as 20 witnesses said it didn't happen. Starkey testified that Bubash asked Starkey to delete that line from the report. There is, therefore, a question as to exactly what Bubash witnessed.

Although Bubash and Holman testified petitioner was upset after the incident, neither could confirm she complained of, or had any signs of injury from the confrontation.

The Arbitrator took into consideration not only the testimony of petitioner, but petitioner's actions after the occurrence, as well as petitioner's medical records. On the day of the occurrence, according to Bubash, petitioner appeared to be more upset with the fact that she was about to be written up for violating the Tact Unit orders than actually being injured.

On the day after the incident, petitioner admittedly drove at least part way to Chicago to take the lieutenant's test and took the lieutenant's test.

She did not seek treatment until three days after the incident at which time there were no objective findings of the complained injury to the head and neck; only slight limited neck movement.

At the time of her testimony on June 28, 2017 she claimed to be under the care of Dr. Lorenz for her neck and upper back pain. Although petitioner claimed her neck was restricted to with up and down movement, the video surveillance from June 3, 2017 and June 20, 2017 showed petitioner's movement was pretty much unrestricted. Petitioner clearly moved freely as she washed her two vehicles and removed a carpet cleaner from the back of her vehicle.

In addition, at the time of petitioner's first visit with Dr. Lorenz on April 13, 2017, she denied having insomnia, confusion/memory loss, anxiety or substance abuse. This was not the same history she gave to Therapist Kokalj of Joliet Center for Clinical Research on April 11, 2017, at which time she complained of an inability to fall asleep, anxiety and memory impairment.

Furthermore, petitioner saw her therapist at Joliet Center for Clinical Research on March 20, 2017, March 28, 2017 and April 4, 2017. She had the identical complaints and findings at these three visits after the incident of March 14, 2017 that she had at the prior visit of July 6, 2016. It was not until her visit on April 11, 2017 that she provided the history of the incident at work. At that time, the PTSD, symptoms were reported as HPI (history of present illness).

For all of these reasons, the Arbitrator finds petitioner lacked credibility and questions her motivation for claiming an injury as a result of the incident as she knew she was being written up for violating orders by the Tact unit.

The Arbitrator, having considered all testimony and evidence, determines petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment with respondent as a result of the incident of March 14, 2017.

As the Arbitrator determined petitioner failed to prove she was injured in an accident that arose out of her employment with respondent, the claim is denied and all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HECTOR SANCHEZ,

Petitioner,

vs. NO: 15 WC 32879

SERVICE DRYWALL & DECORATING,

Respondent.

19IWCC0348

DECISION AND OPINION ON REVIEW

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

Petitioner met his burden of proof that he suffered an aggravation beyond a mere back strain, of his pre-existing degenerative arthritic condition of the low spine. However, Petitioner did not set forth evidence sufficient to justify an award for ongoing vocational rehabilitation, but only for a vocational assessment. At the time of the accident, Petitioner was standing on scaffolding when the scaffolding collapsed. Petitioner fell approximately five feet and landed on his feet. He reported the incident but continued working. Petitioner's symptoms of pain increased over the next few days and he sought medical treatment on December 8, 2014, from his primary care physician. He followed up several times with his primary care physician with continued complaints of low back pain. Initially, the MRI and physical therapy recommended were denied. Eventually, Petitioner underwent an MRI on January 13, 2015, which showed degenerative disc disease and a mild to moderate disc herniation at L3-L5. Petitioner underwent physical therapy as well as some work hardening. Although Petitioner progressed, he had continued complaints of pain as well as some

19IWCC0348

physical limitation due to the pain in his back. Petitioner was ultimately found to be at maximum medical improvement, but for an additional week of work conditioning, recommended by Respondent's expert, as of January 14, 2016.

Petitioner had no complaints of lower back problems prior to the December 5, 2014, accident. Respondent's expert diagnosed Petitioner with a low back strain which he felt should have been resolved by January, 2016. As of the January 14, 2016 IME date, Respondent's expert causally related Petitioner's condition to the work accident of December 5, 2014. Petitioner's treating physicians opined that Petitioner's pre-existing degenerative disc disease was aggravated by the accident and Petitioner suffered from facet hypertrophy. Petitioner's treating physicians are more persuasive than Respondent's expert regarding diagnosis and necessary treatment. Petitioner underwent a functional capacity examination on October 28, 2016. Petitioner was placed at maximum medical improvement, subject to the restrictions as outlined by the functional capacity examination, by his treating pain management physician, Dr. Sharma, on January 9, 2017.

Although Petitioner was released from his employment with Respondent and they were unable to offer him work within his restrictions, Petitioner did not prove his case regarding entitlement to vocational rehabilitation services. Petitioner, however, should have had a vocational rehabilitation assessment performed due to the length of time of his work-related disability. Petitioner testified that he received a letter from Respondent on January 29, 2016, advising him he had been fired. (Px11). He had not worked anywhere since December 8, 2014. He testified he had not looked for work anywhere because of his restrictions. (T. 61) Following the functional capacity evaluation, Petitioner was released back to work in a medium to heavy capacity. Petitioner did not believe he was able to go back to work as a carpenter with this restriction.

A claimant is generally entitled to vocational rehabilitation where he sustains a work-related injury which causes a reduction in his earning power and "there is evidence that rehabilitation will increase his earning capacity." National Tea Co. v. Industrial Comm'n, 97 Ill.2d 424, 432 (1983). Petitioner has not shown that undergoing vocational rehabilitation will increase his earning capacity. The Commission therefore vacates the Award of the Arbitrator granting Petitioner vocational rehabilitation services. However, pursuant to 50 Ill. Admin Code 9110.10(a), "the vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. When the period of total incapacity for work exceeds 365 days, the written assessment required by this subsection shall likewise be prepared." Petitioner was off work more than 365 days following his work-related accident. Additionally, Petitioner has not returned to the work force since the time of his accident and was released from Respondent's employment. The Commission therefore Orders a vocational rehabilitation assessment and remands this matter back to the Arbitrator for further proceedings based upon the outcome of same.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 2, 2017, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,040.92 per week for a period of 109 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

19IWCC0348

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 to Petitioner reasonable and necessary medical expenses of Advantage MRI, ATI Physical Therapy, DOCRX, Inc., Hinsdale Orthopaedic Associates, Joliet Radiological, Metro Health Solution, Pain & Spine Institute, Presence St. Joseph, and Sanitas Medical Group under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner undergo a vocational rehabilitation assessment.

IT IS FURTHER ORDERED BY THE COMMISSION that the award for vocational rehabilitation services be vacated.

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

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

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

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: JUL 9 - 2019

Maria E. Portela

D. Douglas McCarthy

L. Elizabeth Coppoletti

MEP/dmm
O: 061819
49

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

SANCHEZ, HECTOR
Employee/Petitioner

Case# **15WC032879**

SERVICE DRYWALL & DECORATING
Employer/Respondent

19IWCC0348

On 8/2/2017, 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 1.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
ZBIGNIEW BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

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

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

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

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

Hector Sanchez
Employee/Petitioner

v.

Service Drywall & Decorating
Employer/Respondent

Case # **15** WC **32879**

Consolidated cases: **N/A**

19IWCC0348

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 **Geneva** on **June 19, 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. ☐ 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 **Petitioner's entitlement to vocational rehabilitation**

FINDINGS

On the date of accident, December 5, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $81,191.76; the average weekly wage was $1,561.38.

On the date of accident, Petitioner was 41 years of age, *married* with no dependent children.

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

Respondent shall be given a credit of $38,305.86 for TTD, $0 for TPD, $0 for maintenance, and $7,353.70 for other benefits (i.e., PPD advance), for a total credit of $45,659.56.

Respondent is entitled to a credit as agreed by the parties for "proper amounts paid" under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work.

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $1,040.92/week for 109 weeks, commencing December 8, 2014 through July 11, 2015 and July 12, 2015 through January 8, 2017 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 5, 2014 through June 19, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $38,305.86 for TTD benefits paid.

Maintenance Benefits

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has failed to establish is entitlement to maintenance benefits from January 9, 2017 through June 19, 2017 as claimed. Thus, Petitioner's claim for maintenance benefits is denied.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act for the following providers: Advantage MRI, ATI Physical Therapy, DOCRX, Inc., Hinsdale Orthopaedic Associates, Joliet Radiological, Metro Health Solution, Pain & Spine Institute, Presence St. Joseph, and Sanitas Medical Group. Respondent shall receive a credit as agreed by the parties for any payments made with respect to Petitioner's medical bills. *See* AX1.

Vocational Rehabilitation

As explained in the Arbitration Decision Addendum, Petitioner has established his entitlement to vocational rehabilitation services as claimed. Thus, the Arbitrator awards such services and orders Respondent to authorize an initial assessment pursuant to the Commission's Rules with Petitioner's choice of vocational counselor and authorize his or her recommended vocational rehabilitation program pursuant to Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

July 28, 2017
Date

AUG 2 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Hector Sanchez
Employee/Petitioner

v.

Service Drywall & Decorating
Employer/Respondent

Case # **15** WC **32879**

Consolidated cases: **N/A**

FINDINGS OF FACT 19IWCC0348

The issues in dispute include causal connection, Respondent's liability for payment of certain unpaid medical bills, Petitioner's entitlement to temporary total disability from December 8, 2014 through July 11, 2015 and July 12, 2015 through January 8, 2017, Petitioner's entitlement to maintenance benefits from January 9, 2017 through June 19, 2017, and whether Petitioner is entitled to vocational rehabilitation. Arbitrator's Exhibit[1] ("AX") 1.

Employment & Background

Hector Sanchez (Petitioner) testified that he began his employment with Service Drywall & Decorating (Respondent) in September of 2014. Tr. at 15. He is a high school graduate and a member of Local 1889 of the Carpenters Union. Tr. at 14. Petitioner testified that he started working as a Carpenter approximately 18 years ago. Tr. at 60. He attended the carpenter apprentice school, where he obtained certifications in drywall, framing, acoustical ceilings, installing doors and layouts. Tr. at 14.

Petitioner started working for Respondent, Service Drywall & Decorating, in September of 2014. Tr. at 15. He would typically work 8-hour days, for five to six days per week. Tr. at 21. He would start at 7:00 a.m. and end at 3:30 p.m. Tr. at 21. Petitioner was allowed two breaks: one 15-minute break at 9:00am, and another 30-minute lunch break at 12:00 p.m. Tr. at 21. His typical day would start with a meeting with his foreman, Floyd, in the shanty trailer on the construction site. Tr. at 21-22. The foreman would assign tasks to Petitioner and his co-workers, after which he would gather the necessary materials and begin the tasks. Tr. at 22. Once the initial tasks were completed, Petitioner would return to his foreman for his next assignment. Tr. at 22.

Much of Petitioner's work for Respondent required the use of a Baker scaffold, which is an apparatus with ladders on each end that supports a platform connecting one ladder to the other. Tr. at 23. The platform is elevated approximately 7 feet off the ground and it is used to install the top track of the framing to the ceiling. Tr. at 23-24. The top track is a metal beam with a U-shaped track that allows for studs to be vertically slotted inside creating the skeleton of a wall. Tr. at 15-16. Most of Petitioner's work involved the construction of these wall skeletons. Tr. at 16. He was required to lift a variety of items including top and bottom tracks, metal studs for the walls, his tool belt and any tools that he needed. Tr. at 25. The tracks could be as long as 35 feet and weigh up to 200 pounds. Tr. at 26. Petitioner explained that he was able to utilize a boom a miniature crane to assist in lifting these larger pieces. Tr. at 26. The studs themselves were typically 8 to 10 feet long and could

[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. Exhibits attached to depositions will be further denominated with "(Dep. Ex. _)."

weigh as much as 70 pounds. Tr. at 25-26. His tool belt could weigh as much as 60 pounds when fully loaded with cutting snips, a Tr.pe measure, screws, clamps and a TrakFast nail gun. Tr. at 28-29. When the Baker scaffold could not be fit into an area, Petitioner would need to use a ladder instead. Tr. at 27. Petitioner explained that about 85% of his workday took place outdoors, and about 40% of it was spent walking. Tr. at 24, 30.

Accident

In late 2014, Petitioner was working for Respondent on a project involving new construction of an auditorium at Benedictine University in Lisle, Illinois. Tr. at 20. On Friday, December 5, 2014, Petitioner began work that day at 7:00 a.m. and to install framing in the basement of the auditorium. Tr. at 30-31. He was using a Baker scaffold to install the top track of the framing and climbed the Baker scaffold wearing his tool belt and carrying a cordless power drill. Tr. at 31. Petitioner was also carrying about 10 short "cut-offs" which were pieces of metal studs cut to be only a few feet long; altogether, they weighed between 30 and 40 pounds. Tr. at 31, 33. As Petitioner was standing on the Baker scaffold, it came apart underneath him. Tr. at 31-32. Petitioner fell and landed on his feet in a standing position. Tr. at 32.

Petitioner explained that he noticed some stiffness in his back, but continued to work. Tr. at 33. About an hour later, he took his first break and reported the accident to his supervisor, Floyd. Tr. at 34. Floyd asked him whether he wanted to seek medical treatment; Petitioner declined, finished the rest of his work day, and then went home. Tr. at 34-35.

Petitioner testified that he then felt worsening back pain. Tr. at 35. He took a shower and went to sleep. Tr. at 35. The following day, Saturday, December 6, 2014, Petitioner testified that he woke with back pain so severe that he had difficulty getting out of bed. Tr. at 35. The following Monday, December 8, 2014, Petitioner went to see Floyd and he was directed to seek medical attention. Tr. at 36. As Petitioner was on his way to see his doctor, a superintendent for Respondent, Roger, called him and directed him to return to the job site to complete an accident report. Tr. at 37. Petitioner complied, and afterwards again set out to see his primary care physician, Dr. Daniel Ramirez. Tr. at 37.

Medical Treatment

Petitioner first saw Dr. Ramirez on December 8, 2014. PX1. He presented with acute right-sided low back that radiated into his pelvis and abdomen. *Id.* Dr. Ramirez diagnosed him with back pain and radiculopathy and ordered an MRI. *Id.* Petitioner returned to Dr. Ramirez on December 12, 2014 with ongoing complaints of back pain. *Id.* Dr. Ramirez again recommended the MRI, and ordered physical therapy. *Id.* Petitioner reported continued back pain on January 2, 2015. *Id.* The recommended MRI and physical therapy had not been approved. *Id.*

Petitioner eventually underwent the recommended lumbar MRI on January 13, 2015. PX2. Dr. Ramirez reviewed the MRI on January 16, 2015 and diagnosed Petitioner with a moderate disc herniation from L3 to L5. PX1. He also recommended an evaluation with a pain specialist and an epidural steroid injection. *Id.*

Petitioner began the physical therapy at Presence Physical Therapy on January 26, 2015 and then returned to Dr. Ramirez on February 6, 2015. PX1, PX7. He continued to complain of back pain and Dr. Ramirez continued to recommend the epidural steroid injection. PX1. On March 5, 2015 Petitioner continued to report back pain for which Dr. Ramirez continued to recommend physical therapy and pain management. *Id.*

On March 17, 2015, Petitioner began a course of physical therapy at ATI Physical Therapy. PX3. He returned to Dr. Ramirez again on April 3, 2015 with continued complaints of back pain. PX1. Dr. Ramirez continued to recommend an injection, which was not authorized. *Id.* He returned on May 9, 2015 with continued complaints at which point Dr. Ramirez ordered work conditioning. *Id.* Petitioner underwent the recommended work conditioning from May 11, 2015 through June 12, 2015. *Id.* At the end of his work conditioning treatment, Dr. Ramirez noted some improvement in Petitioner's low back pain, but continued pain when lifting over 70 pounds. *Id.* Dr. Ramirez reiterated his recommendation for an injection. *Id.* As of July 13, 2015, Dr. Ramirez maintained his recommendation for an injection. *Id.*

Petitioner testified that his father who lived in Mexico fell ill and that he told Respondent's superintendent, Roger, of his father's condition permitting him to leave for Mexico. Tr. at 42-43. Petitioner testified that he was in Mexico tending to his father from July 14, 2015 through August 28, 2015. Tr. at 44. He explained that he continued to experience back pain, but performed the in-home exercises that he could without equipment. Tr. at 46-47, 90. Petitioner testified that his back pain neither improved nor worsened while he was in Mexico. Tr. at 70. Upon returning to the United States, Petitioner returned to see Dr. Ramirez on September 14, 2015. PX1. At that visit, Petitioner reported continued back pain. *Id.* Dr. Ramirez maintained his recommendation for an epidural steroid injection and physical therapy. *Id.*

The medical records reflect that Petitioner then sought treatment with Dr. Samir Sharma, a pain management specialist. PX5. Dr. Sharma first examined Petitioner on September 23, 2015. *Id.* Petitioner presented with complaints of low back pain. *Id.* Dr. Sharma recommended a follow-up in a few weeks so that he could review Petitioner's lumbar MRI. *Id.* On October 21, 2015, Dr. Sharma noted his review of Petitioner's MRI and recommended an intra-articular facet injection in the low back as well as additional therapy. *Id.* The injection was not approved. *Id.*

On November 2, 2015, Dr. Ramirez referred Petitioner for evaluation by an orthopedic surgeon, Dr. Cary Templin. PX1. Dr. Templin first examined Petitioner on December 15, 2015. PX6. He presented with low back pain and Dr. Templin diagnosed him with low back pain caused by underlying multilevel disc degeneration, facet hypertrophy most prominent at the L5-S1 level. *Id.* Dr. Templin likewise recommended the facet injection. *Id.*

Section 12 Examination Report & AMA Impairment Rating – Dr. Graf

On January 14, 2016, Petitioner saw Karl Graf, M.D. (Dr. Graf) at Respondent's request. RX2 (Dep. Ex. 2). Dr. Graf's report reflects that he took a history from Petitioner, examined him, reviewed various treating medical records, and rendered opinions regarding his physical condition and its relatedness, if any, to his injury at work. *Id.*

In his report, Dr. Graf noted that Petitioner's reported mechanism of injury was consistent with the medical records. RX2 (Dep. Ex. 2). He also noted that Petitioner "did miss medical care and treatment while he was in Mexico" for the emergency involving his father's cancer and subsequent death. *Id.* Dr. Graf opined that Petitioner's missed therapy visits "could have negatively affected" his recovery. *Id.* He also opined that anti-inflammatory medications were appropriate, but Tramadol should be discontinued. *Id.*

Dr. Graf did not indicate whether there was objective medical evidence to support Petitioner's subjective complaints. RX2 (Dep. Ex. 2). He diagnosed Petitioner with a lumbar strain and opined that Petitioner could

work full duty. *Id.* Dr. Graf also opined that facet injections were not reasonable or necessary because Petitioner's pain complaints were far lateral to the spinal canal and facet joints. *Id.* He also indicated that Petitioner was at maximum medical improvement and determined that he had an impairment of 1%. *Id.*

Continued Medical Treatment

Petitioner returned to Dr. Templin on January 26, 2016 and he again recommended the injection. PX6. He then returned to Dr. Sharma on February 18, 2016, who continued to recommend the facet injection. PX5. Petitioner eventually underwent the facet injection with Dr. Sharma on March 8, 2016. *Id.*

Narrative Report – Dr. Templin

At Petitioner's request, Dr. Templin prepared a narrative report in which he summarized Petitioner's medical history and rendered various opinions regarding Petitioner's physical condition, its relatedness, if any, to the injury at work, and Petitioner's current condition in the low back. PX8, PX9 (Dep. Ex. 2). Dr. Templin diagnosed Petitioner with lumbar degenerative disk disease as well as facet arthropathy with low back pain as a result of an aggravation that occurred on December 5, 2014. *Id.* He opined that Petitioner's pre-existing degenerative changes were aggravated by the injury at work. *Id.* In so opining, Dr. Templin explained that Petitioner fell from a height of 5 feet at work after which he has experienced continued back pain. *Id.*

Dr. Templin indicated that Petitioner would benefit from right-sided facet injections. PX8, PX9 (Dep. Ex. 2). Dr. Templin further opined that, while Petitioner's functional capacity evaluation results reflect that he was able to perform the duties of his job, his continued prescription use of Tramadol makes it unsuitable for him to perform significant lifting or bending in a construction environment. *Id.* Dr. Templin explained that Petitioner could return to work if he did not require Tramadol. *Id.*

Dr. Templin also commented on Petitioner's six-week trip to Mexico to attend to his dying father, and whether that hiatus negatively affected his physical condition. PX8, PX9 (Dep. Ex. 2). Dr. Templin opined that it likely affected his condition, but he noted that he had no information that Petitioner failed to perform his home exercises and that Petitioner continued to have low back pain throughout the time he was in Mexico such that it was "difficult to say for sure whether or not this hiatus in Mexico negatively affected his recovery." *Id.* Finally, Dr. Templin reviewed Dr. Graf's Section 12 report and disagreed with Dr. Graf's opinions. *Id.*

Continued Medical Treatment

Petitioner returned to Dr. Templin on April 4, 2016. PX6. Dr. Templin recommended a second injection, and Petitioner returned to Dr. Sharma for that recommendation. PX5, PX6. Dr. Sharma performed the second injection on May 9, 2016. PX5.

As of June 6, 2016, Dr. Sharma noted improvement, but Petitioner continued to complain of back pain. PX5. He recommended a radiofrequency ablation procedure and scheduled it for June 27, 2016. *Id.* The following day, June 7, 2016, Petitioner returned to Dr. Templin who opined that he was not a surgical candidate. PX6. Instead, Dr. Templin recommended that Petitioner undergo Dr. Sharma's treatment plan. *Id.*

Deposition Testimony – Dr. Graf

On June 16, 2016, Respondent called Dr. Graf as a witness and he gave testimony at an evidence deposition. RX2. Dr. Graf testified that he is an orthopedic surgeon specializing in the spine. RX2 at 4-5; RX2 (Dep. Ex. 1). Dr. Graf's curriculum vitae reflects that he is board-certified. *Id.*

Dr. Graf testified that he examined Petitioner once on January 14, 2016. RX2 at 5. He testified that Petitioner reported a history of working as a carpenter for Respondent and that on the date of accident he was working on a Baker scaffold that collapsed causing him to fall about 5 feet, landing on his feet. *Id.*, at 7. Petitioner reported that he underwent extensive conservative treatment, but was still experiencing back pain between 4 and 7 out of 10. *Id.*, at 8. Dr. Graf performed a physical examination of Petitioner, which he indicated was essentially normal. *Id.*, at 10-11.

Dr. Graf also reviewed Petitioner's medical records as well as a job description. RX2 at 11. The job description indicated that Petitioner was required to perform "overhead lifting, carry [up] to 55 pounds, floor-to-waist and knee-to-waist and waist-to-shoulder also 55 pounds with standing." *Id.*, at 12. It also indicated that he was required to "push, pull, overhead lift and carry up to 55 pounds" on "an occasional basis." *Id.*, at 12. Dr. Graf noted that Dr. Ramirez's records reflect that Petitioner experienced pain when lifting over 70 pounds. *Id.*, at 13. Dr. Graf also reviewed the records of Dr. Sharma and Dr. Templin; he noted that both doctors kept Petitioner off work. *Id.*, at 14.

Dr. Graf also reviewed the MRI scan from January 13, 2015 and opined that it showed degenerative changes and left-sided facet degeneration and arthrosis on the left side at L5-S1. RX2 at 15. He noted that this was the opposite side of Petitioner's pain complaints, which were on the right side. *Id.*, at 15. As a result, he opined that the MRI findings did not correlate with Petitioner's clinical complaints. *Id.*, at 16.

Dr. Graf diagnosed Petitioner with a lumbar strain that was causally related to the accident at work which had improved with conservative care. RX2 at 16-17. He further opined that the facet injections were not reasonable, and that after an additional week of work conditioning, Petitioner would reach maximum medical improvement. *Id.*, at 17. He opined that the lumbar strain was causally related to Petitioner's work accident. *Id.*, at 17.

Dr. Graf further opined that Petitioner's absence while in Mexico could have negatively affected his recovery. RX2 at 19. Dr. Graf indicated that Petitioner was capable of returning to work in his prior occupation. *Id.*, at 21-22. He further concluded that Petitioner suffered permanent impairment pursuant to the AMA Guides to the extent of 1%. *Id.*, at 22-23.

On cross-examination, Dr. Graf testified that he charged $1,150 for the independent medical examination and AMA impairment rating as well as $1,500 for a 90-minute deposition, and then $1,000 per hour thereafter. RX2 at 30, 32. He acknowledged that about 80% of his IMEs are done on behalf of Respondents. *Id.*, at 32. Of the depositions, about 60% are done on behalf of Respondents. *Id.*, at 33. Dr. Graf also testified that about 10-15% of his practice is devoted to medico-legal examinations like the one he performed on Petitioner. *Id.*, at 34.

Dr. Graf acknowledged that he would not defer to a pain management specialist or a general practitioner on questions of spinal surgery and spinal conditions. RX2 at 40-41. Likewise, he would not defer to a pain management specialist or general practitioner on treatment recommendations. *Id.*, at 41. However, he would defer to those doctors on issues of work restrictions. *Id.*, at 39, 41. He agreed that he would not recommend

work conditioning if he did not feel it would provide some improvement for a patient. *Id.*, at 42. He agreed that work conditioning would be appropriate for Petitioner at the time he examined him in January of 2015. *Id.*, at 43. He also agreed that if Petitioner had continued his home exercise program while he was in Mexico, it could have positively impacted his recovery. *Id.*, at 46.

Dr. Graf admitted that he could not know whether a medical record was important if he was never provided it. RX2 at 48. He agreed that he was not provided a complete file from Dr. Ramirez's medical records; specifically, Respondent did not provide him with the January 16, February 6, April 3, or the May 6, 2015 notes from Dr. Ramirez. *Id.*, at 49-50.

Dr. Graf admitted that degenerative disc disease could be asymptomatic, and it could be aggravated by a traumatic injury so much so that it becomes symptomatic. RX2 at 52-53. Dr. Graf further agreed with Dr. Templin's diagnosis of degenerative disc disease at L3-4 and L5-S1, although he disagreed with his treatment recommendations. *Id.*, at 53-54.

Dr. Graf agreed that Petitioner's job was heavy according to both Petitioner's description and Respondent's job description. RX2 at 56-57. He further agreed that he had no indication that Petitioner experienced any difficulty performing his job before the work accident. *Id.*, at 57-58. Furthermore, he had no reason to believe that Petitioner experienced any symptoms related to his degenerative disc disease prior to his work accident. *Id.*, at 58-59. Nevertheless, he limited Petitioner's diagnosis that was related to the work accident to merely the lumbar strain. *Id.*, at 59.

Lastly, Dr. Graf agreed that the AMA Guides require that the patient be at MMI before an impairment rating can be reached. RX2 at 67. Dr. Graf rendered an AMA Impairment Rating that Petitioner would reach MMI a week after his examination and testified that he had not generated the report until after that week and therefore the rating was valid; nevertheless, he testified that he had not re-examined Petitioner a second time. *Id.*, at 67-68.

Continued Medical Treatment

Petitioner returned to Dr. Sharma who performed the ablation on June 27, 2016 as planned. PX5. Petitioner returned on July 26, 2016 reporting some relief from the ablation procedure, but continued back pain. *Id.*

Dr. Sharma ordered a repeat MRI, which was performed on August 9, 2016. PX5, PX7. He reviewed the MRI on August 16, 2016 and recommended a nerve block procedure. PX5. That procedure was performed on September 9, 2016. *Id.*

Petitioner subsequently returned to Dr. Sharma on October 10, 2016 reporting continued back pain, although he did experience some relief from the nerve block. PX5. Dr. Sharma recommended a functional capacity evaluation (FCE). *Id.* The FCE was performed at ATI on October 28, 2016. PX4. The evaluating physical therapist found the results to be valid based on a collection of objective data at the time of the FCE. PX4. Petitioner was released to return to work at the medium-to-heavy physical demand level, which fell below the heavy demand level of his work as a carpenter. *Id.* Dr. Sharma reviewed the FCE results on November 7, 2016. PX5, PX3, PX4. He then referred Petitioner back to Dr. Templin for follow up. PX5.

Petitioner saw Dr. Templin on November 30, 2016 who reviewed the repeat MRI, the FCE results, as well as the treatment records since Petitioner's last visit. PX6. Dr. Templin determined that Petitioner was not a surgical candidate and referred him back to Dr. Sharma for further pain management. *Id.*

Petitioner returned to Dr. Sharma on January 9, 2017. PX5. Dr. Sharma refilled Petitioner's prescription medications, but did not recommend any further interventional treatment. PX5. Instead, he released Petitioner back to work with permanent restrictions consistent with the FCE results and indicated that Petitioner should return for medical care on an as-needed basis. *Id.* Petitioner returned for one last visit with Dr. Sharma on May 18, 2017, but no substantive treatment was recommended. *Id.*

Deposition Testimony – Dr. Templin

On April 4, 2017, Petitioner called Dr. Templin as a witness and he gave testimony at an evidence deposition. PX9. Dr. Templin testified that he is a board certified orthopedic surgeon specializing in the spine. PX9 at 4-6; PX9 (Dep. Ex. 1). He performs between 300 and 350 spinal surgeries a year and has been doing so for 10 years. PX9 at 8.

Dr. Templin explained that degenerative disc disease is the process by which the discs in the spine lose their ability to support weight and function. PX9 at 6. He agreed that this could be asymptomatic, but could be aggravated by a traumatic injury. *Id.*, at 7. He further explained that facet hypertrophy is a consequence of degenerative disc disease; as the discs degenerate, the facet joints must bear more of the weight of the body causing them to produce more bone and cause pain. *Id.*, at 7. Facet hypertrophy can likewise be asymptomatic, although it can also be aggravated by a traumatic injury. *Id.*, at 8.

Dr. Templin rendered treatment to Petitioner beginning on December 15, 2015. PX9 at 8-9. He initially diagnosed Petitioner with low back pain after a fall due to disc degeneration and facet hypertrophy. *Id.*, at 11. He recommended further work conditioning and a facet injection at L5-S1, and also removed Petitioner from work. *Id.*, at 11-12. Petitioner returned on January 26, 2016 and again Dr. Templin recommended the facet injection. *Id.*, at 12. Dr. Templin subsequently authored a narrative report at Petitioner's counsel's request. *Id.*, at 13. He was paid $800 for that report, and charged another $1,000 per hour for his deposition. *Id.*, at 13.

Dr. Templin reviewed all of Petitioner's relevant medical records in preparing his report; specifically, the records from Dr. Ramirez, Dr. Sharma, his physical therapy records, his diagnostic studies, and the IME prepared by Dr. Graf. PX9 at 14. Dr. Templin's diagnosis for Petitioner was lumbar degeneration disc disease and facet arthropathy with low back pain. *Id.*, at 16. He recommended further treatment in the form of facet injections and opined that Petitioner could perform his duties at work, but not while taking narcotic pain medication. *Id.*, at 16-17.

Dr. Templin opined that there was a causal connection between Petitioner's current condition of ill-being and his work accident. PX9 at 17. He explained that Petitioner had pre-existing degenerative changes in his spine that were aggravated by his work accident; Dr. Templin based this opinion in part on the fact that Petitioner had no pain complaints prior to his accident, and consistently had them for over a year afterwards. *Id.*, at 17-18. He disagreed with Dr. Graf's opinion that Petitioner suffered merely a back sprain in the work accident as it is unlikely that a sprain would still be symptomatic a year after the injury. *Id.*, at 19. Rather, it was likely the facet joints that were causing Petitioner's pain. *Id.*, at 19-20. To that end, Dr. Templin recommended the facet injections. *Id.*, at 19-20.

Dr. Templin briefly discussed Petitioner's hiatus from treatment while he was in Mexico. PX9 at 18-19. He agreed that if Petitioner performed his in-home exercises, the negative effect of his absence would be lessened. *Id.*, at 19.

Dr. Templin next saw Petitioner on April 4, 2016. PX9 at 20. By then Petitioner had the facet injection which helped him for about a week. *Id.*, at 20. Dr. Templin recommended continued treatment with Dr. Sharma. *Id.*, at 21. Dr. Templin saw Petitioner again on June 7, 2016, and again made the same recommendations. *Id.*, at 21. Petitioner returned on November 30, 2016 after a second MRI and an FCE. *Id.*, at 21-22. Dr. Templin released Petitioner to light duty work consistent with the restrictions contained in the FCE. *Id.*, at 22. He opined that these restrictions were permanent for Petitioner. *Id.*, at 23. He further opined that these restrictions would prevent Petitioner from returning to work according to Respondent's job description provided to Dr. Graf. *Id.*, at 23. He based this opinion in part on the fact that the FCE cleared him to lift 40 to 43 pounds, whereas the job description requires up to 55 pounds of lifting. *Id.*, at 24. Furthermore, the FCE restricted Petitioner to walking no more than 5-6 hours. *Id.*, at 24.

Dr. Templin again testified that, as of the time of his deposition, Petitioner's condition of ill-being was causally related to his work accident. PX9 at 26. He took issue with Dr. Graf's opinion that Petitioner would reach MMI one week after his examination. *Id.*, at 28. He described Dr. Graf's selection of the one week timeline as "arbitrary." *Id.*, at 28.

On cross-examination, Dr. Templin acknowledged that Petitioner did not exhibit any radiating pain or any radicular symptoms. PX9 at 30. He clarified that he based his diagnosis on the MRI, his physical examination, the x-rays, and Petitioner's subjective complaints. *Id.*, at 30. He clarified that he did review the films of the MRIs, and that there were no significant changes between the January 13, 2015 MRI and the later August 9, 2016 MRI. *Id.*, at 31. He admitted that there were no disc herniations or central canal or neural foraminal stenosis son the MRIs. *Id.*, at 31. He did indicate, however, that the MRIs showed facet arthropathy bilaterally, which is consistent with Petitioner's subjective complaints. *Id.*, at 39. He also agreed that Petitioner had a normal neurologic examination, but confirmed that a facet injection was appropriate given Petitioner's pain complaints and MRI findings. *Id.*, at 32-33. He acknowledged that Petitioner was not a surgical candidate. *Id.*, at 38-39.

Dr. Templin was also cross-examined regarding Dr. Ramirez's documentation that Petitioner had pain when lifting over 70 pounds. PX9 at 39. He explained that this was fairly consistent with the FCE that found petitioner had pain when lifting 67 pounds. *Id.*, at 39.

On re-direct, Dr. Templin clarified that facet hypertrophy can be present without radicular symptoms. PX9 at 40. Furthermore, the absence of central canal or neural foraminal stenosis is consistent with Petitioner's lack of radicular symptoms. *Id.*, at 40. Lastly, he explained that he would typically rely on a combination of FCE findings and a patient's complaints in order to delineate appropriate work restrictions. *Id.*, at 40-41.

Work Restrictions

Petitioner was removed from work beginning on December 8, 2014 by Dr. Ramirez. PX1. He was kept off work until November 7, 2016, at which time Dr. Sharma reviewed the October 28, 2016 FCE. PX5, PX4. At that time, Dr. Sharma released Petitioner to light duty consistent with the FCE. *Id.* Dr. Templin likewise confirmed those restrictions at his November 30, 2016 examination of Petitioner. PX6.

On cross-examination, Petitioner acknowledged that he reported a significant improvement in his back pain to Dr. Ramirez on June 12, 2015. Tr. at 65. However, he disputed Dr. Ramirez's note that indicated he only had pain when lifting over 70 pounds. Tr. at 65-66. Rather, he indicated that his pain was constant. Tr. at 65. He

explained that his physical therapists asked him to lift incrementally heavier weights starting at 40 pounds; he was able to lift as much as 70 pounds, but he was only able to do that once. Tr. at 65-66. He further clarified that he told Dr. Ramirez that his back pain was worse after lifting 70 pounds, not that it only hurt when lifting over 70 pounds. Tr. at 68. He still experienced pain when lifting less than 70 pounds. Tr. at 89-90.

Petitioner further acknowledged that he did request that Dr. Ramirez remove him from work and refer him to a pain management doctor and a back specialist, at the request of his attorney. Tr. at 71-72. His attorney recommended Dr. Sharma because he would perform the injection without authorization as it had not been approved for over a year. Tr. at 91-92. He was given a blank referral to a back specialist by Dr. Ramirez on November 2, 2015. PX1. He used that referral to see Dr. Templin. Tr. at 77. He initially saw Dr. Sharma without a referral. PX5. He agreed that both Dr. Templin and Dr. Sharma did not recommend surgery for him. Tr. at 82-83.

Petitioner testified that he did not return to work for Respondent while under medical treatment. Tr. at 57. Once he was released to light duty work by Dr. Sharma, Petitioner explained that he would have liked to return to work for Respondent in an accommodated position, but it was his understanding that he was terminated from his employment. Tr. at 57-59. Petitioner based that understanding on a letter he received from Respondent on or about January 29, 2016 wherein he was advised that the project to which he was assigned had been completed and that no other work was available for him. Tr. at 59, PX11. Petitioner has not worked for any employers since his accident on December 5, 2014. Tr. at 59.

Petitioner acknowledged on cross-examination that he was not performing a job search. Tr. at 84-85. He explained that he had gone to his union to seek an alternative placement, but was informed that they could not place him while he had work restrictions. Tr. at 86-87, 95. He has not received any disability benefits from his union. Tr. at 87. Petitioner testified that he did not seek alternate employment after he received the letter from Respondent. Tr. at 88. He also testified that he applied for work at one or two companies after he was released by Dr. Sharma on January 9, 2017, but he was unable to identify those prospective employers and he did not have copies of any job applications. Tr. at 84-85.

Additional Information

Petitioner testified that he did not have any medical conditions in his back prior to his December 5, 2014 work accident. Tr. at 59. He had never sought medical treatment for his back prior to his work accident, and his low back had never affected his ability to perform his job duties. Tr. at 59. He worked as a carpenter for approximately 15 years prior to his work accident without issue. Tr. at 60.

Petitioner currently complains of intractable low back pain. Tr. at 60. He avoids lifting, bending and sitting or walking for extended periods of time. Tr. at 60-61. These types of activities cause an aggravation of his low back pain. Tr. at 61. Petitioner testified that he has not been looking for alternative work because his restrictions prevent him from being able to work. Tr. at 61. He was informed by his union local that they could only assist him in finding work if he had no restrictions. Tr. at 86-87. Petitioner made it clear that he would be willing to work any type of job within his restrictions and that he would be open to learning a new vocation within his physical limitations. Tr. at 61-62.

Robert Seymour & Video Surveillance

Respondent called Robert Seymour, a private investigator, as a witness. Tr. at 105. He conducted surveillance of Petitioner on April 16, 2016. RX3B.

The footage begins at approximately 11:36am on April 16, 2016. RX3A. Petitioner makes his first appearance at 11:54am. RX3A. Petitioner is seen leaning against a wall behind a chain-link fence. *Id.* He stands there for approximately 1 minute. *Id.* The footage then skips ahead to 11:56am, where Petitioner can be seen walking back from a silver car and returning to his spot. *Id.* Petitioner proceeds to stand in that same position, periodically fidgeting, for approximately two minutes. *Id.* The footage again skips to 11:58am. *Id.* Petitioner is again depicted standing in the same position. *Id.* At 11:58:45, Petitioner is seen picking up a propane tank, carrying it approximately six steps, and placing it in the rear of a silver car. *Id.*, Tr. at 113. Petitioner then resumes his same standing position. *Id.* He proceeds to stand there again, periodically fidgeting, for approximately two more minutes. *Id.* At 12:00:52, Petitioner is seen lifting a larger propane tank with the help of his wife. *Id.*, Tr. at 109. They also place that in the trunk of the car, and Petitioner closes the trunk. *Id.* Petitioner then walks several steps off to the left of the screen but is lost behind some tree branches. *Id.* At about 12:03pm, Petitioner is seen driving the silver car away from the facility. *Id.* The footage then skips ahead to 12:52pm, where Petitioner is seen parking the silver car at his home. *Id.* Petitioner is not seen on the rest of the footage until 1:57pm, where he is again seen driving the silver car away from his home. *Id.* Thereafter, Petitioner is not seen again in the footage. *Id.*

Rebuttal Testimony

In rebuttal, Petitioner indicated that this video may depict a day when he and his wife went to refill propane tanks for use in household cooking. Tr. at 115. He explained that it was possible the tanks were empty because the facility declined to refill them due to the expiration. Tr. at 112-13. He acknowledged, however, that he did not remember whether the propane tanks were empty. Tr. at 112-13.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The parties' dispute centers on whether Petitioner's low back condition stems solely from degeneration or whether there is evidence that Petitioner's low back complaints extend beyond a low back strain as a result of the undisputed accident at work. In consideration of the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being in the lumbar spine is causally related to the injury sustained at work on December 5, 2014, which aggravated his pre-existing degenerative condition.

"It has long been recognized that, in pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accident aggravated or accelerated the preexisting disease such that the employee's current condition of ill being can be said to have been causally connected to the work-related injury

and not simply the result of a normal degenerative process." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 204-05 (2003). In cases where a claimant has a preexisting condition, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro*, 207 Ill. 2d at 205. An "employee need only prove that some act or phase of his employment was a causative factor of the resulting injury[.]" *Twice Over Clean, Inc. v. Indus. Comm'n*, 214 Ill.2d 403, 414 (2005); *see also Sisbro*, 207 Ill. 2d at 208 (*citing County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 17 (1977)).

In determining whether Petitioner's low back condition is causally related to his injury at work beyond a low back strain, several undisputed facts are relevant. Petitioner was 41 years old at the time of his accident. He fell from a height of approximately five feet when the scaffold on which he was working collapsed beneath him. Petitioner was holding various tools and heavy materials when he fell and landed straight down on his feet. He had no prior injury to his low back, no prior low back pain or associated symptoms, and no corollary medical treatment related to the low back before December 5, 2014. At the time of his accident, Petitioner had been a carpenter for approximately 18 years. His work as a carpenter is in the "heavy" physical demand category. Each physician providing medical treatment after December 5, 2014, as well as Respondent's Section 12 examiner, Dr. Graf, understood the same mechanism of injury and Petitioner's lack of symptoms before the accident.

Two physicians gave testimony regarding Petitioner's low back condition; Respondent's Section 12 examiner, Dr. Graf, and Petitioner's treating physician, Dr. Templin. Dr. Templin opined that Petitioner's pre-existing degenerative disc disease and facet hypertrophy was aggravated by the fall at work resulting in permanent restrictions and ongoing pain complaints. Petitioner's medical records from other treating physicians support Dr. Templin's conclusions. Petitioner had consistent complaints of low back pain beginning as early as three days after the accident on December 8, 2014, continuing through his last visit with Dr. Sharma on May 18, 2017. Petitioner's physicians repeatedly ordered steroid injections in the initial stages of treatment to alleviate his back pain, but those requests were repeatedly denied. Indeed, Petitioner did not begin to experience significant relief until after the first injection was performed by Dr. Sharma, without authorization, on March 8, 2016.

By contrast, Dr. Graf examined Petitioner on one occasion. He issued a report at Respondent's request pursuant to Section 12 of the Act in which he opined that Petitioner required no further treatment and that he sustained nothing more than a low back strain as a result of the accident. At his deposition, Dr. Graf steadfastly maintained that Petitioner only sustained a lumbar strain and that Petitioner's symptoms were wholly attributable to his pre-existing degenerative disc disease. However, Dr. Graf made various admissions that undermine the persuasiveness of his opinions. Dr. Graf admitted that Petitioner had no prior low back medical treatment. He admitted that Petitioner had no prior low back symptoms. He also admitted that the mechanism of injury reported to him, and reflected in the treatment records, were consistent. Moreover, Dr. Graf admitted that there were some records from Dr. Ramirez that he did not have at his disposal when rendering his opinions.

There is also a disagreement between the physicians regarding the negative impact, if any, during a six-week period in the summer of 2015. During this period, Petitioner cared for his father who was diagnosed with cancer and succumbed to the disease. Petitioner testified that he continued to perform home exercises, but also experienced low back pain. The proposition that this period somehow severs causal connection beyond a lumbar strain is unpersuasive. Dr. Templin noted that Petitioner continued his home exercises. He could not state that Petitioner's lack of formal physical therapy or conservative care administered by a physician negatively affected his overall condition. Moreover, there is no evidence of any intervening accident during this time or that Petitioner's condition changed after he returned to see his physician. There are also myriad

circumstances in which patients undergo active medical treatment and do not see a doctor or physical therapist on a daily basis. It is notable in this case that Respondent's workers' compensation insurance carrier denied Petitioner's requests for treatment modalities prior to and during the time that Petitioner tended to his father. To suggest that Petitioner was not undergoing active medical treatment when caring for his father is an inaccurate reflection of the circumstances of Petitioner's overall medical care.

Finally, there is video surveillance of Petitioner engaged in physical activities over a matter of several minutes. The footage shows Petitioner carrying propane tanks in his hands below waist level and lifting them with the assistance of his wife into the trunk of a car. Previously, Petitioner participated in a functional capacity evaluation, the results of which were valid. He was released back to work at the medium-to-heavy physical demand level. In light of the record as a whole, the video surveillance does not suggest that Petitioner's physical capabilities were beyond the restrictions indicated in the FCE.

Ultimately, there is no evidence that Petitioner had any complaints or medical treatment relative to the low back before his accident at work. He had no treatment to the low back or for associated symptoms before the accident. He was a young man of 41 at the time of his accident and he had been performing heavy work as a carpenter for 18 years at the time of his accident. Petitioner only became symptomatic immediately after his accident. His subjective complaints are correlated by contemporaneously documented physical examinations and diagnostic tests reflected in the records of Dr. Ramirez, Dr. Sharma, and Dr. Templin. Petitioner was a young, 41-year-old carpenter who fell from a height of five feet while holding heavy carpentry materials landing straight down on his feet with no prior symptomatology in the low back or related medical treatment. There is simply no evidence in the record that Petitioner's low back symptoms and its sequelae, which first manifested after falling from the scaffold, are due to anything other than the accident at work. Thus, the Arbitrator finds the opinions of Dr. Templin to be persuasive and adopts those opinions herein as they are supported by the medical evidence overall. The opinions of Dr. Graf are not persuasive in this case and the Arbitrator assigns them no weight.

In consideration of the totality of the record, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As explained more fully above, the Arbitrator finds that Petitioner's current condition of ill-being in the low back is causally related to his accident at work relying on Petitioner's testimony which is corroborated by the medical records as well as the opinions of his treating physician, Dr. Templin. The medical bills submitted into evidence that remain unpaid are for reasonable and necessary medical services rendered to Petitioner to address

his low back condition after his accident at work.

Additionally, Petitioner remained within the allotted chain of referrals for his choice of providers. He first sought treatment with his primary care physician, Dr. Ramirez. Dr. Ramirez referred him to physical therapy, which was performed at both Presence St. Joseph Medical Center as well as ATI Physical Therapy. Dr. Ramirez also ordered an MRI, which was performed at Molecular Imaging of Orland Park Advanced MRI. Later, Petitioner sought treatment with Dr. Sharma. Of note, although Dr. Ramirez repeatedly ordered pain management treatment, Petitioner was unable to see these providers because Respondent failed to authorize the treatment. Dr. Sharma recommended an FCE, which was performed at ATI. Dr. Ramirez also provided a general referral for Petitioner to see a back specialist. Petitioner selected Dr. Templin, an orthopedic surgeon. Petitioner did not seek treatment with any other providers.

Accordingly, the Arbitrator finds that the medical bills submitted into evidence by Petitioner that remain unpaid as reflected in Petitioner's Exhibits from Advantage MRI, ATI Physical Therapy, DOCRX, Inc., Hinsdale Orthopaedic Associates, Joliet Radiological, Metro Health Solution, Pain & Spine Institute, Presence St. Joseph, and Sanitas Medical Group are to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit, if any, as agreed by the parties pursuant to Section 8(j) for any payments made through the group insurance carrier. *See* AX1.

In support of the Arbitrator's decision relating to Issue (L), Petitioner's entitlement to temporary total disability and maintenance benefits, the Arbitrator finds the following:

Petitioner claims entitlement to temporary total disability benefits beginning December 8, 2014 through July 11, 2015 and from July 12, 2015 through January 8, 2017.

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

The record reflects that during the claimed period of temporary total disability Petitioner was either wholly unable to work or placed on light duty work restrictions by Dr. Ramirez, Dr. Sharma, and/or Dr. Templin because of his low back condition. Respondent did not accommodate any work restrictions and, as explained above, the Arbitrator finds the opinions of Dr. Templin regarding the causal connection of Petitioner's low back condition and accident at work to be persuasive. In light of the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits as claimed. Respondent shall receive a credit, if any, as agreed by the parties. *See* AX1.

Petitioner also claims entitlement to maintenance benefits after he was placed at maximum medical improvement by Dr. Sharma from January 9, 2017 through June 19, 2017. "Maintenance is awarded incidental to vocational rehabilitation." *Interstate Scaffolding v. Workers' Comp. Comm.*, 385 Ill.App.3d 1040, 1049, 896 N.E.2d 1132 (3rd Dist. 2008). A claimant need not participate in a prescribed rehabilitation program in order to

be entitled to maintenance benefits and he may engage in a self-directed job search. *Greaney v. Industrial Comm.*, 358 Ill.App.3d 1002, 1020, 832 N.E.2d 331, 348 (1st Dist. 2005); *Roper Contracting v. Industrial Comm.*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65 (2004) (while self-directed job searches are disfavored, there is no rule prohibiting a claimant from engaging in a self-directed job search).

There is little evidence that Petitioner engaged in any type of active job search or that he requested vocational rehabilitation during the claimed period. Indeed, Petitioner admitted that he did not perform a job search. He testified that he called his union and understood that they would not locate work for him with restrictions. He also testified that he contacted two unidentified employers for work the week prior to the hearing, which is the first time that he requested formal vocational rehabilitation assistance. Petitioner's efforts do not amount to the type of active self-directed job search or engagement in a prescribed vocational rehabilitation program such that the requested maintenance benefits may be awarded. Thus, the Arbitrator finds that Petitioner is not entitled to maintenance benefits as claimed and his claim for such benefits is denied.

In support of the Arbitrator's decision relating to Issue (O), Petitioner's entitlement to vocational rehabilitation, the Arbitrator finds the following:

Section 8(a) of the Illinois Workers' Compensation Act ("Act") states, in pertinent part, that "[v]ocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution." 820 ILCS 305/8(a) (LEXIS 2011).

Petitioner claims entitlement to vocational rehabilitation after he was placed at maximum medical improvement on January 9, 2017 by his treating physician, Dr. Sharma. The record reflects that while Petitioner underwent pain management care with Dr. Sharma, he was also under the care of Dr. Ramirez and Dr. Templin. Of note, in his report, Dr. Templin opined that, while Petitioner's functional capacity evaluation results reflect that he was able to perform the duties of his job, his continued prescription use of Tramadol makes it unsuitable for him to perform significant lifting or bending in a construction environment. At his deposition, Dr. Templin reiterated that Petitioner could return to work if he did not require Tramadol. Petitioner testified that he no longer takes Tramadol. Dr. Ramirez's records reflect a prescription for Tramadol as needed. Based on the foregoing, it would seem that Petitioner could return to work full duty.

However, Dr. Templin also testified about the physical limitations reflected in Petitioner's FCE results, which were valid, in light of Petitioner's duties at work. Dr. Templin opined that Petitioner's physical restrictions prevent him from returning to his prior occupation as a carpenter given the physical requirements of the job. Thus, the Arbitrator finds the opinions of Dr. Templin to be persuasive with regard to Petitioner's physical capabilities and permanent restrictions falling outside of the requirements of Petitioner's job duties.

Based on the totality of this record the Arbitrator finds that Petitioner is entitled to vocational rehabilitation services pursuant to Section 8(a) of the Act as claimed. Accordingly, the Arbitrator awards such services and orders Respondent to authorize an initial assessment pursuant to the Commission's Rules with Petitioner's choice of vocational counselor and authorize his or her recommended vocational rehabilitation program pursuant to Section 8(a) 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 PEORIA)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GEORGE COUTRE,

Petitioner,

vs. NO: 13 WC 37974

WESTERN ILLINOIS UNIVERSITY,

19IWCC0349

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 arising out of, causal connection, prospective medical, temporary total disability, and permanent partial disability, and being advised of the facts and applicable 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 September 13, 2018, is hereby affirmed and adopted.

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

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

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

DATED: JUL 12 2019

D Douglas McCarthy
Douglas McCarthy

DDM/tdm
O: 7/3/19
052

Stephen J. Mathis
Stephen Mathis

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywood 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. 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 holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L Elizabeth Coppoletti
L. Elizabeth Coppoletti

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

COUTRE', GEORGE
Employee/Petitioner

Case# **13WC037974**

WESTERN ILLINOIS UNIVERSITY
Employer/Respondent

19IWCC0349

On 9/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.26% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

SEP 13 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0349

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

George Coutre`
Employee/Petitioner

v.

Western Illinois University
Employer/Respondent

Case # 13 WC 37974

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 **Peoria**, on **August 15, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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, **May 2, 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$71,565.00**; the average weekly wage was **$1,343.62**.

On the date of accident, Petitioner was **55** 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 **$14,716.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$14,716.23.**

Respondent shall be given a credit of **$IF ANY** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall authorize further treatment for Petitioner's right knee, including but not limited to any and all examinations, diagnostic studies and arthroplasty as recommended by Dr. Phillips.

Respondent shall be given a credit of **$14,716.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$14,716.23.**

Respondent shall be given a credit of **$IF ANY** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) 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.

Melinda M. Rowe-Sullivan

Signature of Arbitrator

9/10/18

Date

IC ArbDec 19(b)

SEP 13 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

George R. Coutre`
Employee/Petitioner

Case # **13** WC **37974**

v.

Consolidated cases: **N/A**

Western Illinois University
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on May 2, 2011, he was employed as a carpenter by Respondent. He testified that on that date, he was exiting an elevator with a solid core door that was taller than the elevator opening and that in order to facilitate getting out of the elevator door, he had to lean the solid core door into himself. He testified that as he exited the elevator, the elevator had not come up to floor-level and that he caught his right foot on the difference, twisting and stumbling to keep his balance with the door. He testified that as he did this, he twisted his right knee.

Petitioner testified that he reported the accident to his foreman within a half hour because it was near lunchtime. He testified that he noticed a lot of pain on the inside portion of his right knee. The Arbitrator notes that the Supervisor's Report of Injury or Illness was admitted into evidence as part of Respondent's Exhibit 2. The report noted that the activity was within the course and scope of employment and assigned duties of Petitioner, that took it place on the 19th floor of Thompson Hall and that it took place at approximately 11:50 a.m. (RX2). The report was signed by a supervisor (*i.e.*, Eldon Morrison) and provided the following description of the accident: "When taking door off elevator – it was too tall so had to lean it down – shoe got caught in elevator threshold and twisted knee." (*Id.*).

Petitioner testified that he sought treatment from Dr. Mark Phillips, who had performed prior surgery on his right knee. He testified that Dr. Phillips had performed arthroscopic surgery on his right knee in approximately 2003. With regard to the subject injury, Petitioner testified that Dr. Phillips performed arthroscopic surgeries in both October of 2011 and April of 2012 on the right knee. He testified that he also provided post-surgical injections in August of 2012, November of 2012 and February of 2013. He testified that following the surgeries and injections, he continued to have weakness, recurring pain and a lack of stability. The Arbitrator notes that this aspect of Petitioner's treatment is not in dispute.

Petitioner testified that he eventually returned to work and that in May of 2013, he suffered an injury to his left knee. He testified that while ultimately undergoing a left total knee arthroplasty in February of 2016, the majority of his treatment between the second accident and the arthroplasty was with regard to his left knee. However, Petitioner also testified that his right knee symptoms never resolved during this time. He testified that while doing work hardening, he was carrying 25-pound weights and felt some severe pain in his right knee. He testified that his right knee gave out as he was walking with the weights. Petitioner reiterated, however, that the right knee pain had never completely resolved since the May 2, 2011 accident.

Petitioner testified that on August 24, 2016, he saw Dr. Phillips with complaints of continued pain, lack of stability and an overall feeling of weakness, which were the same problems he was having back in 2013. He testified that they were more intense at this time, and that Dr. Phillips recommended a referral to Dr. Mauer for knee replacement on the right knee. He testified that Dr. Mauer had performed the left knee replacement procedure. He testified that he continues to have considerable pain on the inside medial side of his right knee and that he has difficulty going up and down stairs, overall weakness and instability, in which his knee feels as if it is giving out. He testified that he has taken NSAIDs and Meloxicam for the problem, but has stopped the NSAIDs on the recommendation of his gastroenterologist. He testified that he still has current symptoms and is seeking a referral to Dr. Mauer for further evaluation and treatment of the right knee.

On cross examination Petitioner admitted that he has had four right knee surgeries. Petitioner admitted that the pain has gotten progressively worse over time. With regard to the accident, Petitioner testified he had been doing filler work, which included repairing doors in the dormitories. He testified that he would be on the elevators on a given day one or two times. He testified that he was familiar with the elevator, but did not recall the elevation difference ever happening before or ever tripping on it before. Petitioner described the elevation difference between the elevator and the floor as a "toe catcher, heel catcher, it was just a difference in elevation."

On cross examination, Petitioner testified that when he was receiving treatment for his left knee his right knee was still having pain, but that the left knee was severe and a priority at that time. He testified that he was favoring his left knee after the left knee injury. He testified that he felt that it exacerbated some of the problems he was having with the right knee.

The transcript of the deposition of Dr. Mark Phillips (with accompanying Exhibits 1 through 5) was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Phillips testified that he is board-certified in orthopedics and that he is a fellowship-trained sports medicine subspecialist. (PX1).

Dr. Phillips testified that he provided care and treatment of Petitioner and that he had known him for some time. He testified that he saw Petitioner on May 18, 2011 and that he had previously provided surgical intervention in 2003 for the right knee, which consisted of a right knee arthroscopy with a partial medial and lateral meniscectomy, plica excision and articular cartilage debridement. He testified that back in 2003, Petitioner was relatively unremarkable from a post-operative standpoint and that he progressed through physical therapy strengthening and returned to his pre-injury level without event. (PX1).

Dr. Phillips testified that when he saw Petitioner on May 18, 2011, he stated that he was injured while at work on May 3, 2011, that he was moving doors off an elevator, that he caught his foot as the elevator floor was slightly lower than the existing floor and that he twisted his knee and had significant pain when he started to walk after the incident. He testified that on physical examination Petitioner had exquisite joint line tenderness on both direct palpation and rotation with rotation and flexion maneuvers and that he ordered plain x-rays, which showed well-preserved joint spaces without any narrowing on standing flexion. He testified that his working diagnosis was that of a strong suspicion of a meniscus and chondral pathology. He testified that he added an anti-inflammatory and ordered an MRI, which showed old and new change with most likely new meniscus pathology. He testified that he recommended a repeat arthroscopy of the knee, which was performed on October 7, 2011. (PX1).

Dr. Phillips testified that after the October 2011 surgery, Petitioner had a longer recovery on this knee surgery than he had his first with non-specific issues in regard to therapy, soft tissue swelling and following a little bit longer through the four-month post-operative period. He testified that Petitioner still had some symptomatology of an inflammatory nature, so he gave him a Cortisone injection. He testified

that Petitioner still had some swelling and reactions, and that in March of 2012 he suggested a repeat MRI which was performed on March 21, 2012. He testified that the MRI showed new on old changes in the posterior third of the medial meniscus and some articular cartilage defects which appeared to potentially worsen over that time period, and that he felt it was related to the original surgery injury which started the cascade of problems. (PX1).

Dr. Phillips testified that following the MRI review he recommended another arthroscopic procedure, which took place on April 16, 2012. He testified that Petitioner again had follow-up in regard to therapy, rest, strength, anti-inflammatories and injections all the way up through approximately February 5, 2013. He testified that at that visit, Petitioner was asked to return as needed for the right knee, and that any further injections were deferred. (PX1).

Dr. Phillips testified that he next saw Petitioner following a left total knee by Dr. Mauer and that it was in 2016 and that he would have also seen him in follow-up of his contralateral left knee before Dr. Mauer took over his treatment as well. He testified that he saw Petitioner on August 24, 2016 for review and evaluation of persistent and progressive right knee pain. He testified that Petitioner stated that he had reaggravated and injured his knee during a work hardening and functional capacity-type evaluation for both the right and left knees, and that he stated that he felt a sharp pain immediately with walking with 25-pound weight and that his knee gave way doing stairs in mid-July with some increased swelling. He testified that Petitioner was post total left knee arthroplasty. He testified that x-rays revealed bone-on-bone medial compartment changes with lesser patellofemoral or kneecap femur changes, which was different from what had been seen in 2011 and 2012. He testified that this was a degenerative issue. He testified that the diagnosis was bone-on-bone primary osteoarthritis with subsequent sequelae of previous injuries and arthroscopic interventions. He testified that the progression of arthroscopic intervention and debridement could be progressive arthritic deterioration and changes. He testified that the prior surgical interventions in 2003, 2011 and 2012 contributed in a major way to the etiology of progression. (PX1).

Dr. Phillips testified that given Petitioner's well-being on the other side and the fact that he did not specialize in joint replacements, he re-referred Petitioner to Dr. Mauer for further consideration of the same on his right knee. He testified that he opined that the joint arthroplasty in the right knee was reasonable and necessary treatment. He testified that he has seen Petitioner for the right knee since August 24th only from the indirect standpoint of taking care of another body part, which was that of the right shoulder. (PX1).

On cross examination, Dr. Phillips testified that his first episode intervention with Petitioner was on August 30, 2001 in regard to an office referral from Dr. Rians in regard to a left knee injury. He testified that he saw Petitioner in September of 2001 with an MRI result and proceeded with a diagnosis and treatment plan of mechanical knee pain, and that Petitioner underwent a left knee arthroscopy in October of 2001. He testified that he last saw Petitioner for the right knee in August of 2016 and that he referred him to Dr. Mauer for the right knee. He testified that at that time, he felt that Petitioner had progressive right knee issues and that no further arthroscopic intervention was indicated given his bone-on-bone arthritic progressive changes and that Petitioner's surgical decisions at that point would be left to consideration of joint arthroplasty versus no surgical intervention. (PX1).

On cross examination, Dr. Phillips agreed that bone-on-bone was a change from prior imaging and testified that it was a progressive change over Petitioner's treatment course. He testified that it was his belief that the bone-on-bone condition was progressive and that the workplace incident was a significant component of its progression. He testified that the articular cartilage integrity was changed during each of the debridements and that the surgical sequelae of the arthroscopic surgeries led to arthritic changes and progressions. He testified that absent the need for arthroscopic intervention, the arthritic changes would have been much less likely to have been present and progress over the period of time. (PX1).

On cross examination, Dr. Phillips agreed that he testified that in 2003 Petitioner had a right knee surgery but had returned to his pre-injury status. He testified that Petitioner was fortunate that over the initial many year period after the 2003 surgery not to be symptomatic or re-injured during that period of time. He testified that Petitioner reinjured the knee in the 2011 timeframe necessitating two subsequent surgeries over a six-month period which "really threw him under the bus" in regard to further meniscectomies and articular cartilage progression. (PX1).

On cross examination, Dr. Phillips testified that he was not familiar with the condition of Petitioner's back that the September 27, 2016 note of Dr. Mauer was describing. When asked if he knew that the back pain was degenerative in nature or if it was acute, Dr. Phillips responded that he did not know anything about it. (PX1).

On cross examination, Dr. Phillips testified that he could not state whether Petitioner was at maximum medical improvement for the right knee because he had not seen him since August of 2016. He testified that this would be a question better suited for Dr. Mauer or whoever had seen Petitioner more recently. He testified that as he left him, maximum medical improvement was moot until Petitioner was treated with consideration of joint arthroplasty. He agreed that if Petitioner did not want to have the surgery, he would be at maximum medical improvement. (PX1).

On cross examination, Dr. Phillips agreed that Petitioner had had four prior surgeries on the right knee. He testified that he would disagree with the IME doctor's characterization of the right knee injury as a temporary aggravation of a pre-existing condition. He testified that the first surgery was prior to his intervention and that the three that he treated Petitioner for were related to specific work injuries and aggravations thereof, so it was a component of Petitioner's progressive degenerative state. He testified that these were no temporary aggravations because of the progression of the disease that Petitioner had shown over the last 16 years. (PX1).

On cross examination, Dr. Phillips testified that he did not know whether Petitioner was at maximum medical improvement for the left knee because he had not seen him since his knee had been replaced. When asked if he would have an opinion as to what Petitioner's restrictions were as to the left knee, Dr. Phillips responded that he would defer to his partner that had operated on him. He testified that after the surgical intervention, Petitioner's restrictions would be significantly lessened or improved from a functional standpoint but that he would still have some permanent restrictions. He testified that aggressive weightbearing activities needed to be considered and restricted, that running, jumping, twisting and turning activities would be limited and that one would want to preserve the joint arthroplasty for the longevity of the lifespan. He testified that every patient having the procedure would have permanent restrictions and that it was the gold standard. He testified that from where he left Petitioner, he would be significantly limited to a pain-free level of activity which in his past had proven was relatively light duty and low demands. He testified that the fact that Petitioner had had a left knee joint replacement also came into play. (PX1).

As to the exhibits to the transcript of Dr. Phillips' deposition, the medical records of Great Plains Orthopedics were attached to the transcript as Exhibit 2. The records reflect that Petitioner was seen on February 8, 2012, at which time it was noted that he had slight to moderate return of symptomatology. It was noted that Petitioner had restarted his anti-inflammatory which had been helpful, and that he had mild capsular swelling and non-specific findings. It was noted that Dr. Phillips suggested an injection of Depo-Medrol to help an anti-inflammatory aid and to continue Mobic and activity modification. It was noted that Petitioner had little articular surface damage but that it was what was clinically present in his return of symptoms. An injection was performed on that date. At the time of the October 19, 2011 visit, it was noted that Petitioner was doing well with no calf pain. It was noted that Petitioner was traveling to Hawaii in a few weeks and was to wear his TED hose. Petitioner was given a prescription for therapy in the Macomb area. At the time of the June 29, 2011 visit, it was noted that the MRI results revealed old and new changes

with most likely new meniscus pathology given clinical presentation. It was noted that Petitioner was a candidate for arthroscopic intervention, partial meniscectomy and articular cartilage debridement. It was noted that Dr. Phillips felt that it was work-related and that Petitioner would consider his options and call back in regard to scheduling. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on May 18, 2011, at which time it was noted that he was known from the past from previous surgery in 2003. It was noted that Petitioner had been doing fine and had no issues whatsoever, and that he was injured at work approximately two weeks ago on May 3, 2011. It was noted that Petitioner was moving doors off the elevator when he caught his foot and had a significant twisting rotation injury, and that he had had immediate sharp pain. It was noted that Petitioner presented with medial tenderness, some swelling and rotational localizations. It was noted that x-rays of the right knee were well-preserved without any joint space narrowing with standing flexion and comparison views of the unaffected left side. It was noted that there was a strong suspicion of meniscus and chondral pathology that was progressive and new from previous findings. It was noted that Mobic was to be added and that Petitioner was to undergo an MRI. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on September 25, 2013, at which time it was noted that he complained of left knee discomfort. It was noted that Petitioner had been working without restrictions at first and that he had had aggravation and return of retrospective inflammatory-type concerns. The diagnosis was noted to be that of aggravation of underlying imperfections, osteoarthritic-type concerns over the medial compartment; no clinical evidence of newer injury. It was noted that Dr. Phillips had suggested an injection of Depo-Medrol, work restrictions and follow-up in two months. It was noted that Petitioner needed the difficult task of appropriate job matching and that he informed Dr. Phillips that he was being scheduled for an IME. It was noted that Dr. Phillips encouraged this and also encouraged an FCE at some point and appropriate job matching. It was noted that it was becoming apparent that Petitioner was going to have a hard time with unrestricted activities, given his underlying conditions of left and right knees. At the time of the August 20, 2013 visit, it was noted that Petitioner was proceeding as would be expected and that he was doing well in therapy. It was noted that Dr. Phillips anticipated Petitioner going back to work in an unrestricted sense after the Labor Day holiday and to return in six weeks. At the time of the July 17, 2013 visit, it was noted that Petitioner had some soreness but no specific swelling and no calf pain. It was noted that DVT issues were discussed and that he was to proceed with continued care. It was noted that Petitioner was off work for a month and was to be reevaluated at that time. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on June 11, 2013, at which time it was noted that he was known from the past, now with left knee concerns, a work-related injury with twisting and turning events. It was noted that Petitioner had exquisite joint line tenderness and rotation of localizations in the absence of instability. It was noted that Petitioner's MRI was consistent with a complex medial meniscus tear, Grade I sprain and an incidental medial popliteal cyst. It was noted that Petitioner had plica and clinical symptoms consistent with meniscal pathology, work-related. It was noted that Petitioner was a candidate for outpatient arthroscopic intervention with expected partial medial and/or lateral meniscectomies, articular cartilage debridement and excision of plica. It was noted that Petitioner would proceed with appropriate scheduling and that he was off work pending his surgery. The records reflect that x-rays performed on June 5, 2013 were interpreted by Dr. Phillips as showing some limited left knee medial joint space narrowing as compared to the right, otherwise no acute bony defects; non-specific other findings without abnormality. At the time of the June 5, 2013 visit, it was noted that Petitioner was complaining of left knee pain and swelling. It was noted that Petitioner stated that the pain started on May 15th when he was laying tiles down on the floor and that when he was kneeling down, he felt a sharp pain in his left knee. It was noted that the next day when repairing a fence on a steep hillside, Petitioner walked down the hill to get a tool and felt a sharp pain in his left knee. It was noted that Petitioner had had progressively worsening pain since then, along with swelling. It was noted that the MRI report referenced

a complex tear of the posterior horn and body of the medial meniscus and a Grade I MCL sprain, along with a medial popliteal cyst. It was noted that Petitioner had had a right knee arthroscopy in 2012 and had received cortisone injections in the right knee since that time, that he had done well with them and that he was currently off work due to this injury. It was noted that the impression was that of left knee medial meniscus tear, MCL strain and medial compartment degenerative joint disease. Petitioner was recommended to undergo a left knee arthroscopy. It was noted that Petitioner had had the right knee scoped in the past and had done very well. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on February 5, 2013, at which time it was noted that he was 13 weeks since his right knee injection. It was noted that Petitioner was doing well and that there was trace effusion and good range of motion. It was noted that Petitioner was doing fairly well with deferred injections at that point. Petitioner was recommended to continue Mobic and it was noted that Dr. Phillips would defer long term use, follow-up and prescriptions to his private medical doctor. It was noted that Petitioner was to be reevaluated on an as needed basis. At the time of the November 6, 2012 visit, it was noted that Petitioner was 13 weeks since the right knee injection for osteoarthritic complaints. It was noted that Petitioner had good days and bad days and that he wished a further injection. It was noted that Petitioner was given a Depo-Medrol injection on that date and was instructed to continue Mobic. Petitioner was recommended to follow-up in three months. At the time of the August 7, 2012 visit, it was noted that Petitioner had trace effusion and a Baker cyst, but otherwise was doing fairly well. It was noted that the natural history was reiterated and that Petitioner was recommended to continue Mobic, activity matching and more icing. Petitioner was given a Depo-Medrol injection on that date and was recommended to be reevaluated in three months. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on May 23, 2012, at which time it was noted that he was doing quite well overall and had mild stiffness. It was noted that Dr. Phillips would allow Petitioner to return to reasonable activities without restriction after the holiday and that the natural history was discussed. Petitioner was recommended to be reevaluated in one month or as needed. At the time of the April 24, 2012 visit, it was noted that Petitioner was doing well and had no calf pain at that point. It was noted that Petitioner had had a previous Doppler which was negative and that DVT issues were discussed. It was noted that Petitioner was off until right before the Memorial Day holiday and that he would be seen then and potentially returned to work. It was noted that Petitioner was to proceed with rehabilitation in Macomb. At the time of the March 21, 2012 visit, it was noted that Petitioner maintained Baker cyst discomfort and medial compartment issues. It was noted that Petitioner's MRI was consistent with new on old changes of his posterior third medial meniscus and articular cartilage defects, and that he was a candidate for further arthroscopic intervention and further partial medial meniscectomy and articular cartilage debridement. It was noted that Dr. Phillips thought that it was related to the original surgery in regard to Petitioner's progression and therefore he could correlate it with causal relationship with his previous work-related condition. It was noted that Petitioner was to be kept off work pending surgical approval. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on March 7, 2012, at which time it was noted that he returned four weeks since his right knee injection. It was noted that Petitioner subjectively thought that the injection made him worse and that he complained of swelling and tightness. It was noted that Petitioner had been quite active but that he could not explain from that alone why he would return with a moderate effusion. It was noted that there was no evidence of infection and that he had some soreness on flexion. It was noted that standing comparison x-rays revealed well-preserved joint spaces without joint space collapse or chondral defects by radiographic weight-bearing and comparison views. It was noted that Dr. Phillips recommended a repeat MRI and that Petitioner be taken of work. It was noted that Petitioner stated specifically that he was all or none-type work status and that he could not continue to proceed with this as one of the variables of potential progression of work-related pathology. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that on July 8, 2013, Petitioner underwent (1) arthroscopy of left knee with partial medial and lateral meniscectomies; (2) excision of fibrotic patellar plica; (3) articular cartilage debridement, medial compartment; (4) right knee injection for pre- and post-operative diagnoses of (1) left knee internal derangement, meniscus, plica and chondral pathology; (2) degenerative joint disease of the right knee. The records reflect that on October 7, 2011, Petitioner underwent (1) arthroscopy of the right knee with partial medial and lateral meniscectomies; (2) tricompartmental articular cartilage debridement for a pre-operative diagnosis of right knee internal derangement, meniscus and chondral pathology and a post-operative diagnosis of same, with medial and lateral meniscal tears, old/new, with tricompartmental articular surface defects. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner underwent an MRI of the right knee on March 9, 2012 at McDonough District Hospital, which was interpreted as revealing (1) partial medial meniscectomy changes are present associated with a complex degenerative tear predominantly involving the remaining portions of the posterior horn of the medial meniscus; the lateral meniscus remains intact; there is mild blunting of the body of the free edge of the body of the lateral meniscus; (2) diffuse cartilage thinning of the weighbearing surface of the medial femoral condyle associated with patchy bone marrow edema, predominantly involving the posterior medial aspect of the medial femoral condyle; this bone marrow edema is likely degenerative in nature; (3) intact cruciate and collateral ligaments; (4) mild focal chondromalacia involving the lateral facet of the patella; (5) moderate sized joint effusion; (6) prominent Baker's cyst; (7) mild to moderate medial compartment osteoarthritis. The records further reflect that Petitioner underwent an MRI of the right knee on June 8, 2011 at McDonough District Hospital, which was interpreted as revealing (1) medial meniscus tear; mild medial tibiofemoral compartment cartilage thinning; MCL sprain; (2) small ganglion cyst posterior to the medial femoral condyle; (3) mild cartilage thinning and subchondral edema in the lateral patella and in the lateral tibial plateau; (4) deep infrapatellar bursitis. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner completed a Workers' Compensation Orthopedic Questionnaire on May 25, 2011, at which time he noted that the part of the body injured was that of the right knee. It was noted that on May 3, 2011, Petitioner was moving solid core doors out of an elevator, that the elevator floor was slightly lower than the main floor and that he caught his heel on the edge. It was noted that the door weight caused Petitioner to catch himself from falling and that he twisted his knee. It was noted that Petitioner had consistent pain on the inside of his right knee, that sometimes it was dull and other times it was acute, that there was some popping and that it was mainly painful to walk downhill and down stairs, although going up hurt also. Included within the records of Great Plains Orthopedics was a note dated September 27, 2016 of Dr. Mauer, who noted that Petitioner had done his left total knee in February then struggled if he tried to do some kneeling and squatting. It was noted that Petitioner had some other significant complaints which were bothering him, including significant sciatica issues and some issues with his right knee. It was noted that Petitioner's left knee was settled down and that from the left knee standpoint he could probably return to work in a limited fashion. It was noted that Petitioner had some issues as to his right knee and his back, which were limiting him in what he could do. It was noted that Petitioner had recently seen a chiropractor for his back pain and that he stated that he had not paid much attention to his knee pain due to all his other pains. It was noted that Dr. Mauer thought that Petitioner was not going to be able to kneel or squat and that it was his opinion that these were going to be permanent restrictions. Petitioner was to return in February for a one-year check or earlier if he had trouble. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on August 11, 2016, at which time it was noted that he was six months post left total knee and that he had had an FCE which showed that he could kneel, but that he was struggling a bit to do so. It was noted that Petitioner reported that the knee was doing reasonably well but was quite stiff, that it was tight and hurt him to kneel on it and

that now his right knee was giving him some issues. It was noted that Dr. Mauer thought mechanically Petitioner's left knee was doing well, but that he thought there was overload of his extensor and his iliotibial band. It was noted that they were going to start some therapy with some modalities and stretching. It was noted that the FCE said that Petitioner would return to work with padding and that Dr. Mauer was somewhat doubtful of that and that in his experience, people with total knee arthroplasty frequently struggled to do very much kneeling or squatting work especially over extended periods of time but that he thought Petitioner could be fully active on his feet but that kneeling and squatting may well always be limited. It was noted that Dr. Mauer thought that the combination of doing some more kneeling and squatting and that the right knee was bothering the left quite a bit and that they needed to get the left knee settled down. At the time of the August 24, 2016 visit with Dr. Phillips, it was noted that Petitioner was there for review and evaluation of persistent progressive right knee pain. It was noted that Dr. Phillips had worked with Petitioner in the past and that he had had some progressive osteoarthritic changes. It was noted that Petitioner most recently re-aggravated and injured his knee further during work hardening and an FCE-type evaluation for both the right and left knees. It was noted that Petitioner felt a sharp pain immediately with walking with 25-pound weights, that he gave away doing stairs in mid-July and that he had had some increased swelling. It was noted that Petitioner was status post left total knee arthroplasty on the left in February. It was noted that Petitioner had an antalgic gait favoring his right knee, that he had a mild effusion and that he had exquisite joint line tenderness medially in a capsular standpoint. It was noted that x-rays taken on that date in the standing position revealed bone-on-bone medial compartment changes with lesser patellofemoral, but present arthritic changes there as well. It was noted that the diagnosis was that of bone-on-bone primary osteoarthritis, subsequent sequelae of previous injuries and arthroscopic interventions. It was noted that Petitioner would be followed and treated symptomatically. Petitioner was referred to Dr. Mauer for future consideration of joint arthroplasty measures and that no other expected arthroscopic surgery would be indicated. It was noted that Dr. Phillips "strongly" supported the evidence that this was a progressive work-related condition. (PX1, Deposition Exhibit 2).

The records of Great Plains Orthopedics reflect that Petitioner was seen on August 31, 2016 by Dr. Phillips, at which time it was noted that he was there for a right shoulder evaluation. It was noted that Petitioner had a history of injury in 2016 and that while doing therapy for his left knee, he was doing a significant weight workout with overhead activity and noted significant discomfort in his right shoulder. It was noted that the diagnosis was that of impingement bursitis. Petitioner was recommended to undergo a subacromial injection, physical therapy and observation with reserve for MRI in the future. At the time of the July 1, 2016 visit with Dr. Mauer, it was noted that Petitioner was 20 weeks post left total knee arthroplasty and was doing work hardening, that it went well with regard to the left knee, that his right knee did not hold up quite so well and that he injured his right shoulder. It was noted that Petitioner's knee was doing well, that he had done work hardening and that the next step was an FCE. It was noted that Dr. Mauer thought that there were a couple of complicating factors including the right knee, that the right knee was known to be arthritic and "perhaps is a Workers' Compensation case" and that Petitioner had some issues to the right shoulder as well. It was noted that Petitioner was to be off work until his FCE was complete. (PX1, Deposition Exhibit 2).

As to the exhibits to the transcript of Dr. Phillips' deposition, the medical records of OSF Orthopedics were attached to the transcript as Exhibit 3. The records reflect that Petitioner was seen on September 27, 2016, at which time it was noted that he was status post left total knee arthroplasty. It was noted that Petitioner's left knee had settled down quite a bit, that it was still a little bit tight which Dr. Mauer thought was probably normal and that otherwise the knee was doing pretty well. it was noted that Petitioner had some other significant complaints which were bothering him, including some significant sciatica issues and some issues with his right knee. It was noted that from the left knee standpoint Petitioner would return to work in limited fashion and that he had some issues with regards to the right knee and the back which were really limiting him in what he could do. It was noted that Petitioner's restrictions were permanent. (PX1, Deposition Exhibit 3).

As to the exhibits to the transcript of Dr. Phillips' deposition, the narrative report of Dr. Phillips dated December 2, 2016 was attached to the transcript as Exhibit 5. The report reflects that it was Dr. Phillips' opinion that the injury sustained on May 2, 2011 significantly contributed to the progressive condition and Petitioner's right knee needing care as dictated in 2011 and 2012, and now future care in regard to its contribution to progressive degenerative arthritic and articular surface changes. (PX1).

The transcript of the deposition of Dr. Tomas Nemickas and IME Reports dated June 5, 2017, December 7, 2015 and November 11, 2013 were entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Nemickas testified that he is a board-certified orthopedic surgeon and that he carries an additional certificate of added qualification in sports medicine. He testified that 95% of his practice is devoted to treating patients with injuries and that less than 5% of his practice is devoted to IMEs. (RX1).

Dr. Nemickas testified that he performed three IMEs of Petitioner on June 5, 2017, December 7, 2015 and November 5, 2013. He testified that as to the June 5, 2017 IME, his recollection was that at the time of the initial IME Petitioner reported a date of accident of May 15, 2013 in which he had been kneeling and squatting and felt a pulling sensation in the medial and back side of the knee, that he had confirmed that he had had a prior arthroscopy and meniscectomy in the left knee in 1998 and that he reportedly was also undergoing treatment for his right knee as he had received an injection on February 5, 2013 by Dr. Phillips. He testified that the MRI of the left knee confirmed the presence of a complex tear of the medial meniscus with a loculated medial popliteal cyst and that on July 8, 2013 his left knee underwent an arthroscopy at which time he was noted to have the need for partial medial and lateral meniscectomies as well as a peripatellar plica and that he required debridement of the articular cartilage in the medial compartment. He testified that Petitioner continued to have left knee symptoms and that at the time of the December 7, 2015 IME, he had been undergoing ongoing treatment of the left knee including viscosupplementation with Euflexxa. He testified that Petitioner continued to have reported good and bad days but was progressively worsening, and that x-rays obtained on April 30, 2015 confirmed that Petitioner had osteoarthritic change in the left knee that had progressed to bone-on-bone arthritis and was recommended to undergo a total knee arthroplasty. He testified that in the interim, Petitioner recovered from his left total knee replacement and continued to have ongoing symptomatology related to his right knee and that series x-rays demonstrated progressive right knee osteoarthritic change that ultimately manifested in a recommendation to consider treatment with a total knee arthroplasty. He testified that due to Petitioner's prior history preceding his left knee injury and the ongoing treatment that he had received throughout the course in time of treatment, the evaluation confirmed the presence of end-stage varus gonarthrosis of Petitioner's right knee but that it was felt that the symptomatology that he had manifested and developed were the result of preexisting degenerative condition manifesting symptoms during the course of normal exertive activity. (RX1).

Dr. Nemickas testified that his diagnosis as to the right knee was that of status post four prior arthroscopies with progressive varus gonarthrosis, which was progressive degenerative arthritis predominantly in the medial/inside compartment of the knee. He testified that the diagnosis was not related to the alleged work injury for Petitioner's right knee and that the conclusion was based upon the records available for review which included antecedent treatment with injections of corticosteroid prior to any injury to the knee suggesting ongoing symptomatology and intervention which would be anticipated for a degenerative condition following his four prior knee arthroscopies. He testified that regardless of causation, he believed that Petitioner required a total knee arthroplasty for the right knee, but that he did not believe there was a work-related injury to the right knee. He testified that from a work injury standpoint, Petitioner would be released to return to work unrestricted although he did have an arthritic right knee which was not work-related and may require accommodations for the right knee, but would not be related to any work injury. He testified that as he did not feel that there was an alleged work-related injury for the right knee, he would not place a maximum medical improvement and that Petitioner had ongoing symptoms which

were felt to be related to the underlying degenerative condition manifesting those symptoms during the course of normal exertive activities. (RX1).

When asked whether he believed that Petitioner's current condition in the right knee was a natural progression of a partial meniscectomy and articular debridement that brought along the progressive arthritic deterioration and changes, Dr. Nemickas responded that it was his understanding that Petitioner had undergone four prior arthroscopies and that it was an established, accepted orthopedic fact that arthroscopy and partial meniscectomy put individuals at increased risk for progressive arthrosis. He testified that with four prior surgeries and four prior partial meniscectomies and/or condyle debridements, the natural course would be that the knee would proceed along a degenerative path as it had. (RX1).

On cross examination, Dr. Nemickas agreed that he believed that Petitioner's prior surgical intervention on the right knee contributed to the degenerative process that had led to the need for right knee arthroplasty and further testified that it was based upon the four prior arthroscopies as well as evidence of preexisting treatment to the right knee in which he was symptomalogic as he was requiring interarticular corticoid steroid injections as noted in the records review. When asked if the accident was the accident of May 15, 2013, Dr. Nemickas responded that the initial reported accident to the left knee was May 15, 2013. When asked if he had the information available to him as to the May 2, 2011 accident, Dr. Nemickas responded that he did not believe that he had seen any records prior to February 5, 2013. (RX1).

On cross examination, Dr. Nemickas testified that it was reasonable for Petitioner's treating surgeon to place some restrictions on the left knee. He testified that often it was customary that following a total knee replacement, the potential existed depending upon the result relative to residual discomfort that there may be restrictions to kneeling and, depending on the range of motion, to squatting. As to the right knee when asked if Petitioner did not have the total right knee arthroplasty and what restrictions or limitations he would expect, Dr. Nemickas responded that there was not a formal restriction *per se* relative to an arthritic knee as it was a degenerative condition and that one was allowed to do activity as one could tolerate. He agreed that the primary reason for a knee replacement was to address pain. He further agreed that he opined that Petitioner may have aggravated an underlying condition in the right knee given increased stress while favoring the left knee. (RX1).

The Work Comp Packet was entered into evidence at the time of arbitration as Respondent's Exhibit 2.

CONCLUSIONS OF LAW

With respect to disputed issue (C) pertaining to accident, the Arbitrator finds that Petitioner has met his burden of proving that he sustained an accident arising out of and in the course of his employment with Respondent on May 2, 2011.

Petitioner testified that on May 2, 2011, he was moving a solid core door off an elevator in a dormitory at Western Illinois University. Petitioner testified that the door was taller than the opening, that he had to lean it back to get it out of the elevator and that the elevator stopped at a slightly different elevation than the floor. Petitioner testified that he caught his heel and twisted his right knee. The Arbitrator notes that the accident report submitted by Respondent confirmed Petitioner's version of the accident, and that the medical records confirm this version of the incident as well. The Arbitrator notes that Petitioner was performing activities related to his employment at the time of the accident, and moreover, it is unrefuted the elevator stopped slightly below the level of the floor, thereby creating a defect which caused Petitioner to have the twisting-type injury. Based upon Petitioner's testimony, the medical evidence admitted into evidence which provides consistent histories of accident and the report of injury forms that were admitted

into evidence by Respondent, the Arbitrator finds that Petitioner has met his burden of proving that he sustained an accident arising out of and in the course of his employment with Respondent on May 2, 2011.

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of May 2, 2011.

At the outset, the Arbitrator notes that Petitioner's treating physician, Dr. Phillips, throughout his records, his written reports and in his testimony has indicated that the number of surgeries that Petitioner has undergone on his right knee has resulted in an acceleration of a degenerative condition that would not normally be present or, moreover, would be less likely to be present, absent such surgeries. Dr. Phillips consistently indicated throughout his records and through his testimony his reasons for opining that the accident at issue was a causal factor in the degenerative condition in Petitioner's right knee. (PX1). Not only is this opinion unrefuted, but it is actually supported by the testimony of Dr. Nemickas, Respondent's Section 12 physician, in this matter.

The Arbitrator notes that Dr. Phillips opined that the number of arthroscopic interventions - including two which arose out of the injuries sustained in this accident of May 2, 2011 -- significantly contributed to the progressive condition and Petitioner's right knee needing care. (PX1). The Arbitrator further notes that when asked whether he believed that Petitioner's current condition in the right knee was a natural progression of a partial meniscectomy and articular debridement that brought along the progressive arthritic deterioration and changes, Dr. Nemickas responded that it was his understanding that Petitioner had undergone four prior arthroscopies and that it was an established, accepted orthopedic fact that arthroscopy and partial meniscectomy put individuals at increased risk for progressive arthrosis. (RX1). Dr. Nemickas testified that with four prior surgeries and four prior partial meniscectomies and/or condyle debridements, the natural course would be that the knee would proceed along a degenerative path as it had. (*Id.*).

Having considered and reviewed the entirety of the medical evidence in this matter, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of May 2, 2011.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issue of causation, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Phillips, including, but not limited to, any and all examinations, diagnostic studies and arthroplasty.

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.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTINE CHERRY,

Petitioner,

vs.

NO: 05 WC 41250
13 WC 7224

M & M MARS,

Respondent.

19IWCC0350

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 reinstatement and being advised of the facts and applicable law, hereby reverses and vacates the Arbitrator's denial of Petitioner's Petition to Reinstate; the Commission reinstates and remands this claim back to the Arbitrator for further proceedings.

On a Petition to Reinstate, the burden is on the claimant to allege and prove facts justifying the relief sought. *Banks v. Indus. Comm'n*, 345 Ill. App. 3d 1138, 1140 (5th Dist. 2004). The decision to grant or deny a timely Petition to Reinstate is a matter which rests within the sound discretion of the Commission. *Id.*; *See also Conley v. Indus. Comm'n*, 229 Ill. App. 3d 925, 930 (4th Dist. 1992). Here, Petitioner had the burden of justifying reinstatement of her claims after the Arbitrator had dismissed them initially on May 22, 2017, and by refusing to reinstate her case on August 28, 2017.

The Commission finds that Petitioner's claims merit reinstatement as Petitioner was denied due process in that the dismissal of her claims prevented her from conducting a trial on the merits of her claims. Petitioner is proceeding as a pro se advocate and acknowledges that the same rules and procedures apply to her. However, when Petitioner's case was given a trial date of May 22, 2017, Petitioner requested a continuance prior to appearing before the Arbitrator. When Petitioner learned her continuance would not be granted, Petitioner appeared in person to request a further

19IWCC0350

continuance due to the state of her health. Rather than proceeding with trial on May 22, 2017, Petitioner's claims were dismissed without Petitioner being permitted to present her case.

Petitioner filed her Motion to Reinstate on August 3, 2017. A hearing was conducted on August 28, 2017, wherein the Arbitrator ultimately ruled that Petitioner did not timely file her Motion to Reinstate in accordance with the rules of the Illinois Workers' Compensation Commission. Again, a trial on the merits of this matter was not conducted at that time. In an administrative hearing, due process does not require a full judicial proceeding. *Abrahamson v. Illinois Dept. of Professional Regulation*, 153 Ill.2d 76, 92 (1992) Rather, "[a] fair hearing * * * includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence." Id. at 95. In the instant case, the Petitioner was not so afforded that opportunity.

Accordingly, this matter is reinstated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order of the Arbitrator is hereby reversed and vacated; and, the above-referenced claim is reinstated and remanded back to the Arbitrator for further proceedings.

DATED: JUL 12 2019

Maria E. Portela

D. Douglas McCarthy

L. Elizabeth Coppoletti

MEP/dmm
O: 061819
49

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 Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES BROWN,

Petitioner,

vs. NO: 13 WC 28586

PARKER HANNIFIN,

Respondent.

19IWCC0351

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection 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. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

Scrivener's Errors

The Commission modifies the Arbitrator's Decision solely to correct several scrivener's errors. On page four of the Arbitrator's Decision, the Commission strikes "County of Kane" and replaces it with "County of DuPage," consistent with the transcript of record and the first page of the Arbitrator's Decision.

On pages four through eleven, the Commission strikes case number 13 WC 28585, at the top of each page and replaces it with case number 13 WC 28586.

On page two of the Arbitrator's Decision, the Commission strikes the commencement date of the TTD award, February 16, 2015, and replaces it with February 17, 2015, consistent with the

19IWCC0351

Arbitrator's analysis on page eleven.

Finally, on page five of the Arbitrator's Decision, the Commission strikes the following sentence: "Dr. Cohen did agree that Petitioner had De Quervain's tenosynovitis involving the right wrist but believed such condition was unrelated to the work incident" and replaces it with "Dr. Cohen did agree that Petitioner had De Quervain's tenosynovitis involving the right wrist and opined the condition was related to the work incident."

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 25, 2017, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's right thumb and right carpal tunnel conditions are causally related to the April 29, 2013 work accident through May 22, 2015 when his treating surgeon, Dr. Urbanosky, released him from care at MMI pursuant to his FCE restrictions.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $302.45 per week for a period of 13-4/7 weeks, representing the period of February 17, 2015 through May 22, 2015, 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 the medical bills incurred by Petitioner that are related to his right thumb and wrist were reasonable and necessary to treat Petitioner for his conditions of ill-being caused by his work-related accident. Respondent is liable for the following outstanding charges under §8(a) and §8.2 of the Act if they have not already been satisfied: ATI ($2,440.20), Hinsdale Orthopaedics ($7,086.00), Metro Health Solutions ($2,998.79), and Suburban Radiologists ($92.00). Respondent is not liable for any treatment related to Petitioner's left upper extremity. Further, the Commission acknowledges that Respondent has already paid for the right De Quervain's release performed by Dr. Urbanosky on September 4, 2014. (Rx3 g. 15-16)

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for prospective medical treatment is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim with respect to penalties and/or fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court 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.

19IWCC0351

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,822.00. 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: JUL 12 2019
LEC/bsd
O05/21/19
43

Elizabeth Coppoletti

Thomas J. Tyrrell

Maria Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BROWN, CHARLES
Employee/Petitioner

Case# **13WC028586**

PARKER HANNIFIN
Employer/Respondent

19IWCC0351

On 7/25/2017, 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 1.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2998 MARKER & ASSOCIATES
JASON A MARKER
4015 PLAIFIELD-NAPERVILLE RD
NAPERVILLE, IL 60564

0507 RUSIN & MACIOROWSKI LTD
NATACIA A De LEON
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES BROWN
Employee/Petitioner

v.

PARKER HANNAFIN
Employer/Respondent

Case # **13** WC **28585**

Consolidated cases: **N/A**

19IWCC0351

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 A. HEGARTY**, Arbitrator of the Commission, in the city of **WHEATON**, on **5/5/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/29/13,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**9,527.44**; the average weekly wage was $**453.68**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**3,256.50** for TTD.

ORDER

- The Arbitrator finds Petitioner's right thumb and right carpal tunnel conditions are causally related to the April 29, 2013 work accident through May 22, 2015 when his treating surgeon, Dr. Urbanosky, released him from care at MMI pursuant to his FCE restrictions.

- The Arbitrator finds the medical bills incurred by Petitioner that are related to his right thumb and wrist were reasonable and necessary to treat Petitioner for his conditions of ill being caused by his work-related accident. Respondent is liable for the following outstanding charges that they have not already satisfied: ATI ($2,440.20), Hinsdale Orthopedic ($7,086.00), Metro Health Solutions ($2,998.79), and Suburban Radiologists ($92.00). Respondent is not liable for any treatment related to Petitioner's left upper extremity. Any such charges, including the left carpal tunnel injection administered by Dr. Urbanosky on September 4, 2014, are to be deducted from any outstanding charges mentioned above. Further, the Arbitrator acknowledges that Respondent has already paid for the right De Quervain's release performed by Dr. Urbanosky on September 4, 2014. (RX 3 pg. 15-16).

- Respondent shall pay Petitioner temporary total disability benefits of $302.45/week commencing 2/16/15 through 5/22/15 as provided by Section 8(a) and 8.2 of the Act.

- Petitioner's claim for prospective medical treatment is denied.

- Petitioner's claim with respect to penalties and/or fees 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.

Jason C. Hyatt

Signature of Arbitrator

7/25/17
Date

JUL 25 2017

STATE OF ILLINOIS)
) ss.
COUNTY OF KANE)

19IWCC0351

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES BROWN,)
Petitioner,)
)
v.) Case No: **13 WC 28586**
)
PARKER HANNAFIN)
Respondent.)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

This matter proceeded to hearing on May 5, 2017 in Wheaton, Illinois before Arbitrator Hegarty. (Arb. 1). Disputes exist between the parties as to accident, causal connection, TTD benefits, unpaid medical bills, and whether penalties/fees should be imposed on Respondent. (Id.) Petitioner seeks prospective treatment in the form of a MCP thumb joint fusion as recommended by Dr. Leah Urbanosky.

Petitioner testified he was employed by Respondent as a lead machine operator. His work duties involved loading metal and rubber into a machine which pressed the materials into a mold. The machine would then eject a 20-30 lb. hot, square plate with handles on each side which Petitioner, while wearing gloves, would lift and flip over until the contents fell out. Petitioner testified he would repetitively perform this maneuver, flipping and loading over one-hundred plates per shift. He alleges he was flipping a 20-30 lb. hot plate on April 29, 2013 when he felt a pull in his right thumb and pain in his right wrist. He notified his group leader, completed paperwork to document the injury and shortly thereafter, sought medical attention.

Records from Bolingbrook Hospital note that Petitioner presented on April 29, 2013, with a history of "flipping a metal plate" when he "felt something painful in the thumb." His complaints of right wrist and thumb pain with moderate swelling were noted. Petitioner was prescribed medications, a thumb splint and taken off work until he could follow-up with a doctor.

On April 30, 2013, Petitioner presented to Respondent's medical provider, Physician's Immediate Care with a history of flipping a 25-pound tray when he felt sharp pain in the dorsal left (sic) thumb which radiated to the left (sic) hand. (PX 6). He reported immediate swelling and increased pain with movement. A diagnosis of radial styloid tenosynovitis was noted. Petitioner followed up several times at PIC before Dr. Arthur Hirsch referred him to an orthopedic doctor. (Id.).

The June 13, 2013 records from orthopedic surgeon, Dr. Scott Sagerman note that Petitioner presented for initial consult a history of lifting a heavy plate at work followed by pain, numbness and tingling in his right hand. (PX 7). Petitioner complained of right wrist pain at the radial aspect with numbness, tingling and difficulty moving his right thumb. (Id.) On exam, tenderness and swelling at the radial aspect over the first extensor compartment was noted along with positive Finkelstein's test and limited thumb strength. Dr. Sagerman noted an impression of right De Quervain's tenosynovitis, right hand parasthesias and possible

carpal tunnel syndrome. The doctor ordered an EMG, instituted work restrictions of no lifting, pushing, or forceful gripping and instructed Petitioner to wear a splint. (Id.).
On August 19, 2013, Petitioner underwent EMG studies which noted mild to moderate bilateral ulnar neuropathy across the elbow, worse on the right, with active denervation within the bilateral proximal and/or distal ulnar innervated muscles. (PX 10). It also showed mild bilateral median neuropathy at the wrist, slightly more on the right.

On August 21, 2013, Dr. Sagerman noted Petitioner's continued complaints of numbness and tingling in his right thumb, index and middle fingers. (PX 7). The doctor noted the recent EMG studies indicated mild to moderate bilateral ulnar neuropathies at the elbow, worse on the right. On exam, the doctor noted tenderness at the first extensor compartment, a positive Finkelstein's test and painful thumb abduction. Wrist motion was guarded, but unrestricted. The doctor noted a diagnosis of De Quervain's tenosynovitis and right carpal tunnel syndrome recommending surgical intervention consisting of a right carpal tunnel release and a release of the right first extensor compartment retinaculum. (Id.).

Petitioner testified that prior to having the recommended surgery, he wanted a second opinion.

A letter dated October 14, 2013 from BHN, a utilization review company, indicated that the reviewing physician, Dr. Kirsch agreed that Dr. Sagerman's surgical recommendations had been approved. (PX 1).

Petitioner presented to Dr. Michael Cohen on December 27, 2013 for a Section 12 exam at the request of Respondent. (RX 1). Petitioner reported pain in the first dorsal compartment of his right wrist with occasional popping, numbness and tingling in all five digits. He further reported wearing a soft thumb splint and working light duty.

On examination, Dr. Cohen noted a positive Finkelstein's test. Tenderness over the first dorsal compartment of the right wrist with mild swelling was further noted. Dr. Cohen noted evidence of a previous radial collateral ligament tear in the thumb and joint along with laxity in the radial collateral ligament of the right thumb.

Dr. Cohen noted no A1 pulley tenderness or CMC joint findings and no provocative signs over the cubital tunnel, pronator tunnel or carpal tunnel. Given these findings, Dr. Cohen questioned the medical basis for Dr. Sagerman's diagnosis of carpal tunnel syndrome.

Dr. Cohen did agree that Petitioner had De Quervain's tenosynovitis involving the right wrist but believed such condition was unrelated to the work incident.

The doctor further opined Petitioner's medical treatment thus far had been reasonable and necessary but did not believe further diagnostics or surgery were necessary. With respect to Petitioner's De Quervain's tenosynovitis, the doctor recommended an injection, noting a dorsal compartment release would be appropriate if the injection yielded only temporary relief.

On January 17, 2014, Dr. Leah Urbanosky of Hinsdale Orthopaedics noted Petitioner presented for initial consult complaining of sharp, radiating pain in his right radial thumb and wrist pain that increased with certain movements. (PX 11). Petitioner further complained of numbness and tingling in his right index, long and ring fingers. He also described tendon snapping in the radial aspect of his wrist at night. On physical exam, mild swelling and tenderness in the right thumb were noted along with pain on dorsiflexion. Dr. Urbanosky noted "hyper-laxity of the RCL and MP when compared to the left side." Tinel's test was positive. Finkelstein's, Allen and Shuck tests were negative. X-rays of the left thumb were taken for comparison. The doctor noted a diagnosis of De Quervain's tenosynovitis, carpal tunnel (greater right than left) and a right thumb RCL injury. She recommended an MRI to assess the RCL thumb injury and issued light duty work restrictions.

On March 18, 2014, a right wrist MRI showed degenerative changes, mild tenosynovitis in the second dorsal compartment, mild edema along the radial collateral ligament of the thumb, and a small cyst along the volar aspect of the trapezoid. (PX 9).
On March 24, 2014, Dr. Urbanosky noted Petitioner's report that numbness and tingling had nearly resolved with minimal, occasional pain. Petitioner reported that his right hand felt weak.

With respect to the recent MRI, the doctor noted Petitioner had brought "half a disc" for review, nevertheless, Dr. Urbanosky noted the study was significant for mild tenosynovitis in the extensor tendons of the second dorsal compartment with a suggestion of mild edema along the radial collateral ligament of the thumb. (PX 11). The doctor also noted degenerative changes. (Id.). A second, higher quality right thumb MRI was ordered. (Id.). On exam, Finkelstein's, Phalen and Watson tests were negative. (Id.). The doctor noted Petitioner's bilateral carpal tunnel syndrome had resolved since the last visit due to Petitioner's use of the splint. She maintained her prior diagnoses of right de Quervain's tenosynovitis and right thumb radial collateral ligament injury. Sedentary work restrictions were issued. (Id.).

On April 28, 2014, Petitioner returned to Hinsdale Orthopaedics. An MRI of his right thumb was performed that morning. Dr. Urbanosky noted that she could not open the disc containing the MRI imaging of the right thumb performed earlier that day. Petitioner's complaints of radial wrist pain were noted. His right thumb pain had reportedly improved with the splint. The doctor's impression of a low-grade sprain of the radial collateral ligament and mild degenerative changes was noted. Dr. Urbanosky also noted a diagnosis of bilateral carpal tunnel syndrome and recommended Petitioner undergo a right sided de Quervain's release, a carpal tunnel release and a left-sided carpal tunnel injection. Petitioner's sedentary work restrictions were continued.

On August 11, 2014, Dr. Urbanosky noted Petitioner's complaints of sharp, radiating right-sided wrist pain, as well as numbness and tingling in the tips of his thumb, index, and long fingers with shocking sensation in the volar wrist into the finger tips on the left side. Dr. Urbanosky again noted her prior surgical recommendation and continued Petitioner's sedentary work restrictions.

Respondent authorized the De Quervain's release but denied the bilateral carpal tunnel release on May 12, 2014.

On September 4, 2014, Petitioner underwent a right De Quervain's and right carpal tunnel release, performed by Dr. Urbanosky at Tinley Woods Surgery Center. A left carpal tunnel injection was administered as well. He was authorized off work for four weeks and was to return modified duty on October 14, 2014. He was not to lift greater than 1 to 5 pounds.

On October 13, 2014, Petitioner followed up with Dr. Urbanosky who noted his complaints of shooting palmar and right radial wrist pain with movement. Dr. Urbanosky recommended Petitioner wean out of the splint, continue physical therapy and instituted a 5-pound lifting restriction for the next month.

Over the next few months, Petitioner participated in and completed therapy for his hand and thumb. He returned to Dr. Urbanosky in November, 2014 at which time the doctor noted "thumb opposition" on exam. Petitioner's report of radiating pain over the carpal tunnel release scar from his ring finger to his small finger was noted. He reported being back to light duty work. Dr. Urbanosky recommended Petitioner continue physical therapy, prescribed Meloxicam, and instructed Petitioner to follow up in four weeks. Petitioner's prior work restrictions were continued.

On December 8, 2014, Petitioner followed up with Dr. Urbanosky who noted restrictions of "no lifting greater than 7.5 pounds, no repetitive wrist motion and instructed Petitioner to take a 5-10-minute break after 1 hour of repetitive motions. His weight restrictions were to increase by 2.5 pounds per week.

Petitioner testified he provided the December 8, 2014 work restrictions to Respondent who then requested he perform janitorial duties consisting of mopping, sweeping and scrubbing machines. Petitioner testified he was brought into a meeting where his supervisor Helga, Kathy from HR and the plant manager were present to inform him of this change. He was told the reason for the change was his failure to meet quota in his inspection duties. Petitioner testified he attempted to work the janitorial position for a few weeks. Petitioner testified that on January 13, 2015, he explained to his supervisor, Helga that his current janitorial duties were outside of his restrictions. Petitioner testified Helga instructed him to leave work and not return.

The Petitioner presented to Dr. Michael Cohen for a second Section 12 exam on January 21, 2015. (RX 2). Dr. Cohen's report noted Petitioner's complaints of a popping feeling in his thumb and a "dislocating feeling" in his MP joint. Dr. Cohen noted "he also states the MP joint of his thumb was completely normal prior to the events of 4/29/13, which is not what he told me at the time (of his first IME)." The doctor noted the Petitioner had arthritic changes at the MP joint of the thumb documented in the x-rays, which predated the accident. Nonetheless, Dr. Cohen opined on page three of his report that, "assuming that it did not occur at the time of the injury in questions, i.e., predated it, then I don't think any further medical management is indicated with regard to the events of 4/29/13. If the injury did occur at the time, then the treatment recommended by Dr. Urbanosky, i.e., MP joint fusion, would be appropriate."

Dr. Cohen noted that Petitioner was reportedly in therapy for his right wrist his dorsal compartment and right carpal tunnel release and that Petitioner reported that both diagnoses were completely resolved. Regarding the radial collateral ligament (RCL), the doctor found that on the date of the IME, the RCL did not produce any pain. The Petitioner did report discomfort in that joint but declined fusion by Dr. Urbanosky. The doctor stated that the Petitioner told him that the RCL was normal prior to the injury of April 29, 2013, which is contrary to his statement in December, 2013. The doctor noted his objective findings on exam did not correlate with Petitioner's work restrictions and that Petitioner could return to his normal job activities.

Dr. Cohen placed Petitioner at MMI pertaining to the first dorsal compartment release and carpal tunnel release on the right and his symptoms on the left side. Dr. Cohen opined that Petitioner had arthritic issues that predated his accident. Dr. Cohen opined that Petitioner did not need any further medical intervention as it relates to the accident.

On March 2, 2015, the Petitioner followed up at Hinsdale Orthopedics with complaints of wrist pain with overuse of the right hand. (PX 11). Petitioner denied taking any pain medication. Dr. Urbanosky noted Petitioner was at MMI. An FCE was recommended.

On May 22, 2015, the Petitioner followed up with Dr. Urbanosky reporting right thumb instability when performing activities. His right wrist pain had resolved. Dr. Urbanosky noted the a recent FCE noted permanent restrictions at the medium to heavy physical demand level with occasional lifting of 60 pounds from a chair to the floor with both hands, occasionally lifting of 60-pounds desk to chair with both hands, and occasionally lifting of 47 pounds above shoulder level with both hands. She noted Petitioner was to return to work pursuant to the above noted restrictions.

On April 6, 2016, Petitioner returned to Dr. Urbanosky with complaints of MCP joint pain at the thumb made worse with gripping motions. He stated that his thumb was constantly dislocating and that he had to pop it back into place. He rated the pain 6 to 7/10.

Dr. Urbanosky's physical examination noted laxity and instability of his MCP joint. The doctor assessed the Petitioner with right thumb MCP joint pain, instability and underlying arthritis. Dr. Urbanosky recommended a right MCP joint fusion. The Petitioner stated he was unsure if he wanted to proceed with surgical intervention at that time.

Petitioner testified he returned to his job at the end of May 2015. He testified he was not paid anything while off work from February 15, 2015 to May 22, 2015. Respondent submitted TTD payment logs into evidence which confirm the last payment to Petitioner was for a check dated April 1, 2015 that paid him from January 13, 2015 through February 16, 2015. (RX3)

Petitioner testified he returned to Dr. Urbanosky in April of 2016 for an exam, at which time, she recommended a fusion surgery of the right thumb. He was given a right thumb teepee splint to wear. Petitioner testified he opted not to have surgery at that time due to his fears regarding the outcome.

Petitioner testified he found work for a few months as an office manager beginning in April of 2016 for a company in Chicago Heights before finding work with his current employer VVF in June of 2016 as a machine operator. According to his testimony, the majority of his job duties involve touch screen work. He further testified to handling 5 -10 lb. cardboard containers during his shift.

Petitioner testified that he received a termination letter from an employer in April of 2016.

With respect to his current condition, Petitioner testified his pain has remained the same and he continues to experience the clicking/popping sensation. Because his condition in his right hand/thumb has not improved, he now wishes to have the surgery recommended by Dr. Urbanosky.

Petitioner admitted on cross examination that he did not have any medical treatment for any alleged work-related injuries since April 6, 2016. He further testified no follow-up visits are scheduled nor is he taking any pain medications.

CONCLUSIONS OF LAW

With respect to Petitioner's credibility, the Arbitrator observed his demeanor during his testimony at trial and found him to be a credible witness whose testimony is corroborated by the treating medical records in evidence.

Accident/Causal Connection

With respect to accident, the preponderance of evidence supports a finding that Petitioner sustained injury to his right thumb and right wrist while lifting and flipping a metal plate while working for Respondent on April 29, 2013. In so finding, the Arbitrator relies on the Petitioner's credible, unrebutted description of the accident and the mechanism of injury which is corroborated by the treating medical records in evidence.

With respect to causal connection, the Arbitrator finds Petitioner's right carpal tunnel syndrome and right thumb injury were caused by the April 29, 2013 work accident and that Petitioner reached MMI as of May 22, 2015 when his treating surgeon, Dr. Urbanosky, released him from care pursuant to his FCE restrictions.

In support, the Arbitrator relies on the following medical evidence contained in the record:

- The contemporaneous treating records from Bolingbrook Hospital in which Petitioner reported a history of "flipping a metal plate" when he "felt something painful in the thumb." His complaints of right wrist and thumb pain with moderate swelling were noted.

- April 30, 2013 records from Physician's Immediate Care in which Petitioner reported a history of flipping a 25-pound tray when he felt sharp pain in the dorsal left (sic) thumb which radiated to the left (sic) hand. (PX 6). He reported immediate swelling and increased pain with movement. A diagnosis of radial styloid tenosynovitis was noted.

- June 13, 2013 records from Dr. Scott Sagerman noting complaints of right radial wrist pain with numbness, tingling and difficulty moving the right thumb. (Id.) On exam, tenderness and swelling at the radial aspect over the first extensor compartment was noted along with positive Finkelstein's and limited thumb strength. Dr. Sagerman noted an impression of right De Quervain's tenosynovitis, right hand parasthesias and possible carpal tunnel syndrome.

- The August 19, 2013, EMG report noting mild to moderate bilateral ulnar neuropathy across the elbow, worse on the right with active denervation within the bilateral proximal and/or distal ulnar innervated muscles along with mild bilateral median neuropathy at the wrist, slightly more on the right.

- The August 21, 2013 records of Dr. Sagerman in which he noted Petitioner's continued complaints of numbness and tingling in his right thumb, index and middle fingers. (PX 7). The doctor reviewed the recent EMG studies noting mild to moderate bilateral ulnar neuropathies at the elbow, worse on the right. On exam, the doctor noted tenderness at the first extensor compartment, a positive Finkelstein's test and painful thumb abduction. Wrist motion was guarded, but unrestricted. The doctor noted a diagnosis of De Quervain's tenosynovitis and right carpal tunnel syndrome recommending surgical intervention consisting of a right carpal tunnel release and a release of the right first extensor compartment retinaculum.

- The October 14, 2013 letter from Respondent's utilization review company where the reviewing physician, Dr. Kirsch approved the surgical procedures recommended by Dr. Sagerman. (PX 1).

- To an extent, the Arbitrator relies on the December 27, 2013 IME report from Dr. Michael Cohen in which Petitioner reported pain in the first dorsal compartment of his right wrist with occasional popping, numbness and tingling in all five digits. On examination, Dr. Cohen noted a positive Finkelstein's test, evidence of a previous radial collateral ligament tear in the thumb and joint along with laxity in the radial collateral ligament of the right thumb. Tenderness over the first dorsal compartment of the right wrist with mild swelling was further noted. Dr. Cohen noted a diagnosis of De Quervain's tenosynovitis involving the right wrist but believed such condition was unrelated to the work incident. The Arbitrator places less weight on Dr. Cohen's causation opinion related to Petitioner's De Quervain's tenosynovitis as such opinion fails to consider Petitioner's lack of symptoms and treatment prior to the accident.

- The January 17, 2014 records from Dr. Leah Urbanosky noting Petitioner's complaints of sharp, radiating right radial thumb and right wrist pain along with numbness and tingling in his right index, long and ring fingers. On physical exam, mild swelling and tenderness in Petitioner's right thumb were noted along with pain on dorsiflexion. The doctor noted a diagnosis of injury to the right radial collateral ligament in the thumb, De Quervain's tenosynovitis and bilateral carpal tunnel syndrome.

- The March 18, 2014 right wrist MRI indicating mild tenosynovitis in the second dorsal compartment, mild edema along the radial collateral ligament of the thumb, a small cyst along the volar aspect of the trapezoid along with degenerative changes. (PX 9).

- The August 11, 2014 records from Dr. Urbanosky noting Petitioner's complaints of sharp, radiating right-sided wrist pain along with numbness and tingling in the tips of his thumb, index, and long fingers.

- The September 4, 2014, records indicating Petitioner underwent a right De Quervain's release and right carpal tunnel release performed by Dr. Urbanosky at Tinley Woods Surgery Center.

- The October 13, 2014, records from Dr. Urbanosky noting Petitioner's complaints of shooting palmar and right radial wrist pain with movement. Dr. Urbanosky recommended Petitioner wean out of the splint, continue physical therapy and instituted a 5-pound lifting restriction for the next month.

- The November 10, 2014 records from Dr. Urbanosky noting Petitioner's report of radiating pain over the carpal tunnel release scar from his ring finger to his small finger.

- The March 2, 2015 records of Dr. Urbanosky in which she opined Petitioner was at MMI and that further medical intervention was unnecessary. The Arbitrator notes that the FCE ordered by Dr. Urbanosky had not yet been performed. When Petitioner followed up with Dr. Urbanosky on May 22, 2015, the doctor noted the recent FCE instituted permanent restrictions at the medium to heavy physical demand level with occasional lifting of 60 pounds from a chair to the floor with both hands, occasionally lifting of 60-pounds desk to chair with both hands, and occasionally lifting of 47 pounds above shoulder level with both hands. She noted Petitioner was to return to work with the above noted restrictions. Although Dr. Urbanosky noted Petitioner at MMI on March 2, 2015, the Arbitrator finds Petitioner was at MMI as of May 22, 2015, after a valid FCE was performed and Petitioner was released at MMI pursuant to the restrictions noted at the FCE.

The Arbitrator found no compelling evidence of any pre-existing issues relative to Petitioner's upper right extremity nor was any evidence submitted indicating Petitioner suffered a new injury between his April 29, 2013 work accident and May 22, 2015.

The Arbitrator places greater weight on the treating records of Dr. Urbanosky than the opinions and records of IME physician Dr. Cohen. Petitioner underwent extensive treatment with Dr. Leah Urbanosky, an orthopedic surgeon with a sub-specialty in hand surgery, since January of 2014. Dr. Urbanosky has been involved in the day-to-day care and treatment of Petitioner in which she conducted numerous physical examinations, ordered and reviewed diagnostic testing, managed his course of conservative treatment, performed surgery, ordered and reviewed his FCE and eventually released him from treatment. The opinions of Dr. Urbanosky are corroborated by Petitioner's first treating physician, Dr. Sagerman who first noted a diagnosis of De Quervain's tenosynovitis and right carpal tunnel syndrome recommending surgical intervention consisting of a right carpal tunnel release and a release of the right first extensor compartment retinaculum. Dr. Sagerman's surgical recommendations were reviewed by UR physician, Dr. Kirsch, and in a letter dated October 14, 2013 from BHN, the utilization review company, indicated that Dr. Sagerman's surgical recommendations had been approved. (PX 1).

Medical Bills

The Arbitrator finds the medical services and bills incurred by Petitioner for the treatment of his right thumb and wrist were reasonable and necessary to treat Petitioner for the injuries he sustained in the work related accident at issue. Respondent is liable for the following outstanding charges that they have not already satisfied: ATI ($2,440.20), Hinsdale Orthopedic ($7,086.00), Metro Health Solutions ($2,998.79), and Suburban Radiologists ($92.00).

Respondent is not liable for any treatment related to Petitioner's left upper extremity. Any such charges, including the left carpal tunnel injection administered by Dr. Urbanosky on September 4, 2014, are to be deducted from any outstanding charges mentioned above.

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Further, the Arbitrator acknowledges that Respondent has already paid for the right De Quervain's release performed by Dr. Urbanosky on September 4, 2014. (RX 3 pg. 15-16).

Temporary Total Disability

With respect to temporary total disability benefits ("TTD"), Petitioner received no benefits from Respondent after February 16, 2015. This is clear from Petitioner's testimony and the payment logs contained in ~~Respondent's Exhibit #3 which confirm the last payment to Petitioner was for a check dated April 1, 2015 that~~ paid him from January 13, 2015 through February 16, 2015.

Petitioner had been accommodated with a light duty position for nearly two years prior to January 13, 2015. Petitioner's unrebutted testimony was that on January 13, 2015, he explained to his supervisor, Helga, that his current janitorial duties were outside of his work restrictions. Petitioner testified Helga instructed him to leave work and not return.

Although Respondent did have Petitioner re-examined by their IME doctor on January 21, 2015, Respondent had no basis for telling Petitioner to go home without pay until the IME on January 21, 2015 at the earliest.

After the IME, Respondent's basis not to pay benefits rested on the opinion of Dr. Cohen, which, as noted above, the Arbitrator found less reliable than Petitioner's treating surgeon Dr. Urbanosky. The Arbitrator finds the restrictions instituted by Dr. Urbanosky were medically necessary and related to Petitioner's work related accident and that Respondent failed to accommodate those restrictions.

The Arbitrator has already found Petitioner was released to return to work by Dr. Urbanosky on May 22, 2015 pursuant to his FCE restrictions.

Accordingly, Respondent shall pay Petitioner temporary total disability benefits of $302.45/week commencing February 17, 2015 through May 22, 2015, as provided in Section 8(b) of the Act.

Prospective Medical Treatment

Petitioner is seeking prospective medical treatment consisting of a right MCP joint fusion, the Arbitrator declines to award such treatment given the fact that Petitioner did not seek any treatment related to his right thumb for more than a year prior to the hearing.

Petitioner has also neglected to present evidence that a thumb fusion is necessary at this juncture. Although Dr. Urbanosky recommended such surgery on April 6, 2016, there is no evidence that Dr. Urbanosky, or any other physician, continues to recommend this surgery over a year later.

Accordingly, the Arbitrator finds that Petitioner is not entitled to prospective medical care.

Penalties and Fees

Arbitrator does not find Respondent's reliance on the opinions of Dr. Cohen to be unreasonable, therefore, no penalties or fees will be awarded.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maricela Espinoza-Gonzalez,

Petitioner,

19IWCC0352

vs.

NO: 17 WC 27767

Labor Solutions Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds Petitioner sustained a compensable accident arising out of and in the course of her employment on August 28, 2017.

Findings of Fact

Petitioner worked as a candy packager at Primrose Candy through Respondent, a staffing agency. This position required Petitioner to pack candy, put candy from a tray into a machine, and place labels on packaging. Petitioner testified she was constantly walking on candy, because the machine she worked on dropped candy onto the floor. Petitioner received two breaks during each shift, including a lunch break and a ten-minute break. Petitioner, along with the other employees, had to use a metal staircase to get to the designated break area, which was on a different floor than their work area. Petitioner testified she had to go up this staircase four times per shift and down this staircase four times per shift. Petitioner's supervisor, Ignacio Flores, also testified he used the staircase daily, because it was the only way from the outside area to the production floor. The staircase had handrails on both sides and an anti-slip rubber or plastic material on its surface.

On August 28, 2017, Petitioner was descending the staircase after her ten-minute break to return to her work area when her foot slipped, causing her to fall down the remainder of the stairs

and injure her low back and left shoulder. Petitioner testified her fall was caused by candy on her shoes and not any liquid, cracks, or other defect on the staircase. Prior to this accident, Petitioner never sought any treatment for her back, left shoulder, or neck. Petitioner reported the accident to Mr. Flores the following day, August 29, 2017. At that time, Petitioner signed a written accident report and Mr. Flores took photographs of Petitioner recreating her fall. Petitioner testified that these photographs, which were admitted into evidence as Respondent's Exhibits 3A to 3D, accurately depicted the shoes she was wearing at the time of her accident. Employees at Primrose Candy had to wear a specific work shoe that had a steel toe and a bottom surface that prevented slipping.

Petitioner also took her own photographs of her work shoes four days after the accident. Petitioner testified her photographs, which were admitted into evidence as Petitioner's Exhibit 1, also accurately depicted the condition of her shoes at the time of the accident. However, Petitioner's Exhibit 1 shows Petitioner's work shoes in a different condition than they are depicted in Respondent's Exhibits 3A to 3D. In Respondent's Exhibits 3A to 3D, the work shoes appear to have a light powder or dust substance on them, whereas Petitioner's Exhibit 1 depicts grass and other substances on the work shoes.

Petitioner testified Respondent's Exhibits 3A to 3D did not show any candy on her work shoes, because she had washed them between the accident and the time those photographs were taken. However, there was other conflicting testimony as to when Petitioner had washed her work shoes. Petitioner first testified she washed them between the accident and when she took her own photographs in Petitioner's Exhibit 1 four days after the accident. However, Petitioner later testified she had not washed her work shoes before taking those photographs and indicated she took the photographs because her work shoes were filled with candy and she needed to wash them to bring them inside her house. Petitioner also offered conflicting testimony as to whether she ever walked outside of work in her work shoes.

Mr. Flores testified that the candy Petitioner worked with came out of the machine wrapped. Mr. Flores did not recall Petitioner ever complaining to him about candy being on the ground or collecting on her shoes before the accident. Notwithstanding, Mr. Flores identified the substance on Petitioner's shoes in Respondent's Exhibits 3A to 3D as powder that had formed from candy spilled onto the floor. Mr. Flores explained that this powder debris was found where Petitioner worked, and other work areas of Primrose Candy had different types of candy debris, including chunks of candy pieces. He also testified that he has had candy stick to his shoe while walking through the factory, which was not unusual. With regard to the specific cause of Petitioner's fall, Mr. Flores testified that he did not recall if he asked Petitioner what caused her fall or if there was anything on her shoes at the time of the accident.

After reporting her accident to Mr. Flores on August 29, 2017, Petitioner presented for treatment at Physicians Immediate Care with complaints of low back pain. Lumbosacral X-rays were obtained and revealed no abnormalities. Petitioner was diagnosed with a low back and pelvis contusion, given 20-pound lifting restrictions, and prescribed Mobic and Non-Aspirin Extra Strength Tylenol. When Petitioner returned on September 5, 2017, she complained of additional pain in the lumbar spine, paraspinal muscles, and left upper shoulder. In addition to increased 25-pound lifting restrictions, Petitioner was advised to wear a back brace and avoid prolonged

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squatting, bending, and twisting.

On September 13, 2017, Petitioner returned to Physicians Immediate Care and reported her pain was now radiating down her left leg. The doctor added left-sided sciatica to Petitioner's diagnoses. Shortly thereafter, on September 18, 2017, Petitioner informed the doctor she had tried to return to work with her restrictions, but she had lasted only three hours before having to go home due to pain. The doctor administered a Toradol injection, prescribed Flexeril, and continued Petitioner's work restrictions.

X-rays of Petitioner's left shoulder, thoracic spine, and cervical spine were subsequently obtained on September 21, 2017, and the in-clinic readings revealed no abnormalities. Petitioner was diagnosed with muscle spasms, paresthesia, left shoulder pain, muscle weakness, cervical radiculopathy, and dorsalgia at that time. On September 27, 2017, a cervical MRI further revealed multilevel mild spondylotic changes from C4-C7, a posterior C5-C6 disc herniation effacing the ventral thecal sac and causing mass effect on the cord, shallow annular bulges impinging the ventral thecal sac at C4-C5 and C6-C7, and the straightening of normal cervical lordosis that could represent a muscle spasm versus a strain.

On October 6, 2017, Petitioner presented for the first time to Dr. Axel Vargas at Delaware Physicians. Dr. Vargas diagnosed Petitioner with lumbosacral discogenic radiculopathy and pain syndrome, lumbosacral axial facet pain syndrome, cervical axial pain syndrome, cervical facet pain, and left shoulder pain. Dr. Vargas found Petitioner's findings suggestive of post-traumatic shoulder pain and dysfunction likely secondary to either internal derangement or a post-traumatic inflammatory process from the work injury. Dr. Vargas opined that all of Petitioner's symptoms were directly related to her work accident. Dr. Vargas took Petitioner off work and ordered a course of NSAIDs, muscle relaxants, non-opiate analgesics, and neuromodulations.

Petitioner thereafter participated in physical therapy from October 23, 2017 through January 10, 2018. During this period, Petitioner also underwent a left shoulder MRI on October 30, 2017 that showed an intact rotator cuff with mild rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon. A lumbar MRI obtained the same day further revealed a three to four millimeter subligamentous posterior broad-based disc herniation at L5-S1 with an extruded nucleus pulposus and a posterior annular tear with mild bilateral neuroforaminal narrowing and some ligamentum flavum hypertrophy.

On November 2, 2017, Dr. Vargas interpreted the left shoulder MRI to be consistent with post-traumatic inflammatory changes. Dr. Vargas also found Petitioner's clinical presentation and lumbar MRI to be consistent with lumbar discogenic radiculopathy secondary to facet arthropathy and the L5-S1 disc herniation that had resulted in various degrees of central canal and bilateral neuroforaminal stenosis. Petitioner thereafter underwent two bilateral L5-S1 transforaminal epidural steroid injections with selective nerve root blocks on November 21, 2017 and December 15, 2017.

On January 11, 2018, Petitioner saw Dr. Vargas for the last time before the arbitration hearing. At that time, Petitioner's symptoms remained unchanged despite the injections. Dr. Vargas noted Petitioner continued to exhibit intractable distal lower back axial pain with lower

extremity radiculopathy that interfered with her activities of daily living, despite her around-the-clock intake of muscle relaxants, neuromodulators, non-opiate analgesics, and NSAIDs. As such, Dr. Vargas recommended a surgical decompression and possible fusion. He referred Petitioner for a neurosurgical consultation and noted that most clinicians would also agree on performing a provocative lumbar functional discogram with a CT scan. Dr. Vargas also recommended a neurosurgical consultation for Petitioner's cervical pain and associated upper extremity radiation. Dr. Vargas continued to keep Petitioner off work and indicated her maximum medical improvement date was undeterminable.

Petitioner was not working at the time of hearing. She had attempted to return to work with restrictions one to two weeks after the accident but was unable to finish her shift after working only two hours. Petitioner has not looked for other work nor applied to any potential jobs since her accident. Petitioner testified that she cannot work, drive, or go to school while she is taking her medication.

This matter proceeded to a Section 19(b) hearing on April 20, 2018. In the Decision issued on August 16, 2018, the Arbitrator found Petitioner failed to prove she had sustained an accident that arose out of and in the course of her employment on August 28, 2017, and therefore, denied all benefits.

Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner sustained a compensable accident that arose out of and in the course of her employment on August 28, 2017.

To obtain compensation under the Illinois Workers' Compensation Act, an 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(d). The "in the course of" component is not at issue in the present case. Instead, the Commission's review hinges on whether Petitioner satisfied the "arising out of" component.

To determine whether Petitioner's injury arose out of her employment, the risk to which she was exposed must first be categorized. Risks to employees fall into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An injury resulting from an idiopathic fall arises out of the employment only where the employment conditions significantly contributed to the injury by increasing the risk of falling or the effects of the fall. *Id.* An injury resulting from a neutral risk to which the general public is equally exposed does not arise out of Petitioner's employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 59 (1989).

Petitioner contends she was exposed to a risk associated with her employment because her fall was caused by candy on her shoes. However, Petitioner's testimony regarding candy on her shoes was not corroborated by Mr. Flores' testimony, Respondent's Exhibits 3A to 3D, or her

accident report. Additionally, none of Petitioner's treatment records show Petitioner told a doctor about any candy on her shoes. It is notable that the possible presence of candy powder is collaborated by Mr. Flores' testimony, but there is insufficient evidence regarding the actual presence of such substance on Petitioner's shoes on the date of accident to have caused her slip on the stairs. For this reason, the Commission finds Petitioner failed to establish her fall was caused by candy debris on her shoes.

As Petitioner did not prove that candy debris on her shoes had presented a risk associated with her employment, the Commission must next consider the staircase itself to assess Petitioner's risk. The Commission notes that Petitioner is not claiming any defect on the stairs caused her fall. There was no liquid nor cracks on the staircase. The stairwell also had handrails on both sides, proper lighting, and an anti-slip rubber or plastic surface.

The Illinois Appellate Court has found that falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment. *Village of Villa Park v. Comm'n*, 2013 IL App (2d) 130038WC. However, an exception to non-compensability exists where the requirements of the claimant's employment create a risk to which the general public is not exposed. *Id.* The increased risk may be qualitative or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public. *Id.*; See also *Metropolitan Water Reclamation District of Greater Chicago v. Comm'n*, 407 Ill. 3d 1010 (2011).

In the present case, Petitioner had to go up the stairs four times per shift and down the stairs four times per shift. This equates to Petitioner having to use the staircase at least eight times during her workday. Both Petitioner's testimony and Mr. Flores' testimony established that this staircase was the only way for employees to get to and from the designated break and work areas. There was no testimony to suggest the general public was also allowed to use this staircase.

The Commission finds *Village of Villa Park v. Comm'n* to be instructive in determining whether the frequency in which Petitioner was required to traverse the stairwell exposed her to an increased risk on a quantitative basis. In *Village of Villa Park*, a police officer was descending a stairwell at the police station when his right knee gave out, causing him to fall down the stairs. 2013 IL App (2d) 130038WC. The Illinois Appellate Court found the claimant was required to traverse these stairs a minimum of six times per day, and as such, he was continually forced to use the stairway both for his personal comfort and to complete his work-related activities. *Id.* The Appellate Court found this fact, coupled with the fact that the claimant had informed his supervisors of a pre-accident knee injury and had been seen walking before the accident with a limp, was sufficient to conclude that the claimant's employment had placed him at a greater risk of falling, thus satisfying the exception to the general rule of non-compensability for injuries resulting from a personal risk. *Id.* The Appellate Court further found that the frequency in which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis than that to which the general public was exposed. *Id.*

The Commission acknowledges that Petitioner in the present case is distinguishable from the *Village of Villa Park* claimant insofar as Petitioner had no known preexisting injuries or problems that contributed to her fall. Nevertheless, even though Petitioner did not share similar personal risks with the *Village of Villa Park* claimant, the Illinois Appellate Court still found that

19IWCC0352

the frequency with which the *Village of Villa Park* claimant had to traverse the stairs posed an increased risk on a quantitative basis. The *Village of Villa Park* claimant had to traverse his stairwell six times per day, whereas Petitioner in the present case had to traverse her stairwell eight times per day. Because Petitioner had to use her stairwell more frequently than the *Village of Villa Park* claimant, the Commission finds Petitioner was exposed to an increased risk on a quantitative basis.

The Commission further finds Petitioner's current condition of ill-being is causally related to the August 28, 2017 accident. Petitioner never treated for any back, left shoulder, or neck symptoms prior to her accident. She then sought timely medical treatment the day after the accident for low back pain, and then shortly thereafter on September 5, 2017, she sought additional treatment for left upper shoulder and paraspinal pain. All subsequent treatment focused on Petitioner's back, neck, and left shoulder complaints. Moreover, on October 6, 2017 and at visits thereafter, Dr. Vargas opined that all of Petitioner's symptoms were directly related to her work injury. In noting that Respondent offered no conflicting medical opinion on causation from a Section 12 examiner, the Commission relies on the opinions of Dr. Vargas.

Additionally, as there was no medical opinion to conflict with the treating doctors' recommendations and all of Petitioner's treatment focused on her low back, left shoulder, and neck complaints, the Commission finds Petitioner is entitled to the related medical expenses incurred from the accident date through the April 20, 2018 hearing date. The Commission further finds that Petitioner is entitled to the prospective medical care recommended by Dr. Vargas, including but not limited to the recommended surgery, as there was no conflicting medical opinion to suggest Dr. Vargas' recommendations were unreasonable or unnecessary.

Finally, the Commission finds that Petitioner has proven her entitlement to temporary total disability benefits from October 6, 2017 through the April 20, 2018 hearing date. Petitioner was first given lifting restrictions on August 29, 2017 and was kept on restrictions until Dr. Vargas took her completely off work on October 6, 2017. When Petitioner last saw Dr. Vargas on January 11, 2018, he continued Petitioner's off-work restrictions and indicated her maximum medical improvement date was undeterminable.

Petitioner unsuccessfully tried to return to work with her restrictions one to two weeks after the accident. Although Petitioner's testimony regarding her attempted return to work was vague, it implied Petitioner had been in some communication with Respondent regarding her restrictions and the potential accommodations. Petitioner testified she had tried to return because Mr. Flores told her he had a job she could do. However, Petitioner provided no further details on what job Mr. Flores gave her and why specifically she could not do it.

Due to the lack of testimony and other evidence regarding why Respondent's accommodation failed, the Commission must determine if it was Petitioner or Respondent who was ultimately responsible for Petitioner's unsuccessful attempt at working within her restrictions. As such, Petitioner failed to meet her burden of proving entitlement to temporary total disability benefits for her period of work restrictions from August 29, 2017 to October 5, 2017. Nevertheless, the Commission finds Petitioner is entitled to temporary total disability benefits beginning on October 6, 2017 and continuing to the April 20, 2018 hearing date, as that is the period Dr. Vargas

19IWCC0352

had Petitioner completely off work.

For these reasons, the Commission reverses the Decision of the Arbitrator and awards Petitioner benefits under the Act as stated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated August 16, 2018, is hereby reversed as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay temporary total disability benefits to Petitioner in the sum of $234.14 per week for 28 1/7 weeks, commencing 10/6/2017 through 4/20/2018, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services that relate only to treatment regarding Petitioner's low back and left shoulder injuries from 8/28/17 to 4/20/18, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent is liable for Petitioner's prospective medical care for her related low back and left shoulder injuries, including but not limited to, the treatment and surgical procedures recommended by Dr. Vargas on January 11, 2018.

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 Section 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. 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: JUL 12 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 5/23/19
46

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Tierney,
Petitioner,

19IWCC0353

vs.

NO: 14 WC 30217

TJX, 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, causal connection, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 October 29, 2018, 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.

19IWCC0353

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.

JUL 12 2019

DATED:
O6/20/19
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Barbara N. Flores

Marc Parker

Marc Parker

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

19IWCC0353

TIERNEY, JOHN
Employee/Petitioner

Case# **14WC030217**

TJX INC
Employer/Respondent

On 10/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.42% 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:

0140 PETER D CORTI LAW GROUP
VITAS J MOCKAITIS
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

19 IWCC0353

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)

JOHN TIERNEY,
Employee/Petitioner

v.

TJX INC.,
Employer/Respondent

Case # 14 WC 30217

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **August 27, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 5, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$89,356.80**; the average weekly wage was **$1,718.40**.

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

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

Respondent shall be given a credit of **$147,946.06** for TTD, **$7,823.13** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$155,769.19**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,145.43/week for a period of 6-4/7weeks, being the period of January 28, 2018 through March 14, 2018, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $110,083.45, as provided in Section 8(a) and the Fee Schedule pursuant to Section 8.2 of the Act.

Prospective Medical Treatment

Respondent shall authorize the medical treatment prescribed by Dr. Alden for treatment to Petitioner's hips and subsequent related, reasonable and necessary treatment.

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

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

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

Robert M. Harris

Robert M. Harris, Arbitrator

October 29, 2018
Dated

ICArbDec19(b)

OCT 29 2018

MEMORANDUM OF DECISION OF ARBITRATOR 19(b)

John Tierney v. TJX Inc.

14 WC 30217

STATEMENT OF FACTS

The parties stipulated Petitioner sustained a work-related accident on May 5, 2013, while he was working as a store manager for Respondent. Petitioner testified he tripped on a fatigue mat causing his left knee to strike the floor. He immediately noticed significant left keen pain which increased as he began medical treatment.

As a result of the left keen injury, Petitioner began an extensive and lengthy period of medical treatment which involved numerous surgical procedures and hospitalizations. Petitioner's Exhibit #2 documents eleven left ken surgical procedures were performed from October 15, 2013 to December 21, 2016:

On October 15, 2013, Petitioner underwent a left total knee replacement and left patellar tendon repair by Dr. Steven Chudik of Hinsdale Orthopedic Associates;

On April 8, 2014, Dr. Chudik performed arthroscopy on the Petitioner's left knee for manipulation and arthrofibrosis release caused by scar tissue;

On July 14, 2014, the Petitioner came under the care of Dr. Kris Alden of Hinsdale Orthopedics, who continues to treat him presently and on September 14, 2014, Dr. Alden performed a revision of the total knee arthroplasty, being the second total knee replacement;

On October 7, 2014, Dr. Alden performed a left knee arthrofibrosis;

Subsequently, the total knee replacement became infected, and on October 24, 2014, Dr. Alden performed a left knee resection arthroplasty and placement of an antibiotic spacer;

On February 10, 2015, Dr. Alden again performed a total left knee arthroplasty, removal of the antibiotic spacer and revision of the patellar tendon;

On April 27, 2015, Dr. Alden again performed a left knee arthrofibrosis to address scar tissue issues;

On January 4, 2016, Dr. Alden performed a left knee aspiration to address swelling;

On February 24, 2016, Dr. Alden performed an irrigation and deep debridement of the left knee;

Once the effects of the left knee infection were resolve, on November 11, 2016 Dr. Alden performed another total knee arthroplasty, complicated, and removal of the antibiotic spacer; and,

One last procedure was performed to the left knee on December 21, 2016, a left arthrofibrosis.

Petitioner testified that between knee surgeries, he had several periods of returning to work, noticing that he could not walk normally due to the pain caused by his numerous surgeries. Petitioner testified to using assistive devices, ranging from a cane to a motorized scooter during his numerous periods of recovery from surgery. Petitioner also sustained kidney failure due to the medications being utilized for treatment of the left knee infection.

Petitioner testified that all of the medical treatment for his left knee and complications arising from his surgeries and infection was authorized and Respondent paid the majority of the medical expenses.

Petitioner testified while he was under the care of Dr. Alden for his left knee in 2016, he began to notice pain in both hips. Dr. Alden's medical records document this beginning on August 25, 2016, with radiology indicating arthritic changes in both hips (Petitioner's Exhibit #2). Petitioner testified that he had not received any prior medical care for his hips and had not had any complaints of pain in his hips in the past. Dr. Alden began treating Petitioner's hips in January of 2017, starting with injections and conservative care. On June 1, 2017, Petitioner was seen by Dr. James Cohen at Respondent's request for a Section 12 examination ("IME"). Dr. Alden recommended bilateral hip replacements on August 31, 2017, opining the multiple surgeries to the left knee caused an altered gait and altered weightbearing which put stress on the hip (Petitioner's Exhibit #2).

On January 29, 2018, Dr. Alden performed a left total hip arthroplasty. Respondent has denied liability for the medical treatment and benefits incurred as a result of any medical treatment to Petitioner's hips. Petitioner testified the medical treatment for his hips has been paid by his wife's group medical insurance coverage (Petitioner's Exhibit #5). Petitioner was off work following the left hip surgery from January 28, 2018 to March 14, 2018, a period of 6-4/7 weeks and no TTD was paid for that period.

Petitioner testified, and the parties stipulated, he was paid TTD benefits from October 15, 2013 to March 26, 2017, a period of 129-1/7 weeks, with some periods of Temporary Partial Disability. The parties stipulated that the treatment Petitioner received for his left knee and the complications from that treatment are not in dispute, but there remain some unpaid medical expenses as documented in Petitioner's Exhibit #6.

Petitioner testified that following this IME he continued to see Dr. Alden periodically and eventually proceeded with left hip replacement on January 29, 2018 by of Dr. Alden. (PX. 1, 2). Petitioner testified this treatment was paid by his wife's group insurance and he was off work for 6-4/7 weeks as a result of the surgery. Petitioner also testified he has returned to work subsequently and continues to work in his prior position as a manager for Respondent.

Petitioner also testified, and the records indicate, Dr. Alden continues to treat Petitioner for his right hip, and Petitioner would like to have right hip replacement surgery as well. (PX. 2).

Petitioner testified that following the January 29, 2018 left hip replacement surgery, his left hip symptoms have improved and he was able to return to work.

Petitioner continues to notice significant pain in his right hip and left knee as he continues to work. Petitioner has received pain management treatment at Premier Pain & Spine (Petitioner's Exhibit #3). Petitioner wears a foot orthotic as a result of a shortening of his left leg. Petitioner testified he wants to have the right hip replacement surgery that Dr. Alden has prescribed.

CONCLUSIONS OF LAW

Regarding disputed issue (F) Whether Petitioner's current condition of ill-being regarding his bilateral hips is causally related to the stipulated injury, the Arbitrator finds and concludes as follows:

The parties stipulated Petitioner sustained a compensable work accident on May 5, 2013 while working as a store manager, injuring his left knee. Petitioner underwent multiple medical procedures, endured several serious complications following surgical procedures and lost significant time off work, as documented in his testimony and the medical records of the surgical procedures (Petitioner's Exhibit #1) and the records of treating physician, Dr. Alden (Petitioner's Exhibit #2).

The Arbitrator finds and concludes that the specific facts presented in this case, the types of injuries and conditions involved and the question of causation alleged, make this a claim that concerns questions within the knowledge of medical experts only. The Arbitrator does not hold himself out to be qualified to render medical opinions on disputed causation questions; therefore, this case requires reliance on expert medical testimony. The Arbitrator finds and concludes that the determination of causal connection in dispute regarding Petitioner's bilateral hip conditions can be decided only by weighing and evaluating expert medical opinions (here, Dr. Alden and Dr. Cohen) with additional support and guidance obtained and gleaned from Petitioner's testimony and the histories in the medical records.

In determining questions of accident and causation, 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 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n,* 397 Ill.App.3d 665, 675 (2009); *Fickas v. Industrial Comm'n,* 308 Ill.App.3d 1037, 1041 (1999). The Arbitrator further finds and concludes this was a close case, with both parties presenting credible evidence. Medical experts Dr. Cohen and Dr. Alden both presented arguments and opinions worthy of serious consideration. It is the Arbitrator's role to

decide which opinions (whether lay or expert) to adopt and assign greater weight when confronted with competing and conflicting expert opinions.

Further, "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 (2003). "An expert opinion is only as valid as the reasons for the opinion." *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174, 696 N.E.2d 1271, 1277 (1998). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Torres v. Midwest Development Co.*, 383 Ill. App. 3d 20, 28, 889 N.E.2d 654, 662 (2008). If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1999).

The Arbitrator has carefully reviewed all the evidence and finds and concludes that the opinions of treating physician Dr. Alden are assigned greater weight and credibility than those of Respondent's expert Section 12 examiner Dr. Cohen, both of whom are highly qualified orthopedic specialists. "Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician." *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

The preponderance of the medical evidence suggests that while Petitioner had underlying, pre-existing bilateral hip arthritis, the consequences of these multiple procedures and subsequent post-surgical treatments (such as using crutches, changes in weight-bearing and gait, etc.) directly led to a continuing and permanent aggravation/worsening of this degenerative arthritic condition, ultimately leading to the necessity of the January 29, 2018 left hip replacement surgery and the prospective surgery Dr. Alden recommends.

The Arbitrator also emphasizes that Dr. Alden was far more familiar with Petitioner's unique and overall physical condition, given his close relationship as his treating physician and considerable time examining and treating Petitioner for years and the multiple surgical procedures he performed. Therefore, this is another basis on which to assert that Dr. Alden's opinions should be afforded more weight and credibility than those of Respondent's examining expert Dr. Cohen, who examined Petitioner only once and was unaware of all of the relevant medical facts of this case.

Therefore, the Arbitrator finds and concludes Dr. Alden's theory of causation is quite plausible, more so than Dr. Cohen's total denial of any causation whatsoever. Although the medical records indicate Petitioner first complained of hip problems roughly three years after the accident (in 2016) Petitioner underwent multiple surgical procedures before that time and after, which plausibly aggravated his pre-existing arthritic hips, as Dr.

Alden opined. Dr. Alden also made no comment that Petitioner's first recorded complaints of hip pain which occurred in 2016 somehow negatively affect his causation opinion or the basis therefore, nor was that issue ever raised as a defense.

Further, it is not unreasonable to assume that it would take some time before these new symptoms and complaints would manifest, given that it would take some time for the aggravating circumstances to take effect and accelerate the degenerative arthritic condition. Further, Dr. Cohen opined that Petitioner's pain complaints relating to the hips seem to stem more from his back than the actual rotation of the hips or a condition which would be caused by an altered gait. However, the Arbitrator places very little weight on this opinion theory, which is speculative and relies on unproven assumptions regarding a low back condition. The Arbitrator therefore places less weight on Dr. Cohen's theory denying any and all causation. Accordingly, the Arbitrator adopts Dr. Alden's expert opinions and finds Petitioner has met his burden of proof by a preponderance of the evidence that a causal connection exists between the stipulated accident of May 5, 2013 and his current condition of ill-being regarding his bilateral hips and the resulting continuing need for additional medical treatment as Dr. Alden has recommended.

The Arbitrator notes that Petitioner's left hip was examined and x-rayed during Dr. Alden's office visit as early as June 25,2 015. (PX 2). The left hip examination took place. Hip x-rays revealed "moderate medial osteoarthritis with joint space narrowing, osteophytes, subchondral sclerosis, subchondral cysts. The diagnosis was left hip pain, moderate and moderate osteoarthritis. Further, in his office visit notes on January 26, 2017, Dr. Alden indicated "The patient has put increased stress on the right hip while compensating for the left knee." (PX 2). Dr. Cohen did not dispute the veracity of this note from Dr. Alden. Further, in his office visit notes on February 9, 2017 Dr. Alden indicated "His right hip is a direct cause of overuse due to prolonged nonweight and partial weight bearing to the left lower extremity. Once he started to weight bear on the left side, the pain started over his greater trochanter consistent with bursitis." (PX 2). Dr. Cohen commented on the opinion, criticizing it that it "...did not appear that he was relating his hip arthritis to the work injury but his bursitis." (RX 4, 21). Dr. Cohen, however, acknowledged "That's not in the record, that was my note that I made to myself." (RX 4, 21). The Arbitrator finds this comment by Dr. Cohen to be disingenuous and lack credibility. Dr. Cohen was fully aware that Dr. Alden was opining hip causation to the work accident and nothing else. Further, this was a gratuitous remark, in that Dr. Cohen even agreed that his opinion regarding what Dr. Alden meant was "not in the record." (RX 4, 21).

As the year 2016 progressed, Petitioner claimed continuing left knee pain as well as bilateral hip pain. Dr. Alden noted on August 25, 2016 that Petitioner was mostly suffering pain "in his bilateral hips, particularly in his groin, as well as in the lateral hip." (PX 4, 12). The diagnosis at that time "was basically hip arthritis."

(PX 4, 13). Dr. Alden agreed that this August 25, 2016 office visit was when Petitioner was first complaining of his pain, according to his notes. (PX 4, 23). X-rays were obtained which showed moderate osteoarthritis of the right hip and severe arthritis of the left hip. (PX 4, 13). On January 12, 2017, in addition to the knee complaint, Dr. Alden noted in his records Petitioner was having some progression of hip pain, particularly in the right hip. (PX 4, 14). Petitioner's motion was limited and clinical testing indicated hip pain secondary to arthritis. The diagnosis was significant arthritis in the bilateral hips and there was discussion of possible hop replacement and a bursal injection. A Follow-up visits on January 26, 2017 had similar results but Petitioner received an amniotics injection.

Regarding his visit and notes of January 26, 2017 Dr. Alden testified that regarding causal connection of the hip condition to the left knee and treatment, "I believe it was connected." (PX 4, 18). Dr. Alden testified that this was because Petitioner "...has had significant alterations in his gait for a number of years." (PX 4, 18).

Dr. Alden specifically testified regarding his theory of causation as follows: "He has had 9 or 10 surgeries, maybe more, on the left knee. So the left knee would normally take theoretically 50 percent of the stress of the lower extremities, but he has not been able to weight bear on it normally. He has limitations in his motion on his gait, and a loss of strength. So the lateral hip has had to compensate for all the problems that the left knee has had. In addition, the right side is taking up a lot of stress that has been put upon it because of alterations in the left lower extremity. Si it's sort of a double hip." (PX 4, 18-19). Dr. Alden testified that the hip treatment he is recommending is causally related to the knee condition: "I believe the hip arthritis has been accelerated because of the left knee problems." (PX 4, 19). Dr. Alden further testified "...all the joints are connected and alteration in one extremity can cause problems in the other." (PX 4, 19). Dr. Alden further testified that the length of Petitioner's leg bone has significance to this issue: "Yes, that's correct. **So he subjectively feels that his left leg is shorter, because it is shorter.** He has had a lot of surgery on it...The shortening of the leg, because of the, you know, implants, can put more stress on his low back as well as on the ipsilateral and contra." (PX 4, 19-20). Dr. Alden testified that he agreed the shortening of Petitioner's leg is an objective finding. (PX 4, 20). Dr. Alden testified that the left leg was shorter as "the result of surgery." (PX 4, 24). Dr. Alden further explained why: "The left leg would get short because of basically as we, you know, take the knee out, put spacers in it, there is going to be a natural sort of constriction of the ligaments, and the last surgery we actually had to use a hinged knee because the ligaments were so scarred and fibrotic from the pre-existing arthrofibrosis. So there is not a great way to solve that. That's why we have to make up for the dysfunctional ligaments with the implants. So it was – you know, the knee contracts and gets scarred." ((PX 4, 24).

Dr. Alden indicated in his August 31, 2017 office visits notes that the multiple surgeries to the left knee caused an altered gait and altered weightbearing which put stress on the hip (PX 2). In his records of February 9, 2017, and in his deposition, Dr. Alden indicated that the right hip pain was "a direct cause of overuse due to prolonged non-weight bearing and partial weight bearing to the left lower extremity." (PX 2, 4). The medical treatment records indicate Petitioner was treated with AmnioFix injection for the right hip pain and that the left hip was doing well. (PX. 2).

Dr. Alden's notes from the office visit of June 6, 2018 indicate his opinion that the right hip arthritic process was exacerbated by the altered weightbearing of the left lower extremity and accelerated the development of arthritis and his symptomology.

Dr. Alden testified Petitioner's hip condition was causally connected to the left knee injury because of the significant alterations in his gait for a number of years. Dr. Alden testified the hip arthritis has been accelerated because of the left knee problems. In addition, Dr. Alden testified Petitioner's left leg is shorter as a result of the multiple surgeries, putting additional stress on the back and hips (PX4,18-20, 25).

Respondent offered the deposition opinion testimony of its examining physician, Dr. James Cohen, who, in summary, testified that none of the arthritis or symptoms from the arthritis are related to the accident of May 5, 2013 nor to the left knee condition. (RX 1). On June 1, 2017, Petitioner was seen by Dr. James Cohen for a Section 12 examination ("IME") at Respondent's request. Dr. Cohen reviewed Petitioner's medical treatment records up to that point and performed an examination on Petitioner's left knee and leg and the left and right hips. Petitioner stated he noted his pain was just beneath the posterolateral iliac crest. Following this, Dr. Cohen indicated in both his report as and his deposition that he opined Petitioner was suffering from bilateral hip arthritis. Petitioner's complaint of "hip" pain on the right side is actually located just beneath the iliac crest, and was produced with extension of his back and not with rotation of his hip. (RX. 1). Dr. Cohen opined that none of the arthritis or symptoms from the arthritis are related to the accident of May 5, 2013 nor was the left knee condition. Dr. Cohen opined that an altered gait would not be a competent cause for aggravation of hip arthritis. (RX. 1). In addition, the doctor felt that no treatment for the left or right hip would be related to the May 5, 2013 incident, and that no restrictions of the hips would be related to that incident as well. (RX. 1). Finally, Dr. Cohen rendered the opinion that he did not believe any further treatment regarding either the left or right hip would be a result of the May 5, 2013 accident. (RX. 1).

Dr. Cohen opined that an altered gait would not be a competent cause for aggravation of hip arthritis; however, he admitted that an altered gait is a competent cause of aggravation of hip arthritis if a short legged gait is involved (RX 1, 30). Dr. Cohen's opinion apparently did not take into account the fact that Petitioner has a shortened left leg as indicated by Dr. Alden and Petitioner's credible testimony. Dr. Cohen suggested that

Petitioner suffered from unrelated, pre-existing, degenerative arthritis that happened to get worse after the accident and the multiple surgeries, a fact not in dispute.

The Arbitrator notes Petitioner's testimony and medical records indicate Petitioner had significant changes in his gait as a result of the knee surgeries which began in October of 2103 and continuing through his last knee surgery on December 21, 2016. Petitioner offered unrebutted testimony that he has not been able to walk normally since the knee surgeries. Petitioner testified his hip pain began in 2016 and there was no evidence of prior medical treatment or pain prior to the knee surgeries.

The Arbitrator finds that, when coupled with Petitioner's credible testimony, the medical records and Dr. Alden's deposition opinions, Petitioner has proven a causal connection between Petitioner's condition of ill-being of the left and right hips and the accident of May 5, 2013.

Regarding disputed issue (J), Whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical treatment, the Arbitrator finds and concludes as follows:

The Arbitrator has found Petitioner's current condition of ill-being with respect to both hips is causally related to the accident and the left knee injury. Petitioner testified that the medical expenses incurred for treatment to his hips have been paid by his wife's group insurance coverage, as documented in Petitioner's Exhibit #5. That document indicates that Blue Cross Blue Shield of Illinois is seeking reimbursement in the amount of $85,949.81 for benefits paid.

Petitioner introduced Petitioner's Exhibit #6, which documents unpaid medical expenses related to treatment for the left knee, totaling $24,133.64.

The Arbitrator finds that, based upon Petitioner's testimony, Dr. Alden's testimony and the medical records (Petitioner's Exhibits #1, 2, 3, and 4) Respondent is liable for reasonable and necessary medical expenses which total $110,083.45, as documented in Petitioner's Exhibits #5 and 6, pursuant to Section 8(a) and 8.2 of the Act.

Regarding disputed issue (K), Whether Petitioner is entitled to prospective medical care, the Arbitrator finds and concludes as follows:

As stated above, the Arbitrator has found that there is a causal connection between the Petitioner's current condition of ill-being relating to his left and right hips and the accident of May 5, 2013. The Arbitrator has also adopted the expert medical opinions of treating physician Dr. Alden. Accordingly, Petitioner is entitled to receive written confirmation and authorization from Respondent for treatment for both hips as Dr. Alden prescribed, including the surgical intervention as prescribed and costs attendant thereto. *Bennett Auto Rebuilders v. Industrial Commission,* 306 Ill.App.3d 650 (1999).

Regarding disputed issue (L), Whether temporary total benefits (TTD) are owed, the Arbitrator finds and concludes as follows:

Petitioner claims he missed 6-4/7 weeks off work subsequent to the left hip surgery which was Alden performed on January 29, 2018. The medical records support this period of temporary total disability. Since the Arbitrator has found that there is a causal connection between this left hip treatment and the accident of May 5, 2013, the Arbitrator finds Petitioner is entitled to receive 6-4/7 weeks of temporary total disability.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: October 29, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Danny Cook,
Petitioner,

vs.

City of Chicago,
Respondent.

19IWCC0354

NOS: 08WC39033
08WC39034

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 wage differential, nature and extent, and being advised of the facts and law, affirms and adopts the Decisions of the Arbitrator, which are attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator filed February 7, 2018, are 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: JUL 12 2019
o6/20/19
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0354

COOK, DANNY
Employee/Petitioner

Case# **08WC039033**

08WC039034

CITY OF CHICAGO
Employer/Respondent

On 2/7/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.65% 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:

0494 JOSEPH J SPINGOLA LTD
1314 KESSINGTON ST
SUITE 3843
OAK BROOK, IL 60522-7133

0010 CITY OF CHICAGO CORP COUNSEL
DONALD CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

19IWCC0354

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

Danny Cook
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **08** WC **39033**

Consolidated cases: **08 WC 39034**

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**, Arbitrator of the Commission, in the city of **Chicago**, on **November 27,17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0354

FINDINGS

On **March 26, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,305.97**; the average weekly wage was $**1,275.11**.

On the date of accident, Petitioner was **52** 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 $**None** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**None**.

Respondent is entitled to a credit of $**None** under Section 8(j) of the Act.

ORDER

The Nature and Extent of injury be and is hereby merged into the decision in case no. 08 WC 39034.

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.

#001 George J. Andros — **1/25/2018**

Signature of Arbitrator — Date

FEB 7 - 2018

Exhibit A

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Re: Danny Cook v. City of Chicago
08 WC 39033

Findings of Fact

The Petitioner testified he injured his upper back and right shoulder when he was turning a fire hydrant key on March 26, 2008. The accident is stipulated to between the parties (Arb. Ex. 1).

Medical treatment began the same day when Petitioner appeared at Mercy Works where a diagnosis was made of right shoulder strain (Pet. Ex. 1). A subsequent MRI showed partial high grade under surface tear at the proximal supraspinatus tendon extending into the critical zone (Pet. Ex. 10, pg. 19). Mercy Works doctors interpreted the MRI as a partial tear of the right proximal supraspinatus tendon. Petitioner was referred to Dr. William Heller. He interpreted the MRI as a high grade partial thickness tear with possible full thickness tear within the supraspinatus tendon (Pet. Ex. 1, pg.19). Conservative treatment was provided until Petitioner was discharged from treatment and released to full duty work on June 2, 2008. The sequence of events would lead to the conclusion Petitioner's injury to his right shoulder and upper back is causally related to his accident of March 26, 2008.

Conclusions of Law

Nature and Extent of Injury

The Petitioner sustained a subsequent accident on August 13, 2008, causing re-injury to his right shoulder, right shoulder blade and injury to his cervical spine. Therefore, the nature and extent of injury be and is hereby merged into the decision in case number 08 WC 39034.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0354

COOK, DANNY
Employee/Petitioner

Case# **08WC039034**

08WC039033

CITY OF CHICAGO
Employer/Respondent

On 2/7/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.65% 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:

0494 JOSEPH J SPINGOLA LTD
1314 KESSINGTON
SUITE 3843
OAK BROOK, IL 60522-7133

0010 CITY OF CHICAGO CORP COUNSEL
DONALD CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

19IWCC0354

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

Danny Cook
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 08 WC 39034

Consolidated cases: 08 WC 39033

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**, Arbitrator of the Commission, in the city of **Chicago**, on DECEMBER 22, 17. 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 **August 13, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$68,271.84**; the average weekly wage was **$1,312.92**.

On the date of accident, Petitioner was **52** 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 **$203,307.30** for TTD, **$0** for TPD, **$196,446.32** for maintenance, and **$N/A** for other benefits, for a total credit of **$399,753.62**.

Respondent is entitled to a credit of **$None** under Section 8(j) of the Act.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $875.28/week for 232 2/7 weeks, commencing August 15, 2008 to January 11, 2013 and January 10, 2015 to January 23, 2015, as provided in Section 8(b) of the Act.
Respondent shall be given a credit of $203,307.30 for temporary total disability benefits that have been paid.
Maintenance
Respondent shall pay Petitioner maintenance benefits of $875.28/week for 224 4/7 weeks, commencing January 12, 2013 through May 15, 2017, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $196,446.32 for maintenance benefits that have been paid. The parties have stipulated there is no claim for an overpayment or underpayment of TTD or maintenance.
Medical benefits
Respondent shall pay reasonable and necessary medical services of $1,700.00, as provided in Section 8(a) of the Act.
Permanent Partial Disability: Wage differential
Respondent shall pay Petitioner permanent partial disability benefits, commencing October 18, 2017, of $664.72/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

#001 Hon. George Andros
Signature of Arbitrator

Jan 25, 2018
Date

ICArbDec p. 2

FEB 7 - 2018

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Re: Danny Cook v. City of Chicago
08 WC 39034

Petitioner was injured on August 13, 2008, when he was cutting concrete with a band saw aggravating prior injuries to his right shoulder and an injury to his cervical. The accident is stipulated to between the parties (Arb. Ex. 1).

The Petitioner appeared at Mercy Works the following day where a diagnosis was made of right shoulder and right shoulder blade strain (Pet. Ex. 1, pg. 5). Petitioner was instructed to see Dr. Heller. He was placed on limited duty which Respondent was unable to accommodate and therefore Petitioner was to remain off work. Petitioner saw Dr. Heller on August 18, 2008. He examined Petitioner and diagnosed him with recurrent right shoulder pain from injuries sustained on March 26, 2008. Arthroscopic surgery for decompression was recommended. On September 10, 2008, surgery was performed for right shoulder rotator cuff tear. The surgery was described as arthroscopic repair of right shoulder rotator cuff, longhead biceps resection of the right shoulder, right shoulder arthroscopic subacromial decompression and right shoulder glenohumeral joint arthroscopy with extensive debridement (Pet. Ex. 2, pg. 67-68). Physical therapy followed. An MRI of Petitioner's cervical was performed on December 4, 2008. The results revealed degenerative changes and disc disease at all levels from C3 through C6-7 (Pet. Ex. 1, pg. 17-18). Physical therapy continued until Dr. Heller recommended work conditioning on February 23, 2009. Work conditioning continued until April of 2009, when Respondent denied further authorization.

Respondent requested an IME with Dr. Verma. On August 10, 2009, the doctor assessed Petitioner has persistent weakness of the right shoulder with likely cervical radiculopathy (Pet. Ex. 3, pg. 73-74). Dr. Verma noted displacement of an anchor from Petitioner's rotator cuff repair surgery. He was of the opinion Petitioner has a recurrent rotator cuff tear and recommends further treatment. He also recommended a cervical MRI and a complete evaluation by a cervical specialist.

Finally, he recommended an MRI arthrogram of the right shoulder to evaluate whether Petitioner's rotator cuff was healing (Pet. Ex. 3, pg. 73-74). Dr. Verma later reports the MRI arthrogram he recommended was done on February 22, 2010. He states the results show evidence of displacement of an anchor with evidence of a recurrent small tear of the supraspinatus tendon. He gives a secondary diagnosis of likely cervical radiculopathy and reiterates his recommendation Petitioner should have an independent examination by a cervical specialist to include MRI and EMG. His final opinion is Petitioner suffers from a failure of his rotator cuff repair and further states his condition is causally related to his work injuries (Pet. Ex. 3, pg. 71-72).

Petitioner then sought additional medical treatment with Dr. Howard An. His initial visit was on May 4, 2010. Dr. An makes a diagnosis Petitioner has a pre-existing condition of cervical disc degeneration and spondylosis and has a C5-6 radicular type of pain on the right side associated with bulging or herniated disc. He states Petitioner is quite symptomatic and in need of medical treatment. He provides an opinion Petitioner's current symptoms are related to his work injuries in that his work injury has aggravated a pre-existing condition beyond normal progression (Pet. Ex. 3, pg. 66-67). Petitioner now treated with Dr. An.

An MRI of Petitioner's cervical was done on June 7, 2011. The results reveal degenerative changes throughout with severe spinal and bilateral foraminal stenosis at C4-5. At C5-6, there is right asymmetric posterior disc causing significant right lateral recess stenosis. At C6-7, there is moderate spinal canal and bilateral severe foraminal stenosis (Pet. Ex. 3, pg. 215-216). Cervical fusion was recommended. Further treatment with Dr. An was delayed when Petitioner had to pursue medical treatment for atrial fibrillation. He returned to Dr. An on January 20, 2012, when cervical fusion was again recommended. Further medical treatment was again delayed when Respondent disputed whether Petitioner's cervical had been injured or aggravated at the time of his accident.

Thereafter, Dr. An recommended Petitioner participate in a functional capacity evaluation. The test was performed at Athletico on July 19, 2012. The report of Athletico (Pet.Ex.3, pg. 158-178) reveals Petitioner gave good consistent effort throughout the exam. It concluded Petitioner did not have the ability to return to work as a laborer. The FCE found he was able to do tasks at a medium pdc level with occasional lifting to 45 lb. floor to shoulder and 30 lb. overhead. Petitioner saw Dr. An there

after on August 28, 2012, when the results of the functional capacity evaluation were examined. The Petitioner now decided that he did not want to proceed with cervical fusion. As a result, Dr. An placed him at MMI with limitations to work only medium physical demand level with no lifting more than 45 lb. (Pet. Ex. 3, pg. 43).

Respondent offered vocational rehabilitation through Genex. Petitioner appeared for an initial assessment on October 11, 2012 (Pet. Ex. 5). The report indicates Petitioner will attend introduction to computer classes at Daley College and also begin job search. A closing report dated April 5, 2013, states Petitioner was having increased pain symptoms from sitting for prolonged periods of time making him unable to continue to attend classes after January 24, 2013. The report further indicates Petitioner returned to Dr. An who ordered an MRI and wrote that vocational rehabilitation should be put off as it is causing exacerbation of Petitioner's symptoms (Pet. Ex. 6). Finally the report indicates Marlita Thomas, the Respondent's adjuster, approved closure of the vocational rehabilitation file because of Petitioner's medical issues.

Petitioner saw Dr. An a final time on July 21, 2015, when he said Petitioner's physical condition has plateaued and that he is at MMI. He recommended restrictions of no lifting more than 50 lbs. and avoid frequent bending and twisting of neck. He offers the Petitioner the opportunity to reconsider cervical fusion and/or rotator cuff revision in the future (Pet. Ex. 3, pg. 49).

On December 11, 2015, a report of Triune, a vocational rehabilitation facility, indicates that adjuster Marlita Thomas contacted them to consider resuming vocational rehabilitation. The report indicates that, after having been provided with treatment records including Dr. An's report where he removed Petitioner from school, no further authorization or offer of vocational rehabilitation was ever made.

Petitioner was examined by Dr. Samuel Chmell, whose report is in evidence as Pet. Ex. 8. The doctor makes a diagnosis of torn rotator cuff of the right shoulder and biceps tendon rupture post-arthroscopy. He concurs Petitioner has a failed rotator cuff repair of the right shoulder. He also makes a diagnosis of traumatic aggravation of degenerative disc disease of the cervical spine. He states Petitioner could be a candidate for additional surgeries. He concludes Petitioner has significant permanent impairment and disability about the cervical spine and both upper extremities.

Following, Petitioner participated in a vocational rehabilitation assessment with Steven Blumenthal whose report is in evidence as Pet. Ex. 9. Mr. Blumenthal comes to the conclusion Petitioner is employable but not a good candidate for vocational rehabilitation job placement services. The report also demonstrates Mr. Blumenthal reviewed the various job goals identified at Genex. He states the position of manager of a liquor establishment would not be a viable job goal as Petitioner has limited work experience and no high school diploma or GED. Also, he would not qualify as a gate guard for the same reasons, but also, because Petitioner has a past felony conviction. He states hotel clerk would require a GED and computer literacy both of which Petitioner does not possess. The goal of sales/route driver also is said to be inappropriate as Petitioner is restricted from lifting more than 50 lb. with further restrictions on frequent twisting and bending of the neck. Mr. Blumenthal does identify general salesperson as a position Petitioner might be able to do. He concludes Petitioner will have a substantial wage loss with entry level earnings of $8.75 per hour to $10 per hour. Additional wage expectations are predicted but only after Petitioner would gain work experience.

Carolyn Jones, an administrative assistant in Petitioner's department, testified she provided a work assignment to the Petitioner prior to May 15, 2017. Petitioner testified he is currently performing that work assignment. He is driving a van to and from various locations throughout the city transporting other workers and mail. Carolyn Jones was unable to ascribe a job title for Petitioner's activities. When asked if the work activities described for Petitioner were activities of the job description of a concrete laborer, she testified they were not.

Finally, the Petitioner testified he had an MRI on December 4, 2008, which has not been paid. A copy of the bill in the amount of $1,700.00 along with a copy of the MRI report and HICFA were admitted into evidence as Pet. Ex. 10.

Conclusions of Law

Causal Connection

Respondent disputes causal connection. The various treatment records and IME reports do not reflect a dispute with respect whether Petitioner injured or aggravated a prior injury to his right shoulder. There does appear to be some dispute with respect to whether he injured his cervical spine or sustained an aggravation of pre-existing conditions regarding his cervical. The Respondent has not made clear exactly what it is disputing. Therefore, the Respondent has failed to prove what condition or conditions are not causally related. Therefore, the issue of causal connection be and is hereby found in favor of the Petitioner as it relates to both his right shoulder and cervical spine.

In support of that conclusion, the Arbitrator notes Respondent had an IME of the Petitioner by Dr. Verma on August 10, 2009 (Pet. Ex. 3, pg. 73-74). While Dr. Verma reports on the condition of the Petitioner's right shoulder, he also reports on the condition of Petitioner's cervical. He recommends further treatment for both conditions. However, he does not deny causality as it relates to Petitioner's accident of August 13, 2008.

In support of that conclusion, the Arbitrator notes Petitioner not only complained of right shoulder and right shoulder blade pain when he first appeared at Mercy Works on August 14, 2008 (Pet. Ex. 1, pg. 5). He was now complaining of numbness in his right middle finger and right ring finger.

The Arbitrator recognizes these complaints to signal pathology in addition to shoulder injury. It is noted Petitioner saw Dr. Heller on August 18, 2008. At that visit, Dr. Heller stated Petitioner's injury to his right shoulder has worsened again and is now removed from work. Arthroscopic repair is recommended. A Mercy Works note of the same day states Dr. Heller has recommended physical therapy for the Petitioner's neck prior to shoulder surgery. On September 5, 2008, Mercy Works reports Petitioner has completed seven sessions of physical therapy for his neck. On October 20, 2008, Dr. Heller reports Petitioner has significant neck pain which he described as a recurrent problem existing prior to his shoulder surgery (Pet. Ex. 2, pg. 49). In a letter to Mercy Works dated November 14, 2008, Dr. Heller reports he has reviewed the available medical evidence from the Petitioner's accident of March 26, 2008. He states he finds no evidence of neck injury in those treatment records. However, he states that records in August 2008, state patient is suffering a mild cervical radiculopathy and trapezoid spasm. On December 1, 2008, Dr. Heller reports he does not believe cervical radiculopathy relates to Petitioner's March 26, 2008, accident. He does state the cervical injury is a separate injury causally related to Petitioner's August 13, 2008 accident. The sequence of events leads to the conclusion Petitioner injured his right shoulder in his prior accident on March 26, 2008. In his accident of August 13, 2008, he suffered an aggravation of his right shoulder injury and an injury to his cervical which is a new and distinct injury in the form of an aggravation of pre-existing conditions. In support of that conclusion, the Arbitrator notes that Dr. An gave the opinion Petitioner's cervical symptoms are related to the date of his accident (August 13, 2008) and that the injury aggravated pre-existing conditions beyond normal progression (Pet. Ex. 3, pg. 66-67). Dr. Chmell specifically separates Petitioner's two accidents and states the injury to Petitioner's right shoulder occurred in his accident of March 26, 2008. It is also his opinion Petitioner again sustained injury to his right shoulder in his accident of August 13, 2008.

With respect to Petitioner's cervical spine, it is Dr. Chmell's opinion that injury occurred in his accident of August 13, 2008. Therefore, the Arbitrator hereby finds the injury and treatment to Petitioner's right shoulder began with his accident of March 26, 2008, and was aggravated in his accident of August 13, 2008. With respect to Petitioner's cervical, the Arbitrator hereby finds the Petitioner sustained an injury to his cervical on August 13, 2008, with subsequent medical treatment for an aggravation of pre-existing conditions.

Medical Expenses

The Arbitrator having found causal connection in favor of the Petitioner with respect to his cervical spine emanating from his accident of August 13, 2008, now finds and awards the Petitioner the sum of $1,700.00 as and for a cervical MRI performed at Preferred Open MRI as demonstrated by Pet. Ex. 10.

Nature and Extent of Injury

The Petitioner sustained injury or aggravation of pre-existing conditions in his accident of August 13, 2008. At the conclusion of medical treatment, a functional capacity evaluation revealed that he was unable to return to work as a concrete laborer (Pet. Ex. 4). Dr. An found Petitioner to be at MMI on different occasions. On each occasion, he said Petitioner was able to do medium work sometimes with no lifting more than 45 lb. and at times unable to lift more than 50 lb. A vocational assessment at Genex recommended Petitioner attend Daley College for computer courses and GED classes. When the Petitioner was having increased pain symptoms while in class, Dr. An removed him from class when additional testing was made necessary. As a result, Genex closed their file on April 5, 2013 (Pet. Ex. 6). A subsequent report from Triune (Pet. Ex. 7) demonstrates Respondent considered placing Petitioner back into formal vocational rehabilitation. However when presented with complete treatment records, Triune and Respondent took no further action with respect to vocational rehabilitation.

A final vocational assessment was conducted with Steven Blumenthal (Pet. Ex. 9). That report also states Petitioner is not a good candidate for vocational rehabilitation but is employable.

With respect to those jobs Petitioner may be able to obtain, both Genex and Blumenthal concur on the job of general salesperson and therefore the Arbitrator concludes that is a job which the Petitioner is capable of obtaining. Mr. Blumenthal provides that entry level earnings would be $8.75 per hour to $10.00 per hour. With that, he states that Petitioner has sustained a significant wage loss. The average amount Petitioner would earn is $9.38 per hour. The parties have stipulated the current wage rate for a concrete laborer is $40.20 per hour. Petitioner claims he is entitled to a wage differential award under 8(d)1 of the Act. Respondent claims he is not entitled to a wage differential as he is currently working making the same wages as any other concrete laborer. The evidence reveals Petitioner is performing none of the duties of a concrete laborer (Pet. Ex. 11). That fact was confirmed by Carolyn Jones. She also could not identify a job title for the work Petitioner is doing and referred to it merely as "an assignment". The Arbitrator concludes Petitioner is doing a form of modified duty. Based upon the Appellate Court ruling in the case of Jackson Park Hospital v. Industrial Commission, 2016 Il. App. (1st) 142431 WC, the Arbitrator hereby finds and awards the Petitioner a wage differential award under 8(d)1 of the Act. The Award is hereby calculated using $40.20 per hour for Petitioner's current wages for 40 hours. That would be $1,608.00 per week. Using the average amount of $9.38 which Petitioner might earn for 40 hours would be $375.20 per week. This results in a weekly wage loss of $1,233.80. Two-thirds of that loss is $822.53 per week which exceeds the maximum PPD allowed for an 8(d)1 Award. Therefore, the Arbitrator hereby finds and awards the Petitioner the sum of $664.72 per week for the duration of his disability as provided for in Section 8(d)1 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NORMAN T. ADAMS,

Petitioner,

vs. NO: 17WC 34515

CITY OF VENICE,

19IWCC0355

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 1, 2018, is hereby affirmed and adopted.

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

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

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

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

DATED: JUL 12 2019

o070319
LEC/jrc
043

Elizabeth.Coppoletti

Douglas McCarthy

Stephen Mathis

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

ADAMS, NORMAN
Employee/Petitioner

Case# **17WC034515**

12WC033064

CITY OF VENICE
Employer/Respondent

19IWCC0355

On 10/1/2018, 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 2.32% 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:

5060 EVANS BLASI
PETER S BLASI
1512 JOHNSON RD
GRANITE CITY, IL 62040

0000 RUSIN & MACIOROWSKI LTD
SARAH TRIPP
231 W MAIN ST SUITE 2E
CARBONDALE, IL 62901

STATE OF ILLINOIS) 19IWCC0355
)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)

Norman T. Adams
Employee/Petitioner

v.

City of Venice
Employer/Respondent

Case # 17 WC 34515

Consolidated cases: 12 WC 33064

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 30, 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, November 16, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $27,204.84; the average weekly wage was $523.17.

On the date of accident, Petitioner was 51 years of age, married with 0 dependent child(ren).

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

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

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 provided to Petitioner from November 16, 2017, through February 26, 2018, as identified in Petitioner's Exhibit 18 and Respondent's Exhibit 23, 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.

Petitioner's petition for prospective medical treatment is denied.

Respondent shall pay Petitioner temporary total disability benefits of $348.78 per week for 16 6/7 weeks, commencing November 17, 2017, through March 14, 2018, 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)

September 24, 2018
Date

OCT 1 - 2018

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 12 WC 33064, the Application alleged that on January 4, 2012, Petitioner "Injured back in the course of employment" and sustained an injury to the "Whole person" (Arbitrator's Exhibit 3). In case 17 WC 34515, the Application alleged that on November 16, 2017, Petitioner attempted to break up a "dog fight" and sustained injuries to the low back and left leg (Arbitrator's Exhibit 4).

At trial, Petitioner's counsel made an oral motion to consolidate the two cases and Respondent's counsel had no objection. Accordingly, the Arbitrator granted the motion. In regard to 12 WC 33064, Petitioner's counsel made an oral motion to change the date of accident from January 4, 2012, to November 22, 2011. Respondent's counsel objected to Petitioner's motion, but the Arbitrator overruled the objection and granted Petitioner's motion. The date of accident alleged in 12 WC 33064 was changed by interlineation from January 4, 2012, to November 22, 2011 (Arbitrator's Exhibit 3).

The cases were heard in a 19(b) proceeding and Petitioner sought orders for payment of temporary total disability benefits and medical bills as well as prospective medical treatment. In regard to 12 WC 33064, Respondent disputed liability on the basis of accident, notice, causal relationship and the chain of physician referrals. Because the Arbitrator permitted Petitioner to change the date of accident alleged from January 4, 2012, to November 22, 2011, Respondent also raised a statute of limitations defense. In regard to 17 WC 34515, Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibits 1 and 2).

At the time of both accidents, Petitioner worked for Respondent as the Chief of Police. Petitioner continues to work for Respondent in that capacity.

Petitioner testified that on November 16, 2017, he provided assistance to an officer who was attempting to break up a fight between two dogs. The larger dog was a pit bull and, when Petitioner attempted to restrain the dog, he experienced a sharp pain in his low back. The accident was reported that same day and a First Report of Injury was prepared (Respondent's Exhibit 5).

Petitioner was seen by Dr. Christopher Knapp on November 16, 2017. Petitioner informed Dr. Knapp that he injured his low back while restraining a pit bull, but that he was being treated by Dr. Gornet and Dr. Boutwell for a work-related injury. Dr. Knapp diagnosed Petitioner with an acute lumbar strain and authorized Petitioner to be off work. He saw Petitioner the following day and recommended Petitioner have physical therapy (Respondent's Exhibit 23).

Petitioner subsequently sought treatment at Multicare Specialists where he was evaluated by Dr. Jonathon Brooks, a chiropractor. Dr. Brooks ordered physical therapy and authorized Petitioner to be off work. He treated Petitioner through January 25, 2018 (Petitioner's Exhibit 15).

Dr. Gornet saw Petitioner on February 26, 2018, and Petitioner informed him of the accident involving the pit bull on November 16, 2017. Dr. Gornet's findings on examination were the same as they had been previously and he authorized Petitioner to return to work on light duty on March 15, 2018 (Respondent's Exhibit 21).

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment by Respondent on November 16, 2017.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding the circumstances of the accident of November 16, 2017, was unrebutted. Further, the accident was reported and a First Report of Injury was prepared that same day.

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

The Arbitrator concludes Petitioner's current condition of ill-being is not causally related to the accident of November 16, 2017.

In support of this conclusion the Arbitrator notes the following:

At the time of the accident of November 16, 2017, Petitioner was being treated for a back condition which, in case 12 WC 33064, the Arbitrator has determined not to be work-related.

Petitioner received treatment subsequent to the accident. When seen by Dr. Gornet on February 26, 2018, Dr. Gornet noted that the findings on examination were the same as they were previously.

Accordingly, the Arbitrator concludes Petitioner sustained a temporary exacerbation of his low back condition as a result of the accident of November 16, 2017.

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

The Arbitrator concludes Respondent is liable for payment of medical services provided to Petitioner as a result of the accident of November 16, 2017.

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner from November 16, 2017, through February 26, 2018, as identified in Petitioner's Exhibit 18 and Respondent's Exhibit 23, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers

of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F), Petitioner's petition for prospective medical treatment is denied.

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 16 6/7 weeks commencing November 17, 2017, through March 14, 2018.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work during the aforementioned period of time following the accident of November 16, 2017.

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

NORMAN ADAMS,
Petitioner,

vs.

CITY OF VENICE,
Respondent.

19IWCC0356

NO: 12WC 33064

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 statute of limitations, accident, notice, causal connection, temporary total disability, medical expenses, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 1, 2018, is hereby affirmed and adopted.

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

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

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: JUL 12 2019
o070319
LEC/jrc
043

Elizabeth.Coppoletti

Douglas McCarthy

Stephen Mathis

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

ADAMS, NORMAN
Employee/Petitioner

Case# **12WC033064**

17WC034515

CITY OF VENICE
Employer/Respondent

19IWCC0356

On 10/1/2018, 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 2.32% 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:

5060 EVAN BLASI
PETER S BLASI
1512 JOHNSON RD
GRANITE CITY, IL 62040

0000 RUSIN & MACIOROWSKI LTD
SARAH TRIPP
231 W MAIN ST SUITE 2E
CARBONDALE, IL 62901

19IWCC0356

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)

Norman Adams
Employee/Petitioner

v.

City of Venice
Employer/Respondent

Case # 12 WC 33064

Consolidated cases: 17 WC 34515

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 30, 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 **Statute of Limitations and Chain of Referral**

RECEIVED

FINDINGS

On the date of accident, November 22, 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 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 $27,204.84; the average weekly wage was $523.17.

On the date of accident, Petitioner was 45 years of age, married with 0 dependent child(ren).

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

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

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

ORDER

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

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

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

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

William R. Gallagher

William R. Gallagher, Arbitrator
ICArbDec19(b)

September 28, 2018
Date

OCT 1 - 2018

19IWCC0356

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 12 WC 33064, the Application alleged that on January 4, 2012, Petitioner "Injured back in the course of employment" and sustained an injury to the "Whole person" (Arbitrator's Exhibit 3). In case 17 WC 34515, the Application alleged that on November 16, 2017, Petitioner attempted to break up a "dog fight" and sustained injuries to the low back and left leg (Arbitrator's Exhibit 4).

At trial, Petitioner's counsel made an oral motion to consolidate the two cases and Respondent's counsel had no objection. Accordingly, the Arbitrator granted the motion. In regard to 12 WC 33064, Petitioner's counsel made an oral motion to change the date of accident from January 4, 2012, to November 22, 2011. Respondent's counsel objected to Petitioner's motion, but the Arbitrator overruled the objection and granted Petitioner's motion. The date of accident alleged in 12 WC 33064 was changed by interlineation from January 4, 2012, to November 22, 2011 (Arbitrator's Exhibit 3).

The cases were heard in a 19(b) proceeding and Petitioner sought orders for payment of temporary total disability benefits and medical bills as well as prospective medical treatment. In regard to 12 WC 33064, Respondent disputed liability on the basis of accident, notice, causal relationship and the chain of physician referrals. Because the Arbitrator permitted Petitioner to change the date of accident alleged from January 4, 2012, to November 22, 2011, Respondent also raised a statute of limitations defense. In regard to 17 WC 34515, Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibits 1 and 2).

At the time of both accidents, Petitioner worked for Respondent as the Chief of Police. Petitioner continues to work for Respondent in that capacity.

Petitioner testified that on November 22, 2011, he was in a meeting with a representative of the Secretary of State. The purpose of the meeting was to discuss what records the Department had which could be disposed of. The meeting took place in the basement of the City Hall. Petitioner stated he was in the process of bending over to move/slide boxes of records when he felt a sharp pain in his low back. At that time, Petitioner was being treated for a right shoulder injury which was work-related.

Petitioner testified he reported the accident that same day to Roseann Koelker, the Comptroller. Koelker completed a Form 45 – First Report of Injury and purportedly faxed it to the insurance company. The First Report of Injury that was completed/faxed on November 22, 2011, was somehow lost.

A second Form 45 was prepared by Petitioner on January 4, 2012. The description of the accident was that Petitioner was sliding boxes of files and he experienced low back pain. The date and time of the accident was indicated as January 4, 2012, at 10:30 AM. The second Form 45 was signed by Roseann Koelker. At trial, Petitioner stated that the date of accident being indicated as January 4, 2012, was a "clerical error."

Roseann Koelker was deposed on August 9, 2018, and her deposition testimony was received into evidence at trial. At the time she was deposed, Koelker was the Respondent's Treasurer; however, in November, 2011, and January, 2012, she was the Respondent's Comptroller. As Comptroller, Petitioner's job duties included payroll, insurance and reporting work-related accidents to the insurance company (Petitioner's Exhibit 17; pp 5-8).

Koelker testified that Petitioner reported he sustained an injury while moving boxes in the basement when a representative of the state was there. She confirmed that the date of the First Report was January 4, 2012. When questioned whether this was the original Report of Injury or whether one had been filled out previously, Koelker stated she could not remember (Petitioner's Exhibit 17; pp 14-15).

Koelker identified an exhibit which listed the various documents that the representative of the Secretary of State's office authorized to be destroyed. The document confirmed that the representative of the Secretary of State's office was present on November 22, 2011 (Petitioner's Exhibit 17; Deposition Exhibits 2 and 3).

On cross-examination, Koelker testified that January 4, 2012, would have been the first date Petitioner reported an accident to her. When questioned about November 22, 2011, being the date the representative of the Secretary of State was there, Koelker stated that Petitioner did not inform her that he had sustained an injury on that date (the Arbitrator notes that the question posed erroneously stated the date of accident to be the day prior, November 21, 2011) (Petitioner's Exhibit 17; pp 19-20).

Petitioner did not seek any medical treatment for that injury until January 3, 2012 (the day before the First Report was prepared) when he was seen by Dr. Robert Blankenship, his family physician. According to Dr. Blankenship's records, Petitioner complained of neck, right shoulder and low back pain. In regard to Petitioner's low back pain, Petitioner advised that it was new and reported an onset as having occurred during the past 10 to 14 days. There was no reference to Petitioner having sustained a work-related injury to his low back (Petitioner's Exhibit 1).

Dr. Blankenship referred Petitioner to Dr. Gregory Stynowick, who initially evaluated Petitioner on January 16, 2012. According to Dr. Stynowick's record of that date, Petitioner was involved in a motor vehicle accident in October, 2009, and experienced "severe low back and right lower extremity pain" as well as an injury to his right shoulder. Petitioner subsequently underwent a right rotator cuff repair in March, 2010. The record also noted that "In January of 2012, the patient was moving boxes at the Venice Police Department. This is when his low back pain started." (Petitioner's Exhibit 3).

Dr. Blankenship saw Petitioner on multiple occasions from January, 2012, through April, 2013, and there was not a reference to Petitioner having sustained a work-related injury in any of those records. In Dr. Blankenship's record of June 5, 2013, he noted that Petitioner sustained a low back injury in January, 2012, while moving heavy boxes. He commented that this should have been in the record previously (Petitioner's Exhibit 1).

On June 26, 2013, Petitioner began physical therapy at Gateway Regional Medical Center. According to the record of that date, Petitioner advised that in January, 2012, he was moving boxes at work that weighed at least 100 pounds and sustained an injury to his low back (Respondent's Exhibit 10).

Petitioner was seen at King Spinal & Sports Rehabilitation on April 28, 2014. In the form completed by Petitioner, the space for information regarding an accident or injury was left blank. Petitioner described the condition as "lower back hip pain." According to Dr. Charles King's note of April 29, 2014, Petitioner's low back pain began after he had knee surgery three weeks ago and has low back pain had been constant ever since (Respondent's Exhibit 13).

Petitioner was subsequently treated by Dr. David Kennedy, a neurosurgeon. Prior to being evaluated by Dr. Kennedy, Petitioner completed two forms on October 12, 2014. In the initial form completed and signed by Petitioner, he responded "no" as to whether he had an open work comp case. In a Patient Medical History form completed by Petitioner, in response to the question whether he had a history of major trauma or previous work-related injury, Petitioner responded "yes," but he only referenced his right shoulder (Respondent's Exhibit 13).

Dr. Kennedy evaluated Petitioner on November 11, 2014. His record of that date noted Petitioner was the Police Chief of Venice, Illinois, and he had a long history of lower lumbar pain which had grown progressively more severe. Dr. Kennedy's record noted "This dates back at least two years. He cannot recall any specific event that precipitated this." (Petitioner's Exhibit 9).

On February 23, 2015, Dr. Kennedy performed back surgery. The procedure consisted of a fusion at L5-S1 with placement of an interbody cage (Petitioner's Exhibit 9).

Petitioner continued to be treated by Dr. Kennedy following surgery. Dr. Kennedy subsequently referred Petitioner to Dr. Folasade Oladapo, a pain management physician, who saw Petitioner on April 13, 2015. According to his record of that date, Petitioner's low back and right leg pain began around 2013 when he was moving heavy boxes and furniture (Respondent's Exhibit 15).

Petitioner was seen at Multicare Specialists on January 5, 2016, by Dr. Ashley Eavenson, a chiropractor. At that time, Petitioner complained of lower back pain which he related to an injury that occurred approximately three years ago while moving boxes in the basement of the Police Department. Dr. Eavenson provided chiropractic treatment, but subsequently referred Petitioner to Dr. Matthew Gornet, an orthopedic surgeon (Respondent's Exhibit 16).

Dr. Gornet saw Petitioner on January 12, 2016. At that time, Petitioner complained of low back pain which he related to an accident that occurred on November 22, 2011, while he was moving property boxes. Dr. Gornet noted Petitioner had undergone a fusion with plating at L5-S1. Dr. Gornet ordered various diagnostic tests and has recommended Petitioner undergo a revision fusion procedure at L5-S1 (Petitioner's Exhibit 11).

Dr. Gornet referred Petitioner to Dr. Kaylea Boutwell, a pain management physician. Dr. Boutwell noted Petitioner sustained an injury on November 22, 2011, but did not describe how it occurred. She confirmed that Petitioner had a failed fusion at L5-S1 (Petitioner's Exhibit 14).

At the direction of Respondent, Petitioner was examined by Dr. Robert Bernardi, a neurosurgeon, on June 13, 2017. In connection with his examination of Petitioner, Dr. Bernardi reviewed a voluminous amount of medical records as well as various diagnostic tests provided to him by Respondent. When Dr. Bernardi examined Petitioner, the Petitioner could not recall the date of accident, but thought it was in November, 2011. Dr. Bernardi noted that the records suggested it occurred on January 4, 2012. Petitioner informed Dr. Bernardi he injured his back while moving boxes filled with paper (Respondent's Exhibit 8; Deposition Exhibit 2).

Dr. Bernardi opined Petitioner had L5-S1 degenerative disc disease, had undergone instrumental fusion at L5-S1, a delayed L5-S1 arthrodesis and low back and bilateral non-radicular pain of uncertain etiology. In regard to causality, Dr. Bernardi opined that Petitioner's low back and leg symptoms were not related to the accident of January 4, 2012. He noted that while Petitioner informed him he had not experienced a significant episode of low back pain prior, Petitioner had, in fact, undergone a CT scan of the lumbar spine on September 14, 2009. He also noted that on January 3, 2012 (the day before the accident date alleged in the original Application) Petitioner had been seen by Dr. Blankenship and advised that low back pain had been present for 10 to 14 days. Dr. Bernardi also noted some inconsistencies in the medical records, specifically that when Petitioner was seen by Dr. Stynowick on January 16, 2012, he related his low back symptoms to a motor vehicle accident that occurred in 2009. Dr. Bernardi also noted that when Petitioner was seen by Dr. Kennedy, Petitioner denied that he had a pending work comp case and later stated he could not recall a specific event that precipitated his back complaints (Respondent's Exhibit 8; Deposition Exhibit 2).

Dr. Gornet was deposed on August 15, 2017, 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. Dr. Gornet testified Petitioner sustained a low back injury while moving boxes on November 22, 2011, the accident caused an injury to the L5-S1 disc which necessitated the treatment Petitioner received thereafter. Dr. Gornet recommended Petitioner undergo another fusion procedure at L5-S1 (Petitioner's Exhibit 16; pp 5, 12-14).

On cross-examination, Dr. Gornet agreed that the histories Petitioner provided to Dr. Blankenship, Dr. Stynowick and Dr. Kennedy were inconsistent with the history Petitioner had provided to him. Dr. Gornet agreed he had to rely on the truthfulness of a patient as to how and when his back pain began to opine as to what caused an injury (Petitioner's Exhibit 16; pp 17-26).

Dr. Bernardi testified on September 29, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bernardi's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Bernardi testified that Petitioner's current condition was not related to the accident of January 4, 2012, for the reasons he noted in his narrative report (Respondent's Exhibit 8; pp 28-32).

At trial, Petitioner testified he still has severe back and leg pain. Petitioner has continued to work, but subject to restrictions imposed by Dr. Gornet. He wants to proceed with the surgery recommended by Dr. Gornet.

Petitioner received an extensive amount of conservative medical treatment, has undergone a fusion surgery and has had numerous diagnostic tests performed. The Arbitrator has determined that it was not necessary to summarize all of the preceding in this decision.

Conclusions 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 his employment by Respondent on November 22, 2011.

In support of this conclusion the Arbitrator notes the following:

The original Application for Adjustment of Claim alleged a date of accident of January 4, 2012. It was not until the day of trial that the date of accident on the Application was amended to November 22, 2011.

Petitioner testified that a First Report of Injury was completed by Roseann Koelker on November 22, 2011, but, for some unknown reason, was missing. Roseann Koelker testified that January 4, 2012, was the first time Petitioner reported an accident to her and she had no recollection of having completed a First Report of Injury any time prior.

When Petitioner was initially seen by Dr. Blankenship on January 3, 2012, he reported an onset of low back pain during the past 10-14 days. There was no reference to Petitioner having sustained a work-related accident on November 22, 2011, or at any other time. Further, 10-14 days prior to January 3, 2012, would not date back to November 22, 2011.

When Petitioner was seen by Dr. Stynowick on January 16, 2012, he advised he experienced severe low back pain in October, 2009, as a result of the motor vehicle accident, but also stated it began in January, 2012, while moving boxes.

While the records of Gateway Regional Medical Center and Dr. Eavenson indicated Petitioner injured his back while moving boxes, neither specifically referenced a date of accident of November 22, 2011.

The record of Dr. King contained no history of Petitioner sustaining a work-related accident, but indicated that Petitioner advised that the onset of back pain had occurred shortly after he had knee surgery approximately three weeks ago.

In the forms Petitioner completed in connection with his treatment from Dr. Kennedy, he responded "no" as to whether he had an open work comp case and, in response to a question whether he had a history of major trauma or previous work-related injury, he responded "yes," but only referenced his right shoulder.

The record of Dr. Kennedy, the physician who performed fusion surgery, was completely lacking any history whatsoever of Petitioner having sustained a work-related injury. Further, Dr. Kennedy's record noted that "He cannot recall any specific event that precipitated this."

The first time Petitioner gave a specific history of sustaining the injury while moving boxes on November 22, 2011, was when he was evaluated by Dr. Gornet on January 12, 2016.

When deposed, both Dr. Gornet and Dr. Bernardi noted the inconsistencies in the histories provided by Petitioner to various physicians.

Given the preceding, the Arbitrator concludes Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment by Respondent on November 22, 2011.

In regard to disputed issues (D), (E), (F), (J), (K), (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 issue (C).

William R. Gallagher, Arbitrator

	)	☐ 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

KENNETH MADDOX, JR.,

Petitioner,

vs. NO: 12 WC 20426

JOLEN ELECTRIC,

19IWCC0357

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the RESPONDENT/PETITIONER herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical care, penalties under §19(k), §19(l) & §16, and intervening accident & causal connection as to current care/treatment since September 8, 2014, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 29-year-old employee of Respondent, who described his job as an electrician. Petitioner agreed after the November 26, 2013 hearing and award of

temporary total disability-(TTD) and prospective medical care, Petitioner came under the care of Dr. Sokolowski.

- Petitioner had remained under the care of Dr. Cavalenes treating his shoulder since that hearing as well; follow up after that hearing was December 5, 2013. Dr. Cavalenes had then recommended continued physical therapy and Norco and recommended shoulder manipulation with possible capsulotomy and the doctor kept Petitioner off of work. Petitioner had remained in the therapy September 25, 2013 through February 13, 2014 and Petitioner had follow up appointments during that time and April 11, 2014. Petitioner agreed at the April 11, 2014 appointment, Dr. Cavalenes released Petitioner to return to work with restrictions of no lifting more than 10 pounds and no overhead activities with the left shoulder. Petitioner had follow-up appointments with Dr. Cavalenes June 6, 2014 and September 5, 2014 and at the September visit the doctor released Petitioner with the same restrictions and to return as needed. Petitioner testified that Dr. Cavalenes also recommended that Petitioner follow up with Dr. Sokolowski regarding his lumbar condition.

- Petitioner agreed his initial; exam with Dr. Sokolowski was September 9, 2014 and after that the doctor recommended an updated lumbar MRI and also prescribed Vicodin and authorized Petitioner to remain off of work. Petitioner had follow-up with Dr. Sokolowski October 8, 2014 and the doctor again recommended an updated lumbar MRI and the continued Vicodin and remaining off of work. Petitioner agreed the MRI was ultimately approved and he had the lumbar MRI December 5, 2014 at West Suburban Medical Center.

- Petitioner returned to Dr. Sokolowski December 19, 2014 and the doctor then recommended Petitioner have bilateral epidural steroid injections-(ESI) and again kept Petitioner off of work. Petitioner returned to Dr. Cavalenes January 16, 2015 and Dr. Sokolowski again recommended the ESI and kept Petitioner off work and continued the Vicodin after that appointment. Petitioner finally had the ESI's January 30, 2015 and then returned to Dr. Sokolowski February 19, 2015 and the doctor advised that future treatment options would be pain management and additional ESI's or possible surgical intervention. Petitioner had advised the doctor he was apprehensive of surgical intervention/spine surgery.

- Petitioner agreed Dr. Sokolowski recommended Petitioner have a functional capacity evaluation-(FCE) and also advised Petitioner would be required to have pain management indefinitely. Dr. Sokolowski also prescribed the Vicodin and Pantoprazole, and Dendracin. Petitioner had the FCE March 3, 2015 at Function First Physical Therapy. Petitioner again saw Dr. Sokolowski April 9, 2015 to review the FCE results and the doctor then released Petitioner on permanent restrictions and set a follow up for 6 weeks. At Respondent request, Petitioner saw Dr. Soriano for an IME June 23, 2015; only regarding the lumbar spine. Petitioner returned to Dr. Sokolowski August 3, 2015 and

Petitioner reported to the doctor that the lumbar symptoms had persisted and recently had increased. Petitioner also had advised the doctor that the medications were no longer as effective as they were before. After that visit, Dr. Sokolowski referred Petitioner back to Dr. Cavalenes for evaluation of the shoulder in August 2015 and Petitioner testified that he was unable to have that follow up as workers' compensation insurance would not authorize it.

- Petitioner agreed, at Respondent's request, he saw Dr. Atluri for a Section 12 examination October 28, 2015 regarding the left shoulder condition. Petitioner agreed since the last hearing date he had not been sent back to see Dr. Cherf (IME). Petitioner testified at the Dr. Atluri appointment he did not then tell the doctor he had been working for a different company then at the time of the injury.

- Petitioner testified that he had not returned back to work since his accident June 1, 2012. Petitioner returned to see Dr. Sokolowski November 6, 2015 and the doctor recommended the continued use of the prescribed medications and to return for a 3-month follow up. The doctor also recommended that Petitioner return to work per the FCE if he was cleared by Dr. Cavalenes regarding the shoulder. Petitioner did return to see Dr. Sokolowski February 9, 2016 and the doctor then recommended indefinite pain management care regarding the lumbar condition.

- Petitioner testified that the doctor also recommended that Petitioner follow up with Dr. Cavalenes regarding the left shoulder condition. Petitioner testified that between August 13, 2015 and February 9, 2016 he had not been allowed to return to see Dr. Cavalenes as workers' compensation would not clear it. Petitioner testified that during that time period he did not sustain any new injuries or accidents involving his left shoulder or lumbar spine. Petitioner stated that from the middle or end of 2015 he kind of slowed down on the Norco pain medication and he could see the pain increased in his left shoulder and more things like clicking, more pain, more sticking of his arm, like his arm would stick at times; it was doing that more frequently.

- Petitioner agreed he did have a follow up appointment with Dr. Cavalenes March 17, 2016 and the doctor recommended an update of the left shoulder MRI and again recommended Petitioner remain off of work. Petitioner had a follow up with the doctor scheduled for March 31, 2016 but Petitioner had not been able to get the left shoulder MRI as WC would not authorize it; he did not attend the doctor appointment wither for the same reason. Petitioner wished to have the prescribed left shoulder MRI per Dr. Cavalenes.

- Petitioner agreed he testified of going to the Dr. Soriano Section 12 exam regarding his lumbar spine. Petitioner agreed per Dr. Soriano opinion, Petitioner's TTD benefits were suspended July 6, 2015, but those benefits were later reinstated by the insurance October

2015. Petitioner then had received a check for the TTD benefits around October 12, 2015 that paid TTD July 6, 2015 through October 11, 2015.

- Petitioner testified that since the June 1, 2012 accident he had not sustained any other injuries or accidents involving his left shoulder or lumbar spine. Petitioner testified that he was still taking prescription medications as result of his injuries; Norco-10-325 mg, 3 times per day as prescribed by Dr. Sokolowski. He does not take over-the-counter medications.

- Petitioner testified that currently he noticed that his condition had increased when he tried to slow down on the pain medications; it was bothering his stomach at the end of 2015. Petitioner stated that he really noticed the pain increase more and his arm sticking more and having more problems with the arm than usual. Petitioner testified that his back was pretty much the same; it still goes out whenever it feels like. He stated he has problems standing, sitting, walking long periods. Petitioner testified that basically for the complaints he takes pain pills as needed, 3 times per day and he tries to rest as much as possible; that was about as much as he could do.

Causal connection/Intervening accident

The Commission finds Petitioner testified that he had not sustained any injuries or accidents to his back or left shoulder since this accident and nothing since the prior §19(b) hearing. Petitioner's testimony is unrebutted and there is nothing in medical records evidencing any subsequent injuries. Petitioner relayed his shoulder problem became more symptomatic while driving-(couple months prior to Respondent's Dr. Atluri exam) which would clearly just be an activity of daily living rather than an 'accident' as Respondent would contend; there is no description in the records reflecting any intervening 'accident'.

The Commission finds that there is no break in the causal connection chain. Petitioner's ongoing complaints and treatment have been well documented throughout medical care. There is no doctor's opinion of a break in causal relationship. There are no persuasive medical opinions since the prior Section 19(b) hearing finding on causal connection, to break the causal chain. The evidence and credible testimony find Petitioner met his burden of proving an ongoing causal relationship between the June 1, 2012 and his current conditions of ill-being regarding both his back and left shoulder.

The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to ongoing causal connection.

Temporary total disability

The Commission with finding above of ongoing causal connection finds there are notes authorizing Petitioner off work per Dr. Sokolowski in support of the TTD award. The Petitioner met the burden of proving entitlement to the TTD award.

The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the awarded TTD benefits.

Medical expenses/Prospective medical care

The Commission with finding above of an ongoing causal connection finds medical bills supported by the records for reasonable and necessary and causally related medical bills/expenses of $23,944.12. (of which $4,744.22 of $22,202.42 still unpaid ATI bill that was awarded at the prior 19(b)).

Respondent shall authorize and pay for the prospective medical care in the form of the previously recommended MRI, as recommended by Dr. Cavalenes for Petitioner's left shoulder condition. Respondent shall reimburse Petitioner for out of pocket expenses of $450.00. Respondent is entitled to applicable credits and shall hold Petitioner safe & harmless from any claims from providers against Petitioner regarding said credits.

The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to medical expenses/prospective medical care.

Penalties and attorney fees

The Commission finds Respondent had not made payment of the medical expenses awarded in the prior Section 19(b) decision (ATI bill $4,744,24). That delay was apparently based on Dr. Cherf opinion, albeit, that was before the prior 19(b) and not accepted by the Arbitrator in that Decision. There was some reasonable basis for denying payment as to other medical bills and TTD benefits. The Commission finds Respondent's delay in payment of that bill does not rise to be unreasonable and vexatious to warrant Section 19(k) penalties and Section 16 attorney fees, those penalties and attorney fees awarded by the Arbitrator are therefore, herein, reversed and denied.

The Commission finds the delay sufficient to warrant Section 19(l) penalties. Section 19(l) penalties are supported in the decision at $10,000.00, regarding non-payment of medical bills from prior Section 19(b). The Commission finds the decision of the Arbitrator as not totally contrary to the weight of the evidence, and, herein, modifies the Arbitrator's finding as to

19IWCC0357

penalties and attorney fees to reverse and vacate the Section 19(k) and Section 16 penalties and attorney fees, but affirm the Section 19(l) penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $969.60 per week for a period of 179-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $23,944.12 for medical expenses under §8(a) of the Act. Respondent shall authorize and pay for the prospective medical care in the form of the previously recommended MRI, as recommended by Dr. Cavalenes for Petitioner's left shoulder condition. Respondent shall reimburse Petitioner for out of pocket expenses of $450.00. Respondent is entitled to applicable credits and shall hold Petitioner safe & harmless from any claims from providers against Petitioner regarding said credits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,000.00 as provided in §19(l) 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 $40,000.00. 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: JUL 12 2019
o-6/19/19
SM/JSF
045

Stephen Mathis

Douglas McCarthy

DISSENT/SPECIAL CONCURRENCE

I dissent in part and concur in part. I believe Petitioner failed to prove a causal relationship between his current shoulder condition and his accident. I concur with the award of penalties pursuant to Section 19(l) of the Act in the amount of $10,000.00 for Respondent's failure to pay the ATI bill ($4744.24) awarded in the prior 19(b) decision rendered on July 1, 2014.

Petitioner, an electrician sustained an accident on June 1, 2012 resulting in injuries to his lower back and left shoulder. An initial hearing was conducted on November 23, 2013 wherein a decision was rendered on July 1, 2014 finding a causal relationship between Petitioner's lumbar and left shoulder conditions and awarding benefits including medical treatment. PX5.

Following the hearing/decision, Petitioner continued treatment with Dr. Cavalenes regarding post-operative care for his August 7, 2013 surgery. On September 5, 2014, Dr. Cavalenes evaluated Petitioner who complained of "a little ache in his arm" approximately once a week, but otherwise Petitioner "can do whatever he wants." Dr. Cavalenes released Petitioner to full activity and to return "only if there are any problems." PX1.

On September 9, 2014, Petitioner sought treatment for his lumbar condition from Dr. Sokolowski who recommended a repeat MRI and authorized Petitioner off-work. On December

5, 2014, an MRI was performed which evidenced a disc protrusion at the L5-S1 level. On January 1, 2015, Petitioner underwent an epidural steroid injection (ESI) at the L5-S1 level. On February 19, 2015, Dr. Sokolowski re-evaluated Petitioner who reported pain relief following the ESI. On Dr. Sokolowski's recommendation, an FCE was performed on March 3, 2015 which evidenced Petitioner's ability to return to work at the medium level. On April 9, 2015, Dr. Sokolowski released Petitioner to return to work within the parameters of the FCE on a permanent basis. Petitioner was advised to follow-up in six weeks to evaluate his progress with the restrictions. PX2.

Petitioner failed to follow-up in six weeks instead waiting four months. On August 3, 2015, Dr. Sokolowski evaluated Petitioner who voiced new complaints of left shoulder pain prompting a referral to Dr. Cavalenes. Dr. Sokolowski reiterated Petitioner was capable of returning to work within the restrictions of the FCE. Thereafter, Petitioner continued to seek periodic treatment from Dr. Sokolowski who provided medication as well as a continued release to return to work regarding the lumbar spine with deferment to Dr. Cavalenes regarding Petitioner's shoulder. PX2.

In the interim, Petitioner was evaluated pursuant to Section 12 of the Act at Respondent's request on two occasions. On June 23, 2015, Dr. Soriano evaluated Petitioner regarding his lumbar spine. Dr. Soriano opined Petitioner suffered from a lumbar strain, placed Petitioner at maximum medical improvement, and released Petitioner to return to work without restrictions. RX2.

On October 28, 2015, Dr. Atluri evaluated Petitioner regarding his left shoulder. Dr. Atluri opined Petitioner suffered from left shoulder multidirectional instability which was previously surgically treated with recurrent symptoms suggestive of recurrent instability. Dr. Atluri recommended non-surgical care and released Petitioner to return to work without restrictions. RX3.

Petitioner subsequently sought treatment with Dr. Cavalenes on March 17, 2016. Dr. Cavalenes recommended an MRI due to a possible rotator cuff tear and authorized Petitioner off work. PX1.

The majority finds Petitioner's current left shoulder condition to remain causally connected to his accident based on Petitioner's alleged consistent pain complaints and the lack of a medical opinion evidencing "a break in the causal chain." I do not believe the medical evidence supports such a finding. Moreover, the majority in arriving at its decision appears to rely solely on Petitioner's testimony. Such reliance, though, fails to appreciate the clear contradictions contained in the medical records and reports.

Petitioner underwent surgery on August 7, 2013 due to shoulder instability. Dr. Cavalenes noted in the operative report that Petitioner's glenoid and bicep tendons were intact as was Petitioner's rotator cuff. On September 5, 2014, Dr. Cavalenes released Petitioner to full activities (despite Petitioner's testimony to the contrary), and Petitioner voiced only minor complaints regarding his shoulder. (Dr. Cavelenes authored a note authorizing Petitioner off-work which appears to contradict his prior findings, but when reviewed in context of Petitioner ongoing treatment, such authorization is consistent and relates to Petitioner's continued treatment for his lumbar spine).

To that end, Dr. Sokolowski treated Petitioner for almost one year (09/09/14 through 08/03/15) during which time Petitioner voiced no complaints regarding his left shoulder. Also, during this same period of time, Petitioner sought no treatment for his left shoulder.

Moreover, Dr. Atluri provided a detailed opinion as to Petitioner's diagnosis and further treatment recommendations. Dr. Atluri diagnosed "1) left shoulder multidirectional instability; and 2) status post left shoulder arthroscopy with inferior capsular shift." RX3. Dr. Atluri explained "[t]his patient has ligamentous laxity. This is a normal variation of musculoskeletal physiology which predisposes individuals to joint instability. This patient has a history of right shoulder instability which was treated surgically in the past. He now has recurrent left shoulder instability." *Id.* Dr. Atluri went on to note the arthroscopic findings from Petitioner's surgery of August 3, 2013 which documents an intact rotator cuff. The majority ignores Dr. Atluri's opinion and provides no explanation as to why an MRI is now warranted for a possible rotator cuff tear where no such tear existed six years prior.

Based on the above, I find Petitioner reached MMI as to 1) his left shoulder on September 5, 2014 when he was released to full activity and to return on a PRN basis by Dr. Cavalenes; and 2) his lumbar spine on August 3, 2015 when he was released to return to work with restrictions by Dr. Sokolowski and his medical care stabilized. Accordingly, temporary total disability benefits are owed from September 9, 2014 through August 3, 2015, and no medical treatment is owed for the left shoulder following September 5, 2014. Therefore, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

MADDOX JR, KENNETH Case# **12WC020426**
Employee/Petitioner

JOLEN ELECTRIC
Employer/Respondent

19IWCC0357

On 8/11/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5614 LAW OFFICES OF CAMERON B CLARK
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0481 MACIOROWSKI SACKMANN & ULRICH
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CHICAGO, IL 60603

STATE OF ILLINOIS)SS.

COUNTY OF Cook)

19IWCC0357

- [ ] 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)

Kenneth Maddox, Jr.
Employee/Petitioner

v.

Jolen Electric
Employer/Respondent

Case # **12** WC **20426**

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **April 18, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

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

N. [x] Is Respondent due any credit?

O. [x] Other **Reimbursement/ out-of-pocket expense**

FINDINGS

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

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

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

In the year preceding the injury, Petitioner earned **$75,628.80**; the average weekly wage was **$1,454.40**.

On the date of accident, Petitioner was **29** 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 **$166,913.82** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$11,000.00** for PPD advances, for a total credit of **$177,913.82**.

ORDER

Respondent shall pay the Petitioner temporary total disability benefits of $969.60/week for further period of **179 5/7** weeks, commencing **June 2, 2012** through **April 11, 2014**and **September 5, 2014** through **April 18, 2016**, which is the period of temporary total disability benefits/maintenance benefits for which compensation is payable.

The Respondent shall pay the further sum of **$23,944.12** for necessary medical services, as provided in Section 8(a) of the Act, to be paid pursuant to the provisions of the Illinois Medical Fee Schedule. The parties stipulate that Respondent is entitled to any applicable credit under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless from any claims made by the group insurance carrier or medical providers.

The Respondent shall authorize and pay for the prospective medical care in the form of the previously recommended MRI, as recommended by Dr. Cavalenes for Petitioner's left shoulder condition.

The Respondent shall reimburse Petitioner for his out-of-pocket expenses in the amount of $450.00.

The Respondent is liable for and shall pay Petitioner Section 19(k) Penalties in the amount of $7,704.91; Section 19(l) Penalties in the amount of $10,000.00; and Section 16 Attorney's Fees in the amount of $3,081.97

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.

Deborah L. Simpson

Signature of Arbitrator

July 21, 2016
Date

AUG 11 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Maddox, Jr.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 12 WC 20426**
	)	
Jolen Electric,	)	
	)	
Respondent.	)	
	)	

CORRECTED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on June 1, 2012, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree, per prior decision on Petition for hearing pursuant to Section 19 b of the Act that the Petitioner sustained accidental injuries that arose out of and in the course of the employment and that the Petitioner gave the Respondent timely notice of the accident. They agree that in the year preceding the injuries, the Petitioner earned $75,628.80, and that his average weekly wage was $1,454.40.

The parties also agree that the Respondent is entitled to credit for all payments of medical bills through its group medical plan, and shall be given credit for them. Respondent shall also be given credit for all medical bill payments made by its workers' compensation insurance carrier. As to the issue of causal connection and Petitioner's current condition of ill-being, Respondent's only dispute is to the current condition of ill-being as it relates to Petitioner's left shoulder condition. Respondent claims an intervening accident to the left shoulder. The stipulation sheet does not contain a dispute as to the current condition of ill-being relative to Petitioner's lumbar spine.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being, as to his left shoulder, causally connected to this injury or exposure; (2) Were the medical services that were provided to the Petitioner reasonable and necessary and has the Respondent paid all appropriate charges for all reasonable and necessary medical services; (3) Is the Petitioner entitled to any prospective medical care; (4) Is Petitioner entitled to TTD; (5) Should penalties or fees be imposed upon the Respondent; and (6) Is the Respondent due any credit.

STATEMENT OF FACTS

At the first hearing that Petitioner had pursuant to Section 19b of the Act the Petitioner testified that he was an electrician and that he was a member of the electricians union. Petitioner's job duties required him to perform a variety of tasks involved in the performance of

union electrical work. Petitioner testified that his job required material handling, spacing out materials, underground parking lot work, digging, installing lights, carrying conduit and tools, using various tools of his trade, and carrying his tool belt. Petitioner testified that he is required to lift up to 150 pounds by himself in order to perform the full range of his job duties. Respondent did not provide any rebuttal testimony regarding Petitioner's job responsibilities and/or lifting requirements. The decision in the original found that these were his duties and responsibilities with respect to his job as an electrician for the respondent.

At the second hearing pursuant to Section 19b of the Act, held on April 18, 2016, the Petitioner testified that he had not sustained any other injuries to his left shoulder or back since the original work accident on June 1, 2012. The Petitioner testified further that following the first hearing on his case on November 26, 2013, and the award of prospective medical care, that he came under the care of Dr. Mark Sokolowski for his back injury. He also remained under the medical care of Dr. Cavalenes for his left shoulder.

Petitioner was examined by Dr. Cavalenes on December 5, 2013. Following that examination Dr. Cavalenes recommended continued physical therapy and prescribed Norco for the pain. He also ordered that Petitioner remain off of work. Dr. Cavalenes noted in the medical records that Petitioner was experiencing a popping and catching feeling in his left shoulder. Dr. Cavalenes recommended manipulation with possible capsulotomy. On December 18, 2013, Petitioner underwent a manipulation and a cortisone injection of the left shoulder. (PX 1 p.10)

Petitioner returned to Dr. Cavalenes on December 28, 2013. Dr. Cavalenes noted that Petitioner was still experiencing the clicking in his shoulder. Dr. Cavalenes recommended continued therapy and follow up care. (PX 1, p. 11). The Petitioner testified that he participated in the recommended therapy at ATI from approximately September 25, 2013 through February 13, 2014.

Petitioner had follow up appointments with Dr. Cavalenes on January 24, 2014 and February 21, 2014. During the February 21, 2014 examination, Dr. Cavalenes noted that Petitioner was experiencing back pain that precluded him from walking more than a couple of blocks and that he occasionally experienced discomfort in his left shoulder. According to the doctor's notes, the Petitioner would occasionally get a twitch in his shoulder and the shoulder would lock up. (PX 1, p.11).

Petitioner returned to Dr. Cavalenes on April 11, 2014. Dr. Cavalenes' notes indicate that Petitioner reported that his arm caught twice since the time of his last examination. He directed the Petitioner to return in 8 weeks, he allowed the Petitioner to return to work but he placed restrictions on Petitioner of no lifting more than 10 pounds and no overhead activity with his left arm. (PX 1, p.12, 16). The Petitioner testified that he did not return to work at that time.

The Petitioner returned to Dr. Cavalenes on June 6, 2014. Dr. Cavalenes noted that Petitioner reported that he still gets a painful click once a week or so in his left shoulder. Dr. Cavalenes recommended use of light free weights and that Petitioner return in three months. (PX 1, p. 12)

Petitioner returned to Dr. Cavalenes on September 5, 2014. Dr. Cavalenes noted that Petitioner reported that he gets a little ache in his left arm maybe once a week. He had not been

experiencing the clicking. Dr. Cavalenes recommended activity and follow up if there are any problems. Dr. Cavalanes' medical note of September 5, 2014 contains a handwritten notation "not working, no work" and "patient to see Dr. Sokolowski." (PX 1, p. 12) The work status note from this visit indicates, "The above patient is to be not working as of:" *(no date inserted)* "Continue no work". (PX 1, p. 15).

Petitioner testified that he was initially examined by an orthopedic physician, Dr. Sokolowski, on September 9, 2014. Dr. Sokolowski noted Petitioner's description of his work accident and subsequent injuries to his left shoulder and lumbar spine. It was noted that Petitioner was experiencing back pain 7/10 and leg/buttock pain of 5/10. Petitioner also reported pain that radiates into his buttocks and down his leg. Dr. Sokolowski reviewed the MRI of Petitioner's lumbar spine from Rush Oak Park dated June 19, 2012. Dr. Sokolowski noted, "Despite the radiology reading of a very small disc protrusions at L4-L5, and L5-S1, there is clearly a disc herniation at L4-L5 with associated neural impingement and impression upon the thecal sac ..." Dr. Sokolowski opined that Petitioner had the following diagnoses; (1) lumbar pain; (2) lumbar radiculopathy. Dr. Sokolowski recommended that Petitioner undergo an updated MRI of his lumbar spine and likely lumbar epidural steroid injections. Dr. Sokolowski also recommended that Petitioner remain off of work. The doctor noted that these injuries were "causally related to work injury." (PX 2 at p. 12-13). Dr. Sokolowski also placed Petitioner on Vicodin and recommended that he remain off of work. (PX#2 at p.12).

Petitioner returned to Dr. Sokolowski on October 8, 2014. Dr. Sokolowski noted that Petitioner had not yet undergone the recommended MRI study due to no approval. Dr. Sokolowski again recommended the updated MRI study and that Petitioner remain off of work and utilize Vicodin. (PX 2 at p. 17).

Petitioner returned to Dr. Sokolowski on November 11, 2014. Dr. Sokolowski noted that Petitioner symptoms remain unchanged and that he continued to use analgesics to keep his symptoms under control. It was also noted that the previously recommended MRI had been approved. Dr. Sokolowski recommended that Petitioner undergo the MRI, remain off work, and continue use of Vicodin to minimize his symptoms. (PX 2 at p. 20).

Petitioner underwent the recommended MRI study at West Suburban Medical Center on December 5, 2014. (PX 2 at p. 22). Petitioner returned to Dr. Sokolowski on December 19, 2014. Dr. Sokolowski noted that the MRI study was significant for L5-S1 disc herniation with associated left lateral recess and foraminal impingement. Following the examination, Dr. Sokolowski recommended epidural injections at L5-S1, consider a short program physical therapy, and continue use of Vicodin for symptom management. He also recommended that Petitioner remain off of work. (PX 2 at p. 23).

Petitioner returned to Dr. Sokolowski on January 16, 2015. Petitioner noted continued radicular complaints. Dr. Sokolowski again recommended that Petitioner proceed with the epidural injections, remain off of work, and utilize Vicodin. Dr. Sokolowski also noted that Petitioner's MRI and his clinical exam both corroborate his subjective complaints of lumbar radiculopathy. (PX 2 at p. 26). Petitioner underwent the epidural steroid injections on January 30, 2015, at the Belmont Harlem Surgery Center. (PX 2 at p. 28).

Petitioner attended a follow up appointment with Dr. Sokolowski on February 19, 2015. Dr. Sokolowski noted that Petitioner reported that he had felt better for three days after the epidural injections, but that the relief was wearing off and his symptoms were returning. Dr. Sokolowski opined that Petitioner's treatment options were pain management, epidural injections or surgical management. Petitioner testified that he advised Dr. Sokolowski that he was apprehensive about undergoing surgical intervention. Dr. Sokolowski then recommended that Petitioner undergo a FCE and remain off work. Dr. Sokolowski also opined that Petitioner was likely to require ongoing pain management indefinitely as his analgesic regimen of Vicodin, Pantoprazole, and Dendracin, are the only measures that have provided him relief. Dr. Sokolowski again opined that Petitioner's lumbar condition was causally related to his work accident. (PX 2 at p. 31).

Petitioner underwent the recommended FCE at Function First Physical Therapy on March 3, 2015. The FCE results were determined to be a valid representation of Petitioner's physical capabilities. It was noted that Petitioner was able to perform at the medium work level with a maximum lift of 30 pounds. It was also noted that Petitioner's job as a union electrician was classified as "Heavy", and that he was not able to perform the duties of his occupation. (PX 2 at pgs. 34-48) Following the FCE, Petitioner returned to Dr. Sokolowski.

Petitioner was examined by Dr. Sokolowski on April 9, 2015. Dr. Sokolowski noted that Petitioner reported that his symptoms have persisted, he had ongoing back pain as 6/10 and bilateral lower extremity pain as 6/10. Petitioner continued to require analgesics to control his symptoms. Dr. Sokolowski reviewed the FCE dated March 3, 2015, and commented that it represented a valid representation of Petitioner's physical capabilities. Dr. Sokolowski opined that Petitioner was incapable of returning to his prior occupation and that the FCE results would be his permanent restrictions. Dr. Sokolowski also opined that Petitioner would require pain management indefinitely, and should utilize the previously prescribed analgesic regimen. Dr. Sokolowski recommended that Petitioner return for a follow up visit in six weeks. Petitioner was not placed at MMI or discharged from care. (PX 2 at p. 49).

Petitioner testified that, at the request of the workers' compensation insurance carrier, he submitted to a Section 12 examination with Dr. Soriano on June 23, 2015, relative to his lumbar spine. Dr. Soriano noted the history of Petitioner's work accident that he had experienced severe pain in the low back and his left shoulder kept "popping out".(RX 2 at p.1). Dr. Soriano also noted that Petitioner currently utilized two Vicodin per day for his left arm aching and low back pain. (RX 2 at p.2). Dr. Soriano's physical exam of Petitioner revealed that straight leg raising was negative and Waddell's testing was negative. Dr. Soriano reviewed the medical records of both Dr. Cavalenes and Dr. Sokolowski. He noted that both of these physicians had opined that Petitioner's lumbar MRI from June 2012 (L4-5 and L5-S1), demonstrated a change from the previous lumbar MRI (3/25/08) where he just had L4-L5. (RX 2 at p.3). Dr. Soriano also noted that the most recent lumbar MRI (12/5/14) demonstrated a center posterior disc protrusion at L5-S1 with minimal encroachment on the left neuroforamen. Finally, Dr. Soriano noted that the results of Petitioner's 3/3/15 FCE revealed a consistency of effort of 92.3%. Dr. Soriano opined that Petitioner's current condition of ill-being is status post lumbar strain as of 6/2/12. He made no comment regarding Petitioner's left shoulder condition. Dr. Soriano also opined that Petitioner did not require further medical care or treatment for his lumbar spine, was at MMI and

required no work restrictions as there was "no obvious medical-based evidence as to why the Petitioner would not be able to return to his regular duty job as an electrician". (RX 2 at p. 5).

Following the Section 12 examination with Dr. Soriano, Petitioner returned to Dr. Sokolowski on August 3, 2015. During this examination, Dr. Sokolowski noted that, since the date of his last exam, Petitioner's symptoms have persisted and recently increased. He continued to require use of analgesics to control his symptoms. Dr. Sokolowski opined that Petitioner would require ongoing pain management. It was also noted that Petitioner's work-related left shoulder pain has been increasing. Dr. Sokolowski recommended/ordered that Petitioner follow up with Dr. Cavalenes for a re-evaluation of his left shoulder. A follow up appointment was scheduled.(PX 2 at p. 52, 68).

Petitioner testified that following his examination with Dr. Sokolowski, he was not able to return to Dr. Cavalenes for evaluation of his shoulder due to lack of authorization from the workers' compensation insurance carrier. Petitioner testified that he was scheduled for a second Section 12 examination with Dr. Atluri on October 28, 2015.

Counsel for Petitioner requested authorization for an appointment with Dr. Cavalenes on August 12, 2015. It was noted that the doctor's office would not provide an appointment date without authorization. (PX 6). A letter was sent to Respondent on August 20, 2015 requesting approval for an appointment with Dr. Cavalenes.

Petitioner submitted to the Section 12 examination with Dr. Atluri on October 28, 2015. Petitioner denied during his testimony that during this examination, he reported to Dr. Atluri that he was currently employed by a different company than at the time of his work injury. Dr. Atluri noted that Petitioner stated that postoperatively, the clicking in his shoulder resolved. However, he continued to have difficulty with overhead activity. He also noted that Petitioner indicated that he was fine until a couple of months ago. He reported an incident when he was turning a steering wheel with his left upper extremity and that it "went out". Petitioner noted that his shoulder was weak and popping and that he had not yet been reevaluated by the orthopedic surgeon pending authorization. (RX 3 at p.2). This symptom is consistent with the symptoms Petitioner reported experiencing when he was evaluated by the first Section 12 physician, Dr. Cherf, in October of 2012. At that exam, Petitioner advised the physician that his left shoulder pops while in bed and driving. Dr. Cherf opined that Petitioner's left shoulder symptoms were work-related to his injury on June 1, 2012. (PX 5 at p. 11).

Dr. Atluri's physical exam of Petitioner's left shoulder noted no crepitus or snapping with gentle range of motion. Petitioner did report pain with end range flexion. Dr. Atluri noted that Petitioner was cooperative and that there were no inconsistencies on exam. (RX 3 at p. 3). Dr. Atluri took x-ray studies of Petitioner's left shoulder. They revealed an irregularity at the acromioclavicular joint. It was noted that this may be post-surgical in nature or may represent some degree of osteolysis. There was also lucency at the inferior glenoid consistent with prior surgery. Dr. Alturi's "Impression" of Petitioner was (1) Left shoulder multidirectional instability; (2) Status post left shoulder arthroscopy with inferior capsular shift. (RX 3 at p.4). Dr. Atluri opined that "based upon the history as related to me by the patient, his physical findings, the x-rays and records available for my review, Mr. Maddox has some recurrent complaints of clicking and pain in his left shoulder following surgical treatment for shoulder instability." His findings today are suggestive of recurrent instability of the left shoulder. Dr. Atluri also noted that

shoulder instability associated with ligamentous laxity is notoriously associated with poor surgical outcomes. Petitioner's left shoulder surgery was previously found to be causally related to his work accident. Dr. Cavalenes had indicated that Petitioner would require surgery for a tear of the glenoid rim and possible slap tear. The intraoperative findings revealed that Petitioner's left shoulder had shifted 80% off of the anterior glenoid rim and required the placement of four juggernaut sutures. (PX 5 at p. 12, Arb. Dec. 7/1/14). Dr. Atluri opined that Petitioner would require non-surgical care consisting of a rigorous home exercise program and conditioning which should be maintained throughout Petitioner's lifetime. Finally, Dr. Atluri opined that there were no deficits identified for which any specific work restrictions are indicated.

Petitioner returned to Dr. Sokolowski on November 6, 2015. Petitioner reports that his lumbar symptoms had persisted. Dr. Sokolowski again prescribed the analgesic program and Norco for breakthrough pain. He also recommended that Petitioner follow up with Dr. Cavalenes relative to his left shoulder. Dr. Sokolowski also released Petitioner to return to work per the FCE, but indicated in the work status report that Petitioner would only be released to return to work once he was cleared by his shoulder surgeon. (PX 2 at p. 55, 69). Dr. Sokolowski also recommended that Petitioner follow up in three months.

Petitioner returned for a follow up exam with Dr. Sokolowski on February 9, 2016. Following this exam, Dr. Sokolowski again recommended analgesic pain management indefinitely and noted that Petitioner had been using his pain medications appropriately, sparingly, and with appropriate caution. Petitioner was scheduled for a follow up appointment for June 3, 2016. Dr. Sokolowski also indicated that Petitioner could return to work from a standpoint of his lumbar condition, per the FCE. However, he was not cleared to return to work in a modified capacity unless cleared by his shoulder surgeon, Dr. Cavalenes. (PX 2 at p. 58, 70).

Petitioner testified that between approximately August 3, 2015 and February 9, 2016, he was not able to attend the recommended follow up with his shoulder surgeon, Dr. Cavalenes, due to non-approval by the workers' compensation carrier. He also testified that between his visit with Dr. Cavalenes on September 5, 2014, and through his follow up appointment with Dr. Sokolowski on February 9, 2016, he did not sustain any new injuries or have an accident involving his left shoulder or lumbar spine. During this period of time, Petitioner testified that in approximately the middle part of 2015, he slowed down on his use of the Norco medication, and that he noticed that his pain had increased more in his left shoulder and more incidents and things happened that he began to notice, so he brought it to his doctor's attention. When questioned by what he meant regarding more incidents of things happening, Petitioner testified that he experienced more clicking, more pain, more sticking of his left arm, and that it was happening more frequently.

Petitioner testified that he was able to get an examination with Dr. Cavalenes on March 17, 2016. Petitioner incurred an out-of-pocket expense for this examination in the amount of $450.00. (PX 3) Petitioner testified that following the March 17, 2016 examination, Dr. Cavalenes recommended that he undergo an updated MRI study of his left shoulder. He also recommended that Petitioner remain of work for three weeks and return for a follow up appointment on March 31, 2016. (PX 1 at p. 27-27) Petitioner testified that he was not able to undergo the recommended MRI study or attend the recommend follow up appointment due to lack of authorization by the workers' compensation insurance carrier. Petitioner also testified

that he does wish to proceed with the recommended diagnostic study and follow up with Dr. Cavalenes.

Petitioner testified that, as of the date of arbitration, he had not sustained any new injuries or accidents involving his left shoulder or lumbar spine since his original work accident of June 1, 2012. Petitioner testified that he currently uses the prescription medications prescribed by Dr. Sokolowski for his injuries; he takes Norco 10, 325 – three times per day. With respect to his current complaints, Petitioner testified that he has noticed that his condition increased specifically when he tried to slow down on the pain meds, due to the fact it was bothering his stomach. He explained that "I can really notice my pain increased more, that's when I noticed really that my arm was sticking more and I was having more problems with my arm than usual." With respect to his back condition, Petitioner testified that his back is pretty much the same, and that it "still goes out whenever it feels like it. He testified that he still has problems standing, sitting and walking for long periods of time.

Petitioner testified that following his attendance with the Section 12 physician, Dr. Soriano, that his TTD benefits were suspended on approximately July 6, 2015. Counsel for Petitioner sent written correspondence to Respondent on August 12, 2015 confirming that Petitioner had still not received his TTD benefits and that it was unclear why they had not been issued. Counsel also confirmed that he had not received any formal notification or basis for termination of benefits. (PX 6). On August 31, 2015, Respondent authored a letter to Petitioner's counsel. In this correspondence, counsel for Respondent indicated that Respondent was relying upon the opinion of Dr. Cherf as to the shoulder and Dr. Soriano as to the back. "For that reason, no TTD or additional medical care and treatment is authorized." (PX 8). On September 3, 2015, counsel for Petitioner directed a letter to Respondent's counsel. This correspondence confirmed receipt of the August 31, 2015 letter. Counsel pointed out that he was not aware of any new/recent Section 12 report by Dr. Cherf. Dr. Cherf's three reports had previously been entered into evidence at the first trial of this matter and that the arbitrator had found causation, in part, based on Dr. Cherf's opinions. If there was a new report, then it was requested that it be disclosed. (PX 9).

No new report from Dr. Cherf was entered into evidence. Petitioner was scheduled for and attended an updated Section 12 examination relative to his left shoulder condition with Dr. Atluri on October 28, 2015. (RX 3).

At hearing, Petitioner testified that his TTD benefits were reinstated by Respondent in October of 2015. Petitioner testified that he received a check for TTD benefits on approximately October 12, 2015, that paid him for the period of July 6, 2015 through October 11, 2015. This check was entered into evidence as Petitioner's Exhibit 4. Petitioner testified that he continued to receive payment of his TTD benefits to approximately December 27, 2015. At that point, Petitioner's benefits were again suspended by Respondent. Petitioner's Exhibit#10 is correspondence directed to Respondent via email dated March 18, 2016. This letter indicates that Petitioner had been seeking approval to see his treating doctor since at least August of 2015, but that authorization was withheld pending Petitioner submitting to an updated Section 12 examination. The letter advises Respondent that the Petitioner attended the examination with Dr. Atluri on October 28, 2015. Counsel for Petitioner also provided Respondent with a copy of the

documentation from Petitioner's examination with Dr. Cavalenes on March 17, 2016. This included a copy of Dr. Cavalenes MRI order and off work note according to the letter. (PX 10).

The Respondent filed a written response to Petitioner's Section 19(b) Petition with the Commission on March 30, 2016. (PX 11). In this written response, Respondent actually denied the employer's receipt of a statement from a medical provider indicating the employee cannot work. In addition, in response to Inquiry #3 Nature of Injury, Respondent indicated on the reverse side of the Response form that the "Injury is limited to arm and left shoulder. Petitioner is at MMI, no need for medical and restrictions." (PX 11) In the Response filed with the Commission, the Respondent does not deny Petitioner's entitlement to benefits based on its allegation at the time of trial of an intervening accident to Petitioner's left shoulder.

It is also noted by the Arbitrator that Respondent filed a Response to Petition for Penalties and Attorney's Fees with the Commission, on the date of hearing, April 18, 2016. (RX 4). In this Response the Respondent contends that it has "overpaid" TTD benefits by $46,532.26 and had provided Petitioner with $11,000 in permanency advances. It is noted by the Arbitrator that Respondent had already been provided with a credit for the $11,000.00 in PPD advances as part of the original Section 19(b) arbitration award in this matter. (PX 5).

As previously noted above, Petitioner testified that he has never returned to work in any capacity since his work accident of June 1, 2012. On Cross-Examination, Petitioner was asked whether or not he ever looked for work following the work release by Dr. Cavalenes on April 10; 2014. Petitioner replied that he had not looked for work nor had he or his attorney requested vocational rehabilitation for help in finding work. On Re-Direct, Petitioner testified that he never received a letter or request from Respondent to look for work. Petitioner remained on the work release up to his examination with Dr. Cavalenes in September of 2014. At that time Petitioner was awaiting authorization by Respondent to undergo the recommended evaluation by Dr. Sokolowski. Dr. Cavalenes report from September 5, 2014 indicates that Petitioner was not working and the work status noted dated September 5, 2014 states, "Continue no work" which establishes that Dr. Cavalenes returned the Petitioner to his off work status at that time. (PX 1 at p. 15).

Petitioner entered into evidence various medical bills which at the time of hearing remained unpaid according to the Petitioner.

1. Westgate Orthopaedics - $1,156.70
2. Dr. Mark Sokolowski - $585.00
3. Westgate Orthopaedics (3/17/16) visit - $450.00 (Petitioner out-of-pocket)
4. ATI Physical Therapy - $ 22,202.42

At the Arbitration hearing, Respondent reflected on the stipulation sheet and on the record that with respect to bills #1, #2, and #4, that they did not dispute the reasonableness or necessity of these services. According to the Petitioner, portions of the outstanding charges were previously awarded in the July 1, 2014 decision yet they remain unpaid by Respondent.

CONCLUSIONS OF LAW

The burden is upon 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 Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 242 (1987).

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).

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission,*71 Ill.2d 368, 375 N.E.2d 1306 (1978)

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

At the outset of the hearing, the parties indicated that the focus of the hearing was with respect to the injury of the left shoulder only at this time.

At the hearing on the second 19(b) Petition the Petitioner testified that he had not sustained any new accidents or injuries to his left shoulder or lumbar spine since his original work accident of June 1, 2012. The testimony of Petitioner was unrebutted. In several of the medical records the doctors documented that Petitioner complained of pain occasionally when he would be driving and turning the steering wheel. When Petitioner was evaluated by Dr. Atluri the doctor noted that Petitioner stated : *"I was fine until a couple of months ago." He reports an accident when he was turning a steering wheel with his left upper extremity. He states "it went out." The petitioner gave a history of his shoulder becoming weak and began popping again.* The doctor using the term accident to describe the situation does not raise the incident to the level of an intervening accident sufficient to break the causal connection. The Petitioner had reported on numerous occasions that turning the steering wheel while driving the car was one activity that aggravated the condition of his shoulder. The Respondent's only dispute on the stipulation sheet relative to the issue of the current conditions of ill-being being causally related to the June 1, 2012 work accident was its assertion of an "intervening accident to shoulder, no current condition of ill-being". (Arb. Ex. 1). It is well established that 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. *Boatman v. Industrial* Commission, 256 Ill.App.3d 1070, 628 N.E. 2d 829 (1993). The employment need only remain a cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v. Industrial* Commission, 361 Ill.App.3d 673, 838 N.E.2d 55 (2005). So long as a "but –for" relationship exists between the original event and the subsequent condition, the employer remains liable. *International Harvester Co. v. Industrial* Commission, 46 Ill.2d 238, 263 N.E.2d 49 (1970). In the instant matter, Respondent's Section 12 examining physician, Dr. Atluri, opined that Petitioner was currently suffering from ligamentous laxity and instability of the left shoulder. He also stated that shoulder instability associated with ligamentous laxity is notoriously associated with a poor surgical outcome.

The testimony of Petitioner is credible including his denial of suffering any other accidents after the June 1, 2012 injury. The Arbitrator has relied upon the various medical records admitted into evidence in this matter. In addition, the Arbitrator relies upon the medical records and opinions of Petitioner's treating physicians, Dr. Cavalenes and Dr. Sokolowski and Respondent's Section 12 physicians, Dr. Soriano and Dr. Atluri. All four of these physicians opined that Petitioner's conditions of ill-being were causally related to his work accident of June 1, 2012. Respondent presented no medical evidence or rebuttal testimony to support its dispute as to the issue of causal connection regarding the Petitioner's shoulder, in this matter.

The Arbitrator, upon consideration of the medical records, testimony of Petitioner and opinions expressed by all physicians in this matter, as set forth in this Decision, concludes that Petitioner has established that his current condition of ill being, with respect to Petitioner's shoulder, is causally related to the accidental injuries sustained on June 1, 2012.

In support of the Arbitrator's decision with regard to whether Petitioner is entitled to TTD, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

The Petitioner testified that he was taken off of work by his doctors on June 2, 2012 and that he remained off of work the entire time up to the date of hearing on April 18, 2016. The Petitioner admitted and the medical records confirm that Petitioner was released to return to work light duty, with restrictions of no lifting greater than 10 pounds and no overhead activity with his left arm, by his treating physician Dr. Cavalenes on April 11, 2014. Petitioner testified that he did not make any attempt to return to work, he did not advise the Respondent that he had been released to return to work with restrictions and he did not seek employment elsewhere that would accommodate his restrictions. Respondent was not given an opportunity to accommodate the restrictions or to decline to accommodate the restrictions.

Petitioner saw Dr. Cavalenes on June 6, 2014 and again on September 5, 2014. Each time he reported to Dr. Cavalenes that he was not working. On September 5, 2014, Dr. Cavalenes decided to return the Petitioner to off work status, and signed a slip indicating that the Petitioner should continue not working. Petitioner has not been released to return to work by Dr. Cavalenes since September 5, 2014. Dr. Sokolowski eventually released the Petitioner to return

to work, as to his lumbar condition. He also indicated that he was not releasing him as to his shoulder condition; that release would have to come from Dr. Cavalenes as Dr. Cavalenes was treating that injury. The last work status note written by Dr. Cavalenes appears to have been written on September 5, 2014, "Continue no work." Respondent would not authorize follow up appointments with Dr. Cavalenes, Petitioner was unable to be cleared by his shoulder surgeon. When Petitioner was examined by Dr. Cavalenes on March 17, 2016, at his own expense, Dr. Cavalenes recommended that Petitioner remain off work for three weeks, undergo an updated MRI and return for follow up care.

The Arbitrator finds the medical opinions of Respondent's Section 12 physicians, Dr. Soriano and Dr. Atluri, regarding Petitioner's ability to perform full duty work non-persuasive and not supported by the medical evidence.

Petitioner is entitled to TTD benefits from June 2, 2012 through April 11, 2014 (a period of 96 5/7 weeks) and from September 5, 2014 through April 18, 2016 (a period of 83 weeks). The Respondent has paid $166,913.82 in TTD benefits and PPD Advances in the amount of $11,000. Accordingly, the Arbitrator finds that Respondent is entitled to a credit of $177,913.82 toward the TTD award in this matter of 179 5/7 weeks.

In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Petitioner submitted bills totaling $24,394.12 that remain outstanding at the time of the hearing. Some of the outstanding charges for ATI Physical Therapy were incurred and awarded pursuant to the previous Section 19(b) hearing that was conducted on November 26, 2013. Respondent stated on the record that it did not dispute the necessity of these services. The specific medical bills included the following:

1. Westgate Orthopaedics - $1,156.70
2. Dr. Mark Sokolowski - $585.00
3. Westgate Orthopaedics (3/17/16) visit - $450.00 (Petitioner out-of-pocket)
4. ATI Physical Therapy - $ 22,202.42

Based upon the medical records and the opinions of the treating physicians the medical treatment provided to Petitioner was reasonable and necessary.

The Respondent is liable for payment of the medical bills summarized previously in this decision. The medical bills submitted into evidence include the $450.00 reimbursement to Petitioner, the remaining $23,944.12 is subject to adjustments consistent with the provisions of the Medical Fee Schedule, Section 8.2. The Respondent shall calculate the exact amount of benefits owed to the various medical providers pursuant to Section 8.2. The bills submitted into

evidence also document payments from Petitioner's health insurance carrier. The parties agree that Respondent is entitled to any applicable 8(j) credit in that regard.

The Respondent shall hold Petitioner safe and harmless from any claims made by his group health insurance carrier or from any medical providers whose bill was discharged by Petitioner's group health insurance carrier.

Petitioner has requested reimbursement for out-of-pocket expenses pursuant to Section 8(a) of the Act. Petitioner testified he incurred a $450 charge relative to his examination with Dr. Cavalenes on March 17, 2016. This payment is documented by PX 3. The Arbitrator notes that Respondent's only objection to the request for reimbursement was that of liability. Having found in favor of Petitioner on the issues of medical causation, the Arbitrator awards Petitioner reimbursement of his out-of-pocket expense in the amount of $450.00

In support of the Arbitrator's decision with regard to whether Petitioner is entitled to any prospective medical care, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

The dispute between Petitioner's physicians and Respondent's Section 12 physicians, is whether or not Petitioner will require work restrictions and ongoing medical care. Petitioner submitted to an FCE which was determined to be valid by the evaluators and the treating physicians. The section 12 examiners question the validity, pointing out tests they believe to be lacking. The Arbitrator finds the medical opinions of Dr. Cavalenes and Dr. Sokolowski, who have spent considerable time examining and treating the Petitioner are more persuasive relative to Petitioner's physical abilities and need for ongoing treatment.

Petitioner clearly testified to the subjective complaints, which he experiences in his lumbar spine and left shoulder. The Petitioner is entitled to the prospective medical treatment that is recommended for his lumbar spine condition and left shoulder injury. Petitioner is entitled to prospective medical care in the form of the previously recommended left shoulder MRI, follow up appointment with Dr. Cavalenes, and the indefinite pain management regimen as prescribed by Dr. Sokolowski.

Dr. Sokolowski previously opined that Petitioner was a surgical candidate for his lumbar condition. However, Petitioner testified at the April 18, 2015 hearing that he was hesitant about that procedure and did not wish to proceed with surgical intervention at this time. Petitioner cannot be forced to undergo a surgical procedure if he does not want to. Therefore the indefinite pain management regimen that Dr. Sokolowski has prescribed is appropriate.

In support of this finding, the Arbitrator relies upon, *Plantation Manufacturing Co. v. Industrial Commission*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2nd Dist. 1997). Section 8(a) provides that an employer is required to provide those medical services reasonably required to cure or relieve from the effects of the actual injury. Based on Petitioner's testimony and medical

evidence submitted at hearing, ongoing medical care is required to cure or relieve the symptoms Petitioner continues to experience.

In support of the Arbitrator's decision with regard to whether penalties or attorney fees should be imposed upon the Respondent, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

The Arbitrator does note with significance that a portion of the outstanding bill owed to ATI Physical Therapy ($4,744.24) was previously awarded in the arbitration award entered on July 1, 2014. Respondent has still not paid that portion of the award. The Respondent argues that the bills were submitted to the group insurance and therefore they did not pay them. This is not a valid explanation for why the bills remain unpaid since July 1, 2014. Once the decision was filed and the Respondent was ordered to pay for the medical treatment because the injury was compensable, having determined that the bills remained unpaid by either the group or worker's compensation carrier the bills should have been paid by the worker's compensation carrier. The Arbitrator notes that a Petition for Penalties and Attorney's Fees was filed with the Commission and entered into evidence as PX#14. Respondent filed a Response to this Petition on the date of arbitration, April 18, 2016. This was entered into evidence as RX#4.

The Arbitrator finds that Petitioner is entitled to Penalties under Sections 19(k) and 19(l) of the Act, and Attorney's Fees under Section 16 of the Act for the following issues: It is undisputed by Respondent that the medical bill from ATI physical therapy was admitted into evidence in the original hearing in this matter on November 26, 2013 ($4,744.23). At the time of the April 18, 2016 hearing, the ATI physical therapy bill amounted to $22,202.42. Inclusive in this amount was the unpaid portion that had previously been awarded. This bill was provided to Respondent on at least two subsequent occasions as delineated in PX 13. This exhibit contains letters demanding payment of the bill on 2/26/14 and 3/28/14 (prior to the entry of the 7/1/14 Arbitration Decision). However, Respondent had the bill in question at the time of the November 26, 2013 hearing, and thereafter. A review of the bill itself reveals that Respondent has actually never paid any portion of the ATI bill. No evidence was submitted by Respondent pursuant to Sections 19(k) or 19(l) setting forth a written basis for not paying these charges. At the April 18, 2016 hearing, Respondent stipulated that these charges were necessary. Based on these facts, the Arbitrator awards Petitioner Section 19(k) Penalties in the amount of $2,372.11, and Section 16 Attorney's Fees in the amount of $948.85.

Penalties and Fees are also awarded relative to the non-payment of Petitioner's TTD benefits for the period of 7/6/2015 through 10/11/2015. The record is clear that Respondent unilaterally suspended Petitioner's benefits without notification. Respondent did not provide a written basis to Petitioner until August 31, 2015. (PX 8). In this letter, Respondent, in part, relies upon the opinion of Dr. Cherf to deny benefits. Dr. Cherf's opinions were obtained before the hearing in November of 2013, and supported the treatment that was recommended by the treating

physicians. Counsel for Petitioner responded to this letter on September 3, 2015 setting forth the error with Respondent's position. The Arbitrator notes that Respondent eventually agreed and voluntarily reinstated Petitioner's benefits and issued a draft on 10/5/2016 paying Petitioner for the period of 7/6/15 – 10/11/15 ($10,665.60). Thereafter, Petitioner continued to receive benefits until approximately December 27, 2015. Benefits were not paid after this date based on Dr. Atluri's opinions. The Arbitrator finds the non-payment of benefits after December 27, 2015 to not be unreasonable.

Based on the above, the Arbitrator finds that Petitioner is entitled to Section 19(k) Penalties of $5,332.80 and Section 16 Attorney's Fees of $2,133.12. In addition, Petitioner is entitled to Section 19(l) penalties for the maximum amount of $10,000.00 for the non-payment of the medical expenses awarded in the July 1, 2014 decision and the non-payment of TTD benefits.

In support of the Arbitrator's decision with regard to whether Respondent is entitled to any credit, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

The Respondent is entitled to credit for any payments that they have made. Respondent is given credit for payment of temporary total disability benefits of $168,147.80 and PPD advance of $11,000.00.

ORDER OF THE ARBITRATOR

Respondent shall pay the Petitioner temporary total disability benefits of $969.60/week for further period of **179 5/7** weeks, commencing **June 2, 2012** through **April 11, 2014** and **September 5, 2014** through **April 18, 2016**, which is the period of temporary total disability benefits/maintenance benefits for which compensation is payable.

The Respondent shall pay the further sum of **$23,944.12** for necessary medical services, as provided in Section 8(a) of the Act, to be paid pursuant to the provisions of the Illinois Medical Fee Schedule. The parties stipulate that Respondent is entitled to any applicable credit under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless from any claims made by the group insurance carrier or medical providers.

The Respondent shall authorize and pay for the prospective medical care in the form of the previously recommended MRI, as recommended by Dr. Cavalenes for Petitioner's left shoulder condition.

The Respondent shall reimburse Petitioner for his out-of-pocket expenses in the amount of $450.00.

The Respondent is liable for and shall pay Petitioner Section 19(k) Penalties in the amount of $7,704.91; Section 19(l) Penalties in the amount of $10,000.00; and Section 16 Attorney's Fees in the amount of $3,081.97

Deborah L. Simpson

Signature of Arbitrator

July 21, 2016

Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Annette Fuller-Rowland,

Petitioner,

vs.

NO. 12WC020753

19IWCC0358

State of Illinois/Murray Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, prospective medical care, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 21, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

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.

JUL 12 2019

DATED:
SJM/sj
o-7/3/2019
44

Stephen J. Mathis

Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywood 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. 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 holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

FULLER-ROWLAND, ANNETTE
Employee/Petitioner

Case# **12WC020753**

SOI/MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0358

On 12/21/2018, 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 2.48% 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
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0558 ASSISTANT ATTORNEY GENERAL
NATALIE SHASTEEN
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CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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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

DEC 21 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0358

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)

Annette Fuller-Rowland
Employee/Petitioner

v.

State of Illinois / Murray Developmental Center
Employer/Respondent

Case # **12** WC **20753**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Collinsville**, on **October 23, 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, **November 1, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**42,670.50**; the average weekly wage was $**820.58**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent child.

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

Petitioner ***was*** temporarily totally disabled from 11/02/10 through 10/23/18, a period of 416 weeks.

Respondent ***shall*** be given a credit of $**134,971.47** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**134,971.47**.

Respondent ***is*** entitled to a general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$547.05/week** for **416 weeks**, commencing **11/02/10 through 10/23/18**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$134,971.47** for temporary total disability benefits that have been paid.

Respondent ***shall*** pay the medical bills found in PX 11 totaling $43,395.28 subject to the Medical Fee Schedule or PPO agreement. Respondent shall be given a credit for any amount previously paid towards said medical bills, including any paid through its group health insurance plan, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent ***shall*** authorize prospective medical care, in the form of a cervical fusion, as recommended by Dr. Jonathan Citow.

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.

Nancy Lindsay
Signature of Arbitrator

December 19, 2018
Date

DEC 21 2018

19IWCC0358

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

The parties stipulated that Petitioner, a mental health technician, sustained an accident on November 1, 2010 when she was struck by a combative resident while working for Respondent. (AX 1) At the time of the accident she was helping a resident put on his pajamas and brush his teeth when she was struck with a closed fist against the side of her head.

On November 1, 2010 Petitioner completed a CMS Employee Notice of Injury. She reported an accident on November 1, 2010 when she was hit by a resident's fist knocking her glasses off of her head so hard that she hit "it" into a metal cabinet. She claimed injuries to her head, face, left side of her body and neck. (RX 2)

Josh Reynolds completed a Witness Report on November 1, 2010, stating that he heard a "thud then a shout [and] turned around and saw [Petitioner] getting attacked and heard her call for help." (RX 4)

According to the medical records, Petitioner reported to St. Mary's Hospital's emergency room on November 1, 2010 stating she had been hit in the head by a resident with an "explosive behavior" and she was complaining of neck pain, head pain, headache, chest pain and a migraine. The Nurse's Chart Note indicated she was hit in the left side of the head and was complaining of pain described as "10/10." A CT scan of her head and chest x-ray were performed at that time and she was prescribed pain medication and discharged from the hospital and was provided a note from the hospital indicating that she should remain off work until November 4, 2010. (PX 10)

Respondent completed an Illinois Form 45 (Employer's First Report of Injury) on November 3, 2010. Respondent indicated that Petitioner was injured on November 1, 2010 when she was punched by a client in the left side of her head, causing her to strike her head on a cabinet. The accident was attributed to a physical assault. The report further indicated that Petitioner had been treated at St. Mary's Good Samaritan Hospital and by Dr. Gupta. According to the report, Petitioner had not been seen at the emergency room. (RX 1)

Also, on November 3, 2010, Petitioner's supervisor completed a Supervisor's Report of Injury. The Supervisor noted that Petitioner had been injured while engaged in work activities within the course and scope of her employment. While the Supervisor did not witness the accident, Josh Reynolds did. The Supervisor noted that Petitioner did not give a description of the injury except to state that the individual had "explosive behavior." (RX 3)

Petitioner then followed up with Dr. Shroff on November 4, 2010 with continuing complaints of headaches and dizziness along with atypical chest pain. At that time Petitioner was instructed by Dr. Shroff to return back to the emergency room for evaluation. (PX 3)

According to a Work Safety Institute note dated November 4, 2010 Petitioner was at work on November 1 when she was hit in the head by a patient. She stated that everything went black and the client broke her glasses he hit so hard. She had gone to the emergency department and had been given Vicodin. Petitioner's complaints included a severe headache, fatigue, nausea and pain. Petitioner also complained of vision changes and was seeing floaters (she had a history of that but it was getting worse). Echymosis was noted on her left arm as a result of the incident as the client had tried to bite her. Petitioner was off work and told she needed to go to the eye doctor and should follow up early the next week. (PX 2)

On November 4, 2010 Petitioner returned to St. Mary's Hospital with continued complaints of chest pain, headaches and dizziness after being hit in the head. She subsequently was admitted in to the hospital for 4 days at which time she was evaluated on numerous occasions by a neurologist and provided numerous medications for her headaches, chest and neck pains. (PX 2)

While hospitalized, and at the request of Dr. Shroff, Petitioner was examined by Dr. Nemani on November 4, 2010, for a neurological evaluation. Petitioner gave a history of having been hit by a patient with behavioral issues and he hit her on the right side of the head and her glasses went flying off and she had a significant blow to her head, more on the right side. Since then she had been experiencing headaches. She went to the emergency room and had a CT scan of the brain which was apparently a technically unsatisfactory study. She currently reported worsening headaches rated a "10/10." She denied diplopia, nausea or vomiting, paresthesia or weakness in the upper or lower limbs. She denied any difficulty with thinking or memory or passing out. On examination, Petitioner showed no evidence of external injuries. She appeared to be anxious, fully conscious and alert. Her head and neck displayed no evidence of trauma. Dr. Nemani's impression was post-traumatic headache and dizziness. Dr. Nemani recommended additional medication and a CT scan with and without contrast. A repeat CAT scan performed on November 5, 2010 was unremarkable. On November 7, 2010 Dr. Nemani again met with Petitioner. He noted she was complaining about numbness around her right jaw after having been hit on the left side of her head and hitting her right side against nearby furniture. Medications were adjusted. (PX 3)

Petitioner was discharged on November 8, 2010 following her hospital work-up. According to Dr. Shroff's discharge summary, Petitioner was to follow up with Dr. Nemani in 1 – 2 weeks. Following her discharge from the hospital, she remained off of work per the St. Mary's Work Safety Institute. (PX 2)

In a note dated November 8, 2010 Dr. Shroff indicated that Petitioner was under his care since 11/4/10 with headache, neck, face pain due to work-related injury/incident and patient is advised rest and may return to work on 11/15/10." (PX 10)

Petitioner underwent a CT of her brain on November 16, 2010. It showed no acute bleeding or mass affect suggestive of any acute intracranial abnormality. (PX 9)

Petitioner also began following up with her doctor, Dr. Gupta. On November 17, 2010 she continued to complain of headache, neck pain and mild chest pain. Upon her initial evaluation with Dr. Gupta, she was provided a steroid pack and told to return back to see Dr. Gupta within a week. She also started physical therapy at the behest of Dr. Gupta and then followed up with him throughout November on several occasions. She began physical therapy at the Synergy Therapeutic Group on December 15, 2010. (PX 4)

Petitioner underwent an initial therapy evaluation on December 15, 2010. She reported severe headaches and neck pain since a work injury on November 1, 2010. After a physical examination the therapist recommended therapy two to three times per week for four to eight weeks. (PX 5)

Petitioner attended therapy on December 17, 2010 reporting that she was feeling a little better after her last treatment and was able to go home and vacuum. She slept well when she went to sleep but woke up on her left side and in a lot of pain. Her head and back hurt that day. She did not tolerate therapy as she was weak and guarded against movement. (PX 5) Petitioner returned to therapy on December 20th reporting she was sore and tender over the weekend but a little better that day although she had a headache and her back was tender on the right side. (PX 5)

Petitioner attended therapy on December 22, 2010 reporting pain in her right shoulder and shoulder blade, as well as on the left side, and her head still hurt. She experienced a lot of dizziness and lightheadedness going from supine to sitting. Petitioner canceled her therapy scheduled for the 23rd due to a headache and being sick. (PX 5)

Petitioner continued with therapy on December 27, 29, and 30, 2010. She also attended on January 3, 5, 7, 12, and 14, 2011. (PX 5)

Per Dr. Gupta, Petitioner underwent a cervical MRI at Inmed Diagnostic Services on January 3, 2011. It showed two areas of possible impingement with disc and osteophyte complexes at C4-5 and C5-6. (PX 9)

Petitioner then followed back up with Dr. Gupta at which time Petitioner was referred for a cervical spine surgical consult regarding her MRI. (PX 4)

Petitioner underwent another cervical spine MRI at Barnes Jewish Hospital on January 10, 2011. It showed mild degenerative spur formation and degenerative disc disease from C4 to C6. (PX 6)

Petitioner was then evaluated by Dr. Todd Stewart at Washington University Physicians on or about January 10, 2011 and she provided a history to Dr. Stewart of being assaulted by the person she cared for and being hit in the head and being knocked into a medical cabinet and falling to the floor. She reported headache, neck pain and arm pain extending down in the first and second fingers since the time of the injury and pain between her shoulder blades. Petitioner reported her arms would go numb at night and she would have to flip from side to side while sleeping. She had undergone therapy and was now having symptoms on the right side between

her shoulder blades. Dr. Stewart reviewed Petitioner's MRI and found possible nerve root impingement at C4-5 and C5-6 and gave a working diagnosis of possible C6 radiculopathy and axial neck pain. The doctor wished to see her actual MRI films to look for impingement of the C6 nerve root. If so, treatment options would include medications, therapy, injections and surgery. Petitioner did not wish to consider any injections. (PX 6)

Petitioner returned to see Dr. Gupta at Prompt Care on January 12, 2011 and she reported ongoing neck and head complaints, including dizziness. (PX 4)

Petitioner underwent an Occupational Therapy Evaluation on January 17, 2011 due to her complaints of dizziness noted in therapy. Petitioner complained of dizziness while getting up from lying down (right greater than left) and looking up and down since her work accident involving a direct blow to her head. She has to watch out while getting up from lying in bed because it makes her extremely dizzy. Petitioner was to undergo therapy for three to six weeks to assist with the problem. (PX 5)

Petitioner underwent two cervical spine steroid injections on February 4, 2011 and February 24, 2011 with no improvement in her symptoms. (PX 6)

Petitioner attended therapy on February 21, 2011 reporting her left side was doing better but her right shoulder blade and neck hurt. She also still had headaches. She tolerated all therapy although she was noted to be very weak and fatigued quickly. As of February 23, 2011, she was reporting her right upper neck and shoulder hurt and were tight. She also mentioned left hip and low back pain complaints. She continued with therapy on February 28, 2011 and March 2, 4, and 7, 2011. (PX 5)

Petitioner also underwent occupational therapy for her dizziness in January, February and March of 2011. As of March 7, 2011, she reported feeling better and being more balanced but short of breath. The therapist felt this might be her last appointment as no more visits had been approved through workers' compensation. It was felt she would benefit from further occupational therapy. (PX 5)

According to the March 7th Physical Therapy Discharge Note, Petitioner had shown excellent progress with a pain level of "0/10" now being recorded. She no longer had tenderness over her right shoulder and was able to perform all activities without any pain. (PX 5)

Petitioner was seen at Barnes Jewish Hospital on April 22, 2011 regarding her neck pain that radiated to both shoulders and arms and down to her fingers. (PX 6)

Petitioner underwent a cardiovascular examination at Washington University on June 2, 2011. Dr. Weiss noted that Petitioner's blood pressure had been very volatile since her work accident when she was hit in the face. She also was noted to have been having back pain and headaches ever since. Petitioner had not been back to work since the accident. Medications were discussed and Petitioner was to keep recordings and return in one week as the doctor was concerned about her blood pressure with her pain and steroid injections. (PX 6)

Petitioner was again seen at Barnes Jewish Hospital on June 22, 2011 regarding her neck, head and shoulder pain. (PX 6)

Petitioner returned to see Dr. Gupta at Prompt Care on July 6, 2011. At that time she reported that the right side of her head was hurting as well as her neck and back. She further reported undergoing several shots in her neck but to no relief. A consultation with a neurosurgeon was pending. She was also being seen at the pain clinic and at Dr. Stewart's office. (PX 4)

Petitioner subsequently followed up with Dr. Stewart on August 25, 2011 advising that the three epidural steroid injections she had undergone had not caused any significant improvement in her symptoms and she actually experienced a progression of her pain with pain running down her arms on both sides. Petitioner was having increasing problems with dropping things and had broken two expensive cell phones and multiple mugs of hot coffee. She was having trouble with jewelry clasps, stumbling and tripping. On examination she had decreased sensation in the C6 distribution bilaterally. Dr. Stewart continued to diagnose Petitioner with cervical myeloradiculopathy at that time and indicated that she should undergo a new MRI to confirm no worsening stenosis at other levels. He also felt she might benefit from anterior cervical discectomy and fusion at C4-5 and C5-6. (PX 6)

Petitioner then underwent a new cervical spine MRI on August 31, 2011. It was read as showing mild degenerative changes in the cervical spine. At C3-4 and C5-6 there was evidence of posterior disc osteophyte complex. (PX 9)

Petitioner saw Dr. Harrison at Prompt Care on October 13, 2011. She was needing an off-work slip renewed. Dr. Gupta had given her a "nerve" pill which she took and then her hair fell out. She stopped the pill and her hair was growing back in. She had undergone three steroid epidural injections, but the Clinic could do nothing more for her. She had seen Dr. Stewart who felt she would benefit from ACDF surgery. He also recommended physical therapy which she did until workers' compensation stopped paying for it. In the interim, she was undergoing weekly massage which was helping. Her off work slip was renewed, and she was told to continue her weekly massages. (PX 4)

Petitioner returned to see Dr. Harrison at Prompt Care on January 5, 2012. Dr. Harrison and Petitioner discussed a second opinion. He told her to "have her doctor that wants her to come to the Chicago area for her surgery to give her the name of a neurosurgeon or a hospital that has a neurosurgeon on staff for the doctor to contact to arrange an appointment to get a neurosurgical second opinion." (PX 4)

On March 14, 2012 Petitioner returned to see Dr. Harrison for her ongoing neck pain, back pain and headaches. A "paper chart" was referenced[1]. She was kept off work pending her appointment with Dr. Citow. (PX 4)

Per Dr. Nemani, Petitioner underwent a cervical MRI on April 13, 2012. It was compared to an earlier one dated January 13, 2009 and the radiologist felt the 2012 MRI showed

[1] Not a part of PX 4.

degenerative disc disease and degenerative spondylosis at C4-5 and C5-6 similar to that shown in 2009. (PX 3)

Petitioner returned to see Dr. Harrison at Prompt Care on April 13, 2012. She reported that nothing had changed or was different from her prior exams. She had seen Dr. Nemani in the past and he told her the headaches were unrelated to her work injury. He originally saw her in the hospital after her injury and told her to follow up with him as an out-patient but Dr. Gupta told her she didn't need to see him so she didn't. Petitioner reported he was going to order "head tests" but workers' compensation refused to pay for her although her private insurance would. Dr. Harrison noted no change on physical examination. She complained of pain with any locations. He palpated on her upper back, especially the peri-scapular right more than the left and also the paraspinal tissues of the lower cervical quad upper thoracic vertebrae. She also complained of pain with palpation bilaterally in the upper extremities or with passive range of motion testing or the C-T spines while sitting. Her bilateral grips were almost non-existent with strength testing but the doctor was suspicious for her not really trying. Petitioner ambulated normally though slowly and moaned and complained of pain all over. (PX 4)

Petitioner was evaluated by Dr. Citow for the first time on April 20, 2012. Upon her initial consultation, Petitioner provided Dr. Citow with a history of being injured on November 1, 2010 when she was hit in the head and collided with a cabinet along with the development of neck pain extending through the right upper extremity. Dr. Citow reported decreased biceps weakness on the right side and sensation over the right thumb. He indicated that she should obtain a more recent MRI in order to proceed forward with the anterior cervical decompression fusion at C4 through C6 following the completion of that MRI. Petitioner remained off work per Dr. Citow's office. (PX 7; PX 10)

Petitioner filed her Application for Adjustment of Claim herein on June 14, 2012. (PX 1)

Petitioner underwent a new MRI study September 21, 2012 at the behest of Dr. Citow. It showed mild degenerative disc disease at C4-5, C5-6 and C6-7. There was no evidence of central canal stenosis. She also had mild right neuroforaminal narrowing at C4-5 and C6-7, and asymmetric enlargement of the right thyroid lobe. (PX 7)

Dr. Citow met with Petitioner on September 28, 2012 and they reviewed the recent MRI. At that time surgery was still being recommended for Petitioner and she remained off work. She continued off work through the end of 2012 until she followed back up with Dr. Citow in March 2013 at which time he continued to recommendsurgery and continued to keep her off work. (PX 7)

Petitioner continued to follow up with Dr. Citow through September of 2013and he continued to keep her off work and recommend surgery. (PX 7)

Petitioner underwent a new MRI at the behest of Dr. Citow on March 17, 2014. The impression was multi-level degenerative changes most prominent at C5-6 and slight narrowing of the right greater than left neural foramen. There was also some narrowing at C4-5 on the right

and facet arthropathy contributing to the abnormalities. (PX 9) Following completion of that test, Dr. Citow continued to recommend surgery and kept her off of work on March 26, 2014.

Petitioner was examined by Dr. Juan Alzate (Dr. Citow's office) on March 26, 2014. Petitioner was noted to have a history of neck pain after being involved in a work-related accident. She has been followed by Dr. Citow and surgery was noted as pending. Petitioner's complaints included referred neck pain and pain radiating to her bilateral upper extremities, associated with numbness and tingling. Petitioner walked in by herself with limitation to mobilization of the cervical spine due to muscle spasms. Mild distal weakness in the upper extremities was noted. Dr. Alzate noted that the "new MRI" showed a C4-5 and C5-6 disc osteophyte complex. He felt that explained Petitioner's symptomatology and she'd require a C4-5 anterior cervical discectomy and fusion. He also felt she should remain off work pending the surgery. (PX 3)

Petitioner followed up with Dr. Citow on September 19, 2014 and he, again, recommended for surgery and kept her off work as well as on March 27, 2015 and September 25, 2015. (PX 7)

Petitioner was examined, at the request of Respondent, by Dr. Matthew E. Worth, on May 4, 2016. A written report followed. (RX 5) As part of his exam, Dr. Worth was provided with some, but not all of Petitioner's treatment records. He mentioned being given an IME report from the Brain & Spine Center dated February 1, 2012. [2]He noted that she was hit in the right side of her head forcing her backwards into a metal file cabinet with both her head and back having contact with the file cabinet. Petitioner's complaints at the time of the exam included neck pain with numbness into her arms and fingers and occasional weakness. She further reported that the radicular pain was worse in the right arm and she was regularly dropping things. Petitioner also reported low back pain when walking and moving positions while seated or in bed or standing. She described pain shooting down her left leg with occasional numbness, tingling and weakness. She also reported constant pain described as a discomfort and sharp, shooting and tingling (a 9/10). In his report, Dr. Worth noted that Petitioner was alert and cooperative "but it was very apparent that she did not want to be here." Petitioner was described as mildly defensive and purposefully vague regarding detailed questions regarding her history. Dr. Worth also noted that Petitioner told him she could only flex her neck to 35 degrees without pain; however, she had full active range of motion when looking at her phone in the waiting and examination room. On exam, he noted localized point tenderness at the C/T junction. He felt she markedly exaggerated her instability when standing on a flat firm surface as she could perform the same test on the floor with normal limits and when safety bars were removed, her ability to resist/prevent from falling increased but she was able to control her instability. He felt that part of the exam was invalid due to malingering. Dr. Worth felt that Petitioner's presenting complaints were inconsistent with her presentation. Based upon the previous records provided to him the only notable finding was mild degenerative disc disease in her cervical spine that was pre-existing. While she was referred for possible surgical intervention, he further noted that it had previously been determined that she "was" a surgical candidate. Her multiple neurological evaluations were viewed by him as unremarkable as well as the electrophysiological studies and advanced imaging studies. He noted that he was not provided with the actual studies but just the

[2] This is not part of the record.

reports which "support a diagnosis of pre-existing DJD of the C-spine and potential cervical and lumbar spine sprain." He also noted what he described as Petitioner's many inconsistencies during the exam as she appeared to struggle during various testing procedures but did not have a problem walking to or from her vehicle, bending over to pick up her purse, or actively engaging in range of motion with her neck while on the phone. He felt she was malingering and did not feel further treatment was necessary as she was at maximum medical improvement (MMI) and could return to her previous job without restriction. He felt no disability rating was necessary. (RX 5)

Petitioner followed up with Dr. Citow on October 26, 2016. She remained symptomatic and he continued to recommend surgery. (PX 7)

The deposition of Dr. Worth was taken on October 28, 2016. (RX 6) Dr. Worth testified to his education, experience, and credentials. Dr. Worth testified about the work accident as described to him by Petitioner. Petitioner relayed to Dr. Worth she was hit by a patient on the right side of her head, forcing her back into a metal cabinet, with no loss of consciousness. Petitioner described motor and sensory deficits in her upper extremities, headaches, and low back pain. Dr. Worth testified that his physical examination of Petitioner demonstrated neck pain that caused numbness in both arms and fingers; pain extending from Petitioner's neck into her upper back on sides, worse on the right; and drops objects due to numbness in her fingers, mostly her fourth and fifth bilateral digits. Petitioner relayed her pain as a 9/10 on a pain scale but denied any increased pressure that would indicate a disc issue and was not in any distress during the examination. Petitioner answered questions without any signs of pain.

Dr. Worth described several inconsistencies in Petitioner's subjective complaints and objective findings on exam. Dr. Worth was unable to substantiate any cause for any type of dizziness with Petitioner and her findings were not consistent with someone who had a vestibular disorder. Petitioner had full range of motion in her neck despite stating she was unable to move her neck. While in the waiting room prior to the examination, Dr. Worth observed Petitioner on her cell phone in a cervical position she could not do once she was in the exam room. Petitioner became increasingly defensive when Dr. Worth asked her detailed questions. Dr. Worth further observed Petitioner struggling to walk from the waiting area to the examination room, but she had no difficulty walking to her car which was parked a distance from the office and down a hill.

Dr. Worth opined Petitioner had degenerative cervical changes that were not caused from an acute injury. Dr. Worth testified his opinion was supported by diagnostics which showed degenerative changes, which occurred over a significant period of time. He testified that the work injury might have caused a strain and aggravated her condition by causing neck pain with tightness and stiffness, but it would not have elicited pain down her arms. He further testified that any cervical condition caused by the alleged work injury would have resolved by the date of Dr. Worth's examination. Petitioner had no neurological signs regarding decreased strength or sensory findings. Petitioner's objective findings did not match her subjective complaints. Dr. Worth opined Petitioner was malingering throughout the evaluation and he provided multiple examples of Petitioner's inconsistent testing, including breakaway weakness. It was noted that Petitioner's pulse never increased despite palpation on allegedly tender areas.

Dr. Worth testified that Petitioner was not fully cooperative during the examination. Petitioner was unable to perform certain tests upon Dr. Worth's request, but subsequently performed that test when Dr. Worth presented it in a different environment. Dr. Worth testified that Petitioner was defensive when answering questions regarding her history. Petitioner did not adequately complete the patient intake questionnaire regarding family or social history, hospitalizations, surgeries, or serious illnesses. Dr. Worth testified that the questionnaire was returned to Petitioner to complete the section covering past medical conditions.

Dr. Worth opined that Petitioner's medical treatment to date was reasonable and necessary to resolve an organic issue, but no further treatment was needed. He felt Petitioner was at maximum medical improvement and could return to work full duty. Dr. Worth testified it was unreasonable that Petitioner had been off work since 2011 as there were no objective findings to support her off duty work status for that period of time. (RX 6)

After the deposition of Dr. Worth, Petitioner followed up with Dr. Citow on January 27, 2017, May 31, 2017 and August 16, 2017. Petitioner continued to follow up on these occasions while she was awaiting surgical approval from Respondent. He has kept her off work to a "date to be determined." (PX 10)

Petitioner underwent another cervical spine MRI on July 26, 2017. It showed degenerative spondylosis changes, minimally at C2-3 and C3-4 and slightly more prominent at C4 – C7. There was no evidence of protrusion, canal or neural foraminal stenosis. (PX 9)

Petitioner was again seen by the Washington University Cardiology Department on August 9, 2017 in anticipation of cervical spine surgery. Dr. Weiss felt she was stable for surgery. (PX 6)

The deposition of Dr. Citow was taken on April 18, 2018. (PX 8) Dr. Citow is a board-certified neurosurgeon. Dr. Citow testified consistent with his office notes discussed herein. He has recommended, and continues to recommend, that Petitioner undergo a two-level cervical fusion. He has kept her off work while he has been treating her. When he last saw her on May 31, 2017 he still recommended the fusion and her physical examination was unchanged. (PX 8, pp. 1- 13) Dr. Citow opined that Petitioner's condition in her cervical spine and the need for surgery is due to her work accident of November 1, 2010 as she detailed the onset of her symptoms to that event and the accident either caused the C4-6 issue or exacerbated a pre-existing arthritic C4-6 issue causing her to become symptomatic despite conservative means. (PX 8, pp. 14-15) If the surgery is awarded/authorized, he would like for her to undergo another cervical MRI as he wants one at least taken within three months of surgery. (PX 8, p. 16)

On cross-examination Dr. Citow was asked about the gap in time between the accident and his first visit with Petitioner and he explained that the gap played no impact on his treatment of her. His understanding of Petitioner's treatment prior to their first visit was based upon what Petitioner told him. When he saw her on April 20, 2012 her symptoms were neck pain and right upper extremity issues. She had no left-sided complaints at that time. (PX 8, p. 16 -17) Dr. Citow also explained that Petitioner has cervical disc disease/spondylosis. Spondylosis is an arthritic process of the neck where the discs lose moisture over time and become less tall providing more

motion. Bone spurs then begin to form and disc protrusions also form and nerves gradually get pinched. It is usually an arthritic condition that slowly progresses. He also testified that cervical disc disease can be caused by an acute injury or from wear and tear. He could not tell whether any of Petitioner's findings were long-standing or acute but he relied upon her history as to when the pain began. He had no evidence of any back pain prior to the accident. Dr. Citow testified that Petitioner's right thumb and index finger numbness and weakness would be typical for her diagnosis. (PX 8, pp. 17 – 21) He also testified that she has biceps weakness and thumb numbness which corresponds to a C5 – 6 issue and a C4-5 problem can affect the shoulder muscles and hands. She has a combination of those levels and problems. The MRI taken before he first saw Petitioner showed C4-6 protrusion and stenosis with foraminal narrowing. The MRI taken on September 21, 2012 was pretty similar although C5-6 might not have been quite as bad. She had protrusions at C4/5 and that level was worse than C5/6. (PX 8, pp. 21 – 23)

Dr. Citow was asked if there was any way to know whether a protrusion has been aggravated or exacerbated and he replied, "No, because many people have protrusions that are asymptomatic. And some people have actually large disc herniations that are not symptomatic. And others have smaller disc herniations that are extremely symptomatic. So we usually don't treat anything unless it's symptomatic." (PX 8, pp. 23-24) Dr. Citow had no reason to believe Petitioner was giving him false information. (PX 8, p. 24) When asked what part of the September 2012 MRI findings were due to the work accident, Dr. Citow explained that what part would be pre-existing and what part would be due to the work injury would be hard to say because one can have an arthritic condition that's asymptomatic and then one has an injury and it becomes symptomatic and requires treatment. "I can't look at it [the MRI] and say any specific part would obviously be from a trauma or not." (PX 8, p. 24)

Dr. Citow acknowledged that it was at the September of 2012 visit that he felt she might not need surgery at C5-6. If he could only operate on one level he would prefer to do so and so he took a "wait and see" attitude regarding surgery at that level. (PX 8, pp. 24 – 26)

Dr. Citow testified that he saw Petitioner six months later in March of 2013 and he had no idea why there was a gap of six months between appointments. At that visit her symptoms had changed and were going through both upper extremities. He explained that it made sense because she had a degenerative arthritic condition followed by a traumatic event and it can worsen or stabilize, the former of which was occurring in her case. He felt those symptoms would also be related to the accident, assuming the other side was. (PX 8, p. 28) When asked if he had testified that he couldn't state whether her condition was caused or exacerbated by the accident, he replied, "If her symptoms started or worsened, either one, after an injury, then it would be caused by the accident. And the accident would be acting upon either a normal spine or a previously arthritic spine, meaning it would either be a de novo injury or an exacerbation of a pre-existing condition. I can't say which of the two it is and therefore I can't say once again if this is a new thing or a worsening of something that was already there. But if you are going to say that it did indeed worsen after the accident, her symptoms worsened after the accident to ultimately now have progression of that to the point the other side is involved would still be in the same process." (PX 8, pp. 28-29)

Dr. Citow was asked repeatedly about gaps between visits and repeatedly stated that he did not know why they occurred. He acknowledged that his partner, Dr. Alzate, saw Petitioner on March 24, 2014 and recommended a two-level surgery. His only explanation for the difference in recommendation was that of different surgeons. One might be a little more conservative than the other and trying to prevent adjacent level disease sooner. He testified that he then saw her in September of 2014 and had another MRI done. He didn't know how much the pathology on the MRIs had changed by then. He didn't recall if anything had changed subjectively for Petitioner. Dr. Citow was again asked about causation and he explained that if Petitioner's symptoms began after her accident then the accident caused an exacerbation of a pre-existing either asymptomatic or lesser symptomatic arthritic condition or a de novo condition where theoretically she didn't have any arthritic changes over time, though that would be less likely. If that did, indeed, happen, then Dr. Citow felt the right arm symptoms would be related as would the worsening of the symptoms on the other side. (PX 8, p. 37) When asked at what point causation would end, he replied, "Well, it hasn't left that 2010 accident. She has symptoms in that right arm down to the thumb with numbness and weakness that never once changed. She always had those right-sided symptoms." (PX 8, pp. 37-38) As for the left side, those complaints were not present originally, her condition in the neck and right side has continued to progress and, as such, can lead to symptoms on the other side. (PX 8, p. 38)

Dr. Citow was also asked about additional visits and acknowledged that nothing really changed in terms of her symptoms or presentations. Everything really stayed the same. She had symptoms. She wanted surgery and she was unable to get it authorized. She remained unable to work. (PX 8, pp. 40 – 43)

Dr. Citow was unaware of any issues with Petitioner's lower extremities. (PX 8, p. 43) He also acknowledged that in May of 2017 Petitioner indicated she was going to put the surgery through her group health. He didn't know why she didn't go forward. He requested another MRI at that time because he wasn't going to proceed with surgery without an updated MRI. He doesn't know if the surgery was authorized at that time. The MRI findings were similar to earlier ones. They always have been. He has no notes of mid or lower back pain. (PX 8, pp. 43 – 45) Dr. Citow was also asked about two office forms Petitioner completed and he had no explanation as to why Petitioner filled them out as she did. (PX 8, pp. 45 – 47)

Dr. Citow did not have any results from earlier therapy or injections that Petitioner underwent. (PX 8, p. 48) Dr. Citow also testified that it is possible to have neck pain without arm symptoms, even with degenerative disc disease. (PX 8, p. 49)

On redirect examination Dr. Citow testified that he did not review any documents suggesting problems with Petitioner's cervical spine pre-accident. The additional left-sided complaints have not changed his treatment recommendations for Petitioner. (PX 8, p. 51)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on October 23, 2018 pursuant to a 19(b) Petition filed by Petitioner. The parties stipulated that Petitioner sustained an accident on

November 1, 2010. Respondent disputed liability for causal connection, medical bills and temporary total disability benefits after August 15, 2016. It also disputed liability for prospective medical care. Petitioner was the sole witness at the hearing.

Petitioner testified that she was working for Respondent on November 1, 2010 as a Mental Health Technician II. Her job requires her to deal with residents/recipients with disabilities. She was injured on November 1, 2010 while assisting a recipient with grooming tasks after supper. She explained that the recipient hit her quickly with his fist up against her head and her head and body went into a big metal cabinet and then he hit her again. The recipient was engaged in "very explosive behavior" and it was one thing after another until he was restrained. Petitioner testified that she was hit on the side of her head and then the other side of her head went into the metal cabinet. She lost her balance there and when she got up he hit her again. The back part of her head struck the cabinet and she thought it was the left side of her head but wasn't for sure. She did not lose consciousness.

Petitioner testified that she didn't notice anything right away because they were dealing with the resident's behavior and trying to get the recipient restrained so she had to yell for help. Later that evening she began to have problems. She went on her supper break and went home to feed her cat and forgot all about her house alarm and the police showed up. The officer explained to her that she needed to go to the hospital. Petitioner took herself to St. Mary's Hospital emergency room in Centralia, Illinois. At that time her head hurt real bad and her blood pressure was elevated and she felt light-headed and dizzy. Her heart was beating very fast. She thought she got released but also recalled going to her doctor and ending up being admitted for a few days.

Petitioner testified that after she was discharged from the hospital she followed up with her doctor and had therapy. She was also seen by a doctor at Washington University who referred her for epidural injections that were not helpful. Petitioner testified that during this time she was having pain in her neck, head, shoulder and arm. Her arms would get tight and tingling in her fingers. It was mainly her right arm but her left arm hurt too. Dr. Stewart recommended surgery. Petitioner testified that Respondent has never authorized the surgery.

Petitioner further testified that she returned to her family doctor and requested a second opinion regarding surgery. She then went and saw Dr. Citow in the Chicago area. He, too, recommended surgery.

Petitioner testified that her family doctor has continued to keep her off work since the accident. She is still having the same complaints as when she was originally assaulted. She would like to undergo surgery with Dr. Citow.

On cross-examination Petitioner acknowledged that she felt her medical records were accurate. She also stated that she was honest with them regarding her pain and symptoms.

When asked which side of the head she was hit on, Petitioner was not sure. It happened in 2010 and she just recalled getting hit "upside the head on one side" and then the other side went

back and hit a metal cabinet. She was also asked about the location of the assault which was the shower area of the facility.

Petitioner testified that her pain level on the day of arbitration was a "9.5/10." Her head was really hurting. Her right side hurt more than her left side and her neck hurts worse on the left. On the right side the most painful area is between her ear and her eye where frames to glasses would lie. Sometimes her entire head hurts and she doesn't know if it's from her blood pressure going up. Sometimes her whole neck hurts and rubbing it or a hot shower will help. The pain can radiate to both arms.

Petitioner acknowledged that she has had previous head and surgical injuries before November 1, 2010. She could not recall how many times she has been hurt at work but she's had head injuries before and that she had probably had CT scans or MRIs. She recalled one time seeing stars after getting hurt. Petitioner was asked about her current medications. She doesn't take any pain medication other than an Aleve or something every now and then. She tries not to because she has problems with her stomach. Her blood pressure has always been under control until the accident herein.

Petitioner acknowledged that she is receiving SSD benefits. Once workers' compensation stopped paying her, she applied for them because she had no income. Petitioner testified that she has had symptoms in her upper extremities, head and neck since the accident.

On redirect examination Petitioner testified that she was wearing glasses when she was assaulted and that they were knocked off. She further testified that she was working full duty without any restrictions prior to the work accident and was not under any doctor's care for any prior problems. She had no problems performing her job prior to the accident on November 1st.

Petitioner's medical bills are found in PX 11.

The Arbitrator concludes:

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

Petitioner's current condition of ill-being in her cervical spine and upper extremities is causally connected to her work accident. In so concluding the Arbitrator relies upon Petitioner's credible testimony, a chain of events, and the more persuasive opinion of Dr. Citow over Dr. Worth, Respondent's examining doctor.

The Arbitrator finds that the central issue in dispute is the issue of causal connection between Petitioner's injury to her cervical spine and the recommendation for prospective medical care in the form of a cervical fusion as recommended by two of her treating physicians, Dr. Todd Stewart and Dr. Jonathan Citow. Additionally, Dr. Altaze, also a neurosurgeon, has concurred in the need for a fusion.

Petitioner testified she worked for Respondent as a mental health technician and that on November 1, 2010 she was assaulted by a combative resident of the Murray Developmental

Center. Petitioner testified that she had been taken off work following her accident and has not returned back to work since then and that she has remained off work per her current treating physician, Dr. Jonathan Citow, since her initial consultation with Dr. Citow on April 20, 2012. At the time of arbitration, Petitioner indicated that she was under no active medical care for any other injuries sustained in this accident other than her neck injury that she takes over the counter medication for. Respondent disputes that Petitioner's condition of ill-being since August 15, 2016 is causally related to the undisputed work accident. Respondent relies upon the testimony and opinions of its examining chiropractor, Dr. Worth.

Petitioner has consistently reported neck, head, and upper extremity complaints since the date of the accident. She initially reported these complaints when seen in the emergency room on the date of the accident. The histories in the emergency room records are consistent that she was hit on one side of her head by a resident at the Murray Developmental Center (See PX 2 pg. 17). She was further noted to have a contusion about her head at the time of her initial medical treatment. The mechanism of injury provided in Petitioner's accident report and the initial ER records are consistent with every other medical providers' records offered into evidence by Petitioner as well as the history provided to the Respondent's own IME. The Arbitrator finds that Petitioner presented credible and unrebutted testimony regarding the circumstances of how her accident occurred and the injuries she sustained. Indeed, if Respondent really had an issue with the details of the accident, it could have called the witness to the accident; however, it did not. While Respondent has taken some issue with which side of the head Petitioner was hit on by the resident, the Arbitrator finds that factor rather unimportant, especially given the fact that as a result of the blow to one side of her head, she hit a metal cabinet with the other side of her head, neck, and body.

Petitioner then followed up with Dr. Shroff following her release from the ER and continued to complain of headaches with dizziness as well as continued chest pain. Petitioner was then referred back to the emergency room by Dr. Shroff. Petitioner spent 4 days in St. Mary's Hospital in Centralia, Illinois for continued complaints of headache, dizziness, chest, face and neck pain related to her workers' compensation injuries and was put on a variety of headache and pain relieving medications for her continued problems. Upon her release from medical care from the hospital, Petitioner remained off work per Dr. Shroff through at least November 15, 2010 (See PX 10 pg. 3). Petitioner then sought medical treatment with Dr. Gupta following her release from the hospital. Dr. Gupta ordered a CT scan of her brain and placed her on a steroid pack. She continued following up with Dr. Gupta on several occasions throughout November and December of 2010 with the same continuing complaints. Petitioner subsequently underwent a course of physical therapy at the behest of Dr. Gupta. The therapy that she completed at the Synergy Therapeutic Group (See PX 5). Petitioner provided a consistent history of having severe headaches and neck pain since the date of accident with increasing intensity to the Physical therapy providers. The Arbitrator notes that Petitioner's physical therapy notes admitted into evidence as Petitioner Exhibit 5 report pain in the cervical spine, bilateral scapula and shoulders, as well as posterior neck pain which were being addressed in the therapy that she underwent. Petitioner then underwent a MRI of her cervical spine on January 3, 2011 at the behest of Dr. Gupta who then made a referral for her to be evaluated by a surgeon with Washington University Physicians in St. Louis. Petitioner was next seen by Dr. Todd Stewart in early 2011 complaining of the same headache and neck pain complaints that she was previously

having as well as left arm pain extending down to the first and second fingers with pain extending down into her radial forearm. The Arbitrator finds that this is mostly consistent with Petitioner's testimony of where and how her pain traveled following the accident. Following physical examination and review of the diagnostic studies, Dr. Stewart diagnosed Petitioner with possible nerve root impingement at C4-C5 and C5-C6 bilaterally. Dr. Stewart's working diagnosis, at that time, was axial neck pain and interscapular pain with intermittent pain down the left arm and a C6 distribution. Dr. Stewart indicated that he wanted to formally review the MRI before making any formal recommendations and indicated that injections or surgery may be recommended. Petitioner then underwent epidural injections on several occasions in early 2011. Petitioner testified, and the medical records are consistent, that the epidural injections did not help Petitioner's pain nor radicular problems in early 2011. Upon follow up with Dr. Stewart on August 25, 2011 Petitioner indicated that she continued to have pain in the left arm as well as pain extending down to her elbows on both sides with problems with dropping things. At that time, Dr. Stewart indicated that she might benefit from a 2-level anterior cervical discectomy and fusion but that Dr. Stewart wanted to review a new MRI, after which he would discuss the matter with her by phone. If the MRI was essentially unchanged, he felt she might benefit from surgery.

Petitioner then continued to follow up with Dr. Gupta and Dr. Harrison who worked with her regarding her referral to a doctor in the Chicago area. Petitioner then began treating with Dr. Citow on April 20, 2012 and she provided a consistent history of being hit in the head and colliding with a cabinet and developing neck pain radiating through her extremities as well as failing epidural injections. The Arbitrator notes that the questionnaire Petitioner filled out for Dr. Citow upon her initial consultation with him reported an injury sustained at work and no other injuries that caused her problems (See PX 7 pg. 41). The Arbitrator finds Petitioner credible in her testimony that she did have prior injuries at work but was working full duty at the time of this accident. The Arbitrator further notes that Respondent presented no evidence to suggest any prior injuries nor restrictions that Petitioner might have been under. Petitioner then was evaluated by Dr. Citow who wanted to review a new MRI before formally recommending surgery but did indicate that surgery would be needed. After reviewing a new MRI, Dr. Citow made the recommendation for Petitioner to undergo a C4-C5 anterior cervical discectomy and fusion and kept Petitioner off work. Petitioner has remained under the care of Dr. Citow since that time and surgery has continued to be recommended by Dr. Citow's office up to and including her last visit with Dr. Citow on August 16, 2017. Petitioner testified that she remains willing and able to go forward with the surgery that Dr. Citow has recommended as she continues to have issues with her neck.

The main issue of dispute in this situation is one of a disagreement over medical causation between Petitioner's treating neurosurgeon, Dr. Jonathan Citow and the Respondent's chiropractor and Section 12 physician, Dr. Matthew Worth. In reviewing the deposition of Dr. Citow, admitted into evidence as Petitioner's Exhibit 8, the Arbitrator notes that Dr. Citow testified, based upon her detail and the onset of her symptoms with her injury, that the injury would have caused this C4-C6 issue or exasperated a pre-existing arthritic C4-C6 issue causing her to become symptomatic despite conservative means and ultimately require surgical intervention (See PX 8 pg. 15). Furthermore, the Arbitrator notes that Dr. Worth, on cross-examination, also testified that the accident in question may have aggravated her situation but was not the cause. Dr. Worth testified, "I honestly think that she had degenerative cervical spine

changes. The push into the cabinet that she reported may have aggravated the situation but it was not the cause." (See RX 6 pg. 21). After reviewing the totality of the testimony of both doctors in this situation, the Arbitrator finds that the testimony of Dr. Citow is more persuasive than that of Chiropractor Worth. The Arbitrator bases this first upon the fact that the issue in question involves a question of the necessity of spinal surgery on the cervical spine. Dr. Citow being a neurological surgeon is a medical professional who performs surgery on the cervical spine. Dr. Worth, being a chiropractor, does not. The Arbitrator further notes that Dr. Citow reviewed numerous images of the multiple MRI studies that Petitioner underwent during the pendency of her medical treatment in this case and Dr. Worth only reviewed reports not any images themselves based upon his own testimony and his independent medical examination report (See RX 5 pg. 5). Additionally, Dr. Worth did not review all of Petitioner's prior treatment records, especially any pre-dating the January 3, 2011 cervical spine MRI. Thus, Dr. Worth did not review the ER records, the hospital admission records, or any physical therapy or occupational therapy records. While Dr. Worth took exception to some of Petitioner's exam including alleged problems/inconsistencies with balance and weakness, he might have interpreted these differently had he reviewed the therapy records and records of Dr. Nemani. The Arbitrator also notes that the February 2012 IME cited by Dr. Worth was not included in the records nor discussed by the doctor. Dr. Worth also lacked recent reports from Dr. Citow as part of his exam. The Arbitrator further notes that Petitioner had been indicated for surgery by Dr. Stewart many months before she came under the care of Dr. Citow and that the recommendations of both Dr. Stewart and Dr. Citow are basically consistent with regard to what Petitioner needs with regard to medical treatment regarding her cervical spine. Finally, it cannot be overlooked that Dr. Worth acknowledged during his deposition that Petitioner could have strained her neck in the accident and, additionally, the impact with the metal cabinet may have aggravated her degenerative disc disease. While he felt the aggravation would have only been temporary and would not have accounted for her arm symptoms, the Arbitrator again notes his lack of familiarity with all of Petitioner's treatment and Dr. Citow's reasonable explanation for the progression of the bilateral upper extremity symptoms over time. Dr. Worth also incorrectly believed that Petitioner had not been deemed a surgical candidate. While his initial report stated that records he reviewed suggested that she was, he then testified that this was a scrivener's error and should have stated that she was not a surgical candidate. He was right the first time as Dr. Stewart. Dr. Alzate, and Dr. Citow all felt she was a surgical candidate.

Based upon the foregoing, the Arbitrator finds that the causal connection opinions of Dr. Citow and the medical records of Dr. Citow admitted into evidence as Petitioner's Exhibit 8 and the medical records of Dr. Stewart admitted into evidence as Petitioner's Exhibit 6 are more persuasive than any opinions provided by Dr. Worth. Additionally, causation is supported by a chain of events analysis.

The Arbitrator is aware that Respondent's causation dispute since August 15, 2016 has primarily been based upon Dr. Worth's opinions combined with Petitioner's perceived lack of credibility and objective findings as it relates to her ongoing subjective complaints. In response, the Arbitrator notes that Petitioner has consistently complained of not only severe headaches and chest pain since the accident but also neck pain. (See RX 2 and PX 10, the ER record). Dr. Shroff noted on November 8, 2010 that he had been treating her for headaches, neck pain and face pain due to a work-related accident. The Arbitrator further notes that while Dr. Citow did

not begin treating Petitioner until approximately 1 ½ years after the accident and did not review her prior treatment records, those factors don't undermine his opinion. First, this isn't an instance wherein the claimant did not treat for a period of time. To the contrary, Petitioner has been continuously treating for her injuries since the accident. Furthermore, the history she provided to Dr. Citow regarding her earlier treatment was accurate. The Arbitrator is also aware that Petitioner underwent a cervical MRI in 2009 thereby suggesting Petitioner was symptomatic in 2009. Petitioner acknowledged prior injuries at work for Respondent. However, she also testified that she was able to work full duty prior to the accident and was under no restrictions. Respondent did not introduce the actual 2009 cervical MRI report nor did it submit any records pre-dating the accident showing treatment for a cervical problem. As such, Petitioner's testimony remained unrebutted. While Petitioner may have had some inconsistencies in records regarding which side of the head she was hit on or whether she "blacked out," the Arbitrator does not find those negating her overall credibility. Petitioner sustained multiple blows to her head and, some confusion as a result thereof, combined with the passage of time, would seem reasonable and understandable.

Based upon the foregoing, the Arbitrator finds a causal relationship between Petitioner's accident of November 1, 2010 and the conditions of ill-being about her cervical spine for which Dr. Citow has recommended treatment.

(K) Is Petitioner entitled to any prospective medical care?

Petitioner is entitled to prospective medical care.

Having found causal connection in favor of Petitioner, the Arbitrator awards that the surgical procedure as recommended by Dr. Citow as it is medically necessary and reasonable and appropriate and shall be approved by Respondent in this matter. Petitioner is seeking authorization and approval for the prospective medical care recommended by Dr. Todd Stewart and Dr. Jonathan Citow, both of whom are board certified neurological surgeons. Dr. Alzate, also a neurosurgeon, concurs in the need for surgery.

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

Petitioner is awarded temporary total disability benefits (TTD) commencing November 2, 2010 through October 23, 2018. While Petitioner seeks temporary total disability benefits beginning on November 1, 2010, Petitioner testified that she was working that day as that was the day of the accident. She was then taken off work and has remained off work through the date of arbitration, a total period of 416 weeks. The Arbitrator also notes that Respondent stipulated to liability for TTD from November 6, 2010 through August 15, 2016. The Arbitrator's award of temporary total disability benefits is based upon her causation determination, Petitioner's unrebutted testimony regarding her lost time, and the supporting medical treatment records. Respondent shall receive credit in the amount of $134,971.47 for TTD previously paid.

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

Petitioner is awarded the medical bills set forth in PX 11. With regard to said medical bills, the Arbitrator orders that any medical bills that have not already been paid by Respondent that were admitted into evidence as presented by Petitioner in Petitioner's Exhibit 11 shall be paid for by Respondent at the fee schedule amount or per a PPO agreement. Respondent stipulated to liability for bills incurred prior to August 15, 2016. Consistent with her causation determination, any bills incurred thereafter and through the date of arbitration are awarded. Petitioner's Exhibit 11 has been outlined as follows:

NAME OF PROVIDER	ACCOUNT NUMBER	DATE OF SERVICE	TOTAL AMOUNT OF BILL
St. Mary's Good Samaritan	10305-00913	11/01/10	$5,115.34
St. Mary's Good Samaritan	10308-00357	11/04/10	$74.00
St. Mary's Good Samaritan	10308-00819	11/04/10 – 11/08/10	$11,529.92
Synergy Therapeutic Group	00142 & 00152	12/15/10 – 3/07/11	$6,060.00
Physicians Billing Service	12418828	1/10/11 – 8/31/11	$3,548.00
St. Mary's Good Samaritan	12104-00068	4/13/12	$7,692.00
American Center for Spine & Neuro	65231	4/20/12 – 5/31/17	$4,631.12
St. Mary's Good Samaritan	12265-00099	9/21/12	$4,195.00
Southern Illinois Imaging	1058	7/26/17	$550.00
	TOTAL		**$43,395.38**

****

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

Josh Mileur,

Petitioner,

vs. NO. 11 WC032737

State of Illinois/Menard Correctional Center,

Respondent.

19IWCC0359

DECISION AND OPINION ON REVIEW

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

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

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: JUL 12 2019
SJM/sj
o-7/3/2019
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MILEUR, JOSH
Employee/Petitioner

Case# **11WC032737**

STATE OF ILLINOIS/MENARD CORR CTR
Employer/Respondent

19IWCC0359

On 2/20/2019, 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 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:

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
KENTON J OWENS
601 S UNIVRSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3228

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 20 2019

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

19IWCC0359

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

JOSH MILEUR
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD CORR. CTR.
Employer/Respondent

Case # **11** WC **32737**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Herrin**, on **December 13, 2018**. By stipulation, the parties agree:

On the date of accident, **August 22, 2011**, 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 $**46,077.50**, and the average weekly wage was $**860.62**.

At the time of injury, Petitioner was **35** years of age, ***married*** with **0** dependent children.

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

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

19IWCC0359

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

ORDER

Respondent shall pay Petitioner the sum of $516.37/week for a further period of **56.9 weeks**, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the 20% loss of the right arm (50.6 weeks) and the additional 2.5% loss of the left arm (6.33 weeks).**

Respondent shall pay Petitioner compensation that has accrued from **October 8, 2018,** through **December 13, 2018**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

2/14/2019
Date

FEB 20 2019

19IWCC0359

Procedural History

This case was tried on December 13, 2018. The issues in dispute involve the nature and extent of Petitioner's injury and whether Respondent is entitled to a credit from a prior settlement on case numbers 09 WC 45279 and 09 WC 45280. (Arb. Ex. #1). In the instant case, the Application for Adjustment of Claim alleges a repetitive trauma injury to the right and left elbows and arms. (Arb. Ex. #2). Petitioner previously settled two worker's compensation claims (*i.e.* Claim numbers 09 WC 45279 and 09 WC 45280), which settled on September 13, 2010. A single settlement contract was submitted and approved for both claims. The settlement contract lists two dates of injuries and two descriptions of how the accident occurred (*i.e. "Repetitive Trauma/Restraining Inmate").* The body parts affected are listed as the back, left shoulder, left knee and right and left wrists and elbows. Under the terms of the settlement Petitioner received 40% of the left thumb, 17.5% of each hand and 22.5 % of the left arm. (RX 2).

Findings of Fact

Petitioner filed a claim for repetitive injuries (cubital tunnel syndrome) to his bilateral arms that manifested on August 22, 2011. The matter was previously heard by an Arbitrator appointed by the Commission, and findings were rendered in favor of Petitioner. Those findings were affirmed by the Commission. A copy of the Commission's Decision was admitted into evidence as Petitioner's Exhibit 6 and Respondent's Exhibit 1. (PX6, RX 1) Those findings are adopted and incorporated herein by reference.

Following receipt of the Commission's Decision, Petitioner returned to his treating physician, Dr. George Paletta, on January 8, 2018. (PX3, 1/8/18) Dr. Paletta noted that Petitioner still had ongoing symptoms including bilateral medial elbow pain and intermittent numbness involving the fourth and fifth fingers. *Id.* Dr. Paletta's examination showed tenderness to palpation, a positive ulnar nerve compression test, and a positive Tinel's sign. *Id.* There was no radial tunnel tenderness, and biceps and triceps tendon were intact. *Id.* While there was slightly decreased sensation in the ulnar nerve distribution bilaterally, medial and radial nerve motor and sensory function were intact. *Id.* Dr. Paletta recommended an EMG and nerve conduction study to assess the severity of the ulnar involvement. *Id.* These were done the same day and confirmed a continued slow deterioration of the ulnar nerve sensory profile bilaterally. (PX4, 1/8/18)

19IWCC0359

Dr. Paletta recommended surgery with the more symptomatic side being done first. (PX3, 1/8/18) The first surgery, which occurred on July 24, 2018, was to the left elbow and involved an elbow ulnar nerve transposition. (PX3, 7/24/18) The second surgery, which occurred on August 14, 2018, was to the right elbow and, also, involved an ulnar nerve transposition. (PX3, 8/14/18) Following each surgery, Dr. Paletta released Petitioner back to work on light duty, with no inmate contact, and recommending a course of physical therapy. (PX3, 8/6/18; 8/27/18).

Petitioner testified that despite the improvement resulting from surgery and physical therapy, he still has significant symptoms, including a loss of strength in his arms at the elbows bilaterally. (T.13) He testified that he is not able to lift as much or use his arms overhead without symptoms, and that his hobbies of fishing and playing ball with his son have been adversely effected because the throwing with his arm causes inflammation. (T.13) He notices tenderness to the scar sites, especially while driving. (T.14) His hobby of upper body weight lifting has been curtailed although he still works his lower body. (T.14) For his symptoms he takes over-the-counter medication/ Ibuprofen one to two times per day. (T.14)

At the hearing, Respondent submitted into evidence a settlement contract for two cases Petitioner settled on September 13, 2013. Both case numbers 09WC45279 and 09WC45280 were submitted on a single settlement contract. The settlement included permanent partial disability of 22.5% of the left shoulder. (RX 1, RX 2).

Petitioner testified that he had the opportunity to review the settlement contracts and the contract was a true and accurate representations of his prior injuries and the amounts of money he received. (T.17) Petitioner testified that he received compensation of 22.5% permanent partial disability of his left arm for shoulder surgery and for the removal of a bone spur in his left elbow. (T.17) In January of 2010, Petitioner underwent left shoulder surgery to repair a tear of the subscapularis. (PX 6, RX 1).

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law:

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

In Support of the Arbitrator's Decision Regarding Issue (L), What is the Nature and Extend of Petitioner's Injury, the Arbitrator finds as follows:

Pursuant to the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria set forth in 820 ILCS 305/8.1b(b)(v). However, Petitioner's injuries manifested on August 22, 2011, prior the effective date of this Amendment and, therefore, the Arbitrator considers the evidence of disability in the record and similar precedent.

As a result of his repetitive job duties, Petitioner developed bilateral cubital tunnel syndrome. Despite a lengthy period of conservative care, Petitioner remained symptomatic and ultimately required bilateral ulnar nerve transpositions. Despite the improvement resulting from surgery and physical therapy, Petitioner still had significant symptoms, including a loss of strength in his arms at the elbows bilaterally. (T.13) He testified that he is not able to lift as much or use his arms overhead without symptoms, and that his hobbies of fishing and playing ball with his son have been adversely affected, because the throwing with his arm causes inflammation. (T.13) He notices tenderness to the scar sites, especially while driving. (T.14) His hobby of upper body weight lifting has been curtailed although he still works his lower body. (T.14) For his symptoms he takes over-the-counter medication/ Ibuprofen one to two times per day. (T.14)

In January of 2010, Petitioner underwent surgery for his left shoulder to repair a tear in the subscapularis. The settlement states that Petitioner sustained permanent partial disability to the extent of 22.5% loss of use the left arm. Neither party submitted any medical records involving the nature and extent of Petitioner's left arm and left elbow treatment or condition as a result of his work-related accidents on 8/21/2009 and 10/19/2009, which he settled on September 13, 2010. Based upon the settlement, Petitioner sustained permanent partial disability of 22.5% of his left arm. Then, on August 22, 2011, Petitioner sustained a new injury involving his left arm. Petitioner was diagnosed with cubital tunnel syndrome and Petitioner underwent another surgery to his left arm, a left elbow ulnar nerve transposition. The cubital tunnel syndrome and ulnar nerve transposition surgery was superimposed upon Petitioner's preexisting left arm condition which was found to have 22.5% permanent partial disability.

In cases involving cubital tunnel syndrome, on an arm without a prior determination of permanent partial disability, the Commission, often, awarded 20% loss of use of an arm in cases

where the Petitioner underwent cubital tunnel release surgeries, returned to work full-duty, and suffered an aggravation of their pre-surgical symptoms upon their resumption of their repetitive job duties. *See Sherri Crain v. Olin,* 10 I.W.C.C. 0888 (2010); *Barbara Edelen v. Olin,* 09 I.W.C.C. 0943 (2009); *Cindy Antrobus v. Olin,* 08 I.W.C.C. 0006 (2008); *Fred Scott Carter v. State of Illinois/Menard Correctional Center,* 12 I.W.C.C. 0342 (2012); *Jason Lane v. State of Illinois/Menard Correctional Center,* 12 I.W.C.C. 0146 (2012); *Javelins Lewis v. State of Illinois/Menard Correctional Center,* 12 I.W.C.C. 0173 (2012); *Greg Mayhugh v. State of Illinois/Menard Correctional Center,* 11 I.W.C.C. 0970 (2011); *Lucas Mennerich v. State of Illinois/Menard Correctional Center,* 12 I.W.C.C. 0272 (2012); *Thomas Mezo v. State of Illinois/Menard Correctional Center,* 10 IL.W.C. 11406 (2011); *Sean Starkweather v. State of Illinois/Menard Correctional Center,* 11 I.W.C.C. 0670 (2011); *Ronald Tuttle v. State of Illinois/Menard Correctional Center,* 10 IL.W.C. 15865 (2010); *James Wingerter v. State of Illinois/Menard Correctional Center,* 11 I.W.C.C. 0669 (2011); *Richard Kirkover v. State of Illinois/Menard Correctional Center,* 12 I.W.C.C. 0361 (2012).

Based on the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% loss of use the right arm and 25% loss of use of the left arm, pursuant to Section 8(e) of the Act, prior to addressing any credits claimed by Respondent.

In Support of the Arbitrator's Decision Regarding Issue (N), Whether Respondent is Due a Credit, the Arbitrator finds as follows:

Respondent is claiming a credit of 22.5% loss of use of the arm pursuant to Section 8(e)(17) of the Act. Section 8(e) of the Act provides a schedule of compensation of injuries to any of 15 different specified body parts including the "arm". 820 ILCS 305/8(e)(1) (West 2008). For purposes of compensation under section 8(e)(10) of the Act, the "arm" has been defined as "the segment of the upper limb between the shoulder and the elbow" or "between the shoulder and the wrist". *Will County Forest Preserve v. Illinois Workers' Comp. Comm'n,* 970 N.E.2d 16 (3rd Dist. 2012). Section 8(e)(17) of the Act provides that, for the "permanent loss of use, or the permanent partial loss of use of" a "hand, arm, thumb or fingers, leg, foot or any toes" for which compensation has been pain, subsequent injury". The credit under this section of the Act is mandatory. *General Motors Corp, Fisher Body Division v. Industrial Comm'n,* 62 Ill.2d 106, 112-113 (175). The credit is due whether the prior compensation was paid pursuant to an award by the Commission or pursuant to a settlement contract. *Id.* It is well settled that a settlement contact, approved by the Commission is a final award of the Commission for all legal effects, including credits due in later

awards and the ability to collaterally attack the agreement. *See Harrison Sheet Steel Co. v. Industrial Comm'n*, 404 Ill. 557, 565 (1950); *Michelson v. Industrial Comm'n*, 375 Ill. 462 (1941).

In this case, Petitioner received a settlement of 22.5% loss of use of a left arm. (RX 2). The settlement was based upon the left arm pursuant to Section 8(e) of the Act. The credit under Section 8(e)(17) is mandatory. As such, Respondent is entitled to a credit of 22.5% loss of use of a left arm pursuant to Section 8(e)(17)of the Act. The fact that a claimant might be compensated differently today for an injury and settlement that occurred prior to Will County Forest Preserve does not change the fact that the claimant was compensated under section 8(e) of the Act. *See Dorsey v. Illinois Worker's Compensation Comm'n*, 2016 IL App (1st) 143044WC.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Wisdom,

Petitioner,

vs.

NO: 17 WC 4338

Associated,

19IWCC0360

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, and nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 2/26/18 is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of 11,767.18, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $684.00 per week for 21.5 weeks, as provided in §8(e)(12) of the Act, for the reason that the injuries sustained caused the loss of use of 30% of the right leg, less a credit of 20% loss of use of the right leg previously received in case 91 WC 675.

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

19IWCC0360

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 $26,600.00. 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: JUL 18 2019
o:5/21/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WISDOM, DAVID
Employee/Petitioner

Case# **17WC004338**
17WC020981

ASSOCIATED
Employer/Respondent

19IWCC0360

On 2/26/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% 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:

2208 CAPRON & AVGERINOS PC
STEPHEN J SMALLING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

5265 WOLF LAW LTD
MARGARET A BENTLEY ESQ
25 E WASHINGTON ST SUITE 801
CHICAGO, IL 60602

19IWCC0360

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Wisdom
Employee/Petitioner

v.

Associated
Employer/Respondent

Case # **17** WC **04338**

Consolidated cases: **17 WC 20981**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **December 19, 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. [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. [ ] 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 **February 15, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $**59,280.00**; the average weekly wage was $**1,140.00**.

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 ***may not have paid*** all appropriate charges for all reasonable and necessary medical services.

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $11,767.18 to Adventist Bolingbrook Hospital, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all payments and adjustments against the medical awarded.

Respondent shall pay Petitioner permanent partial disability benefits of $684.00/week for 21.5 weeks, because the injuries sustained caused the 30% loss of the Right Leg, less credit of 20% loss of use of the Right Leg previously received in case 91 WC 675, 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

February 20, 2018
Date

FEB 26 2018

Statement of Facts

This matter was tried in conjunction with consolidated case 17 WC 20981 (DOA 8/19/16). A single transcript was prepared. The Arbitrator has issued separate decisions in these matters.

Petitioner David Wisdom testified that he was employed by Respondent Associated since June 13, 2011 as a field service technician. Respondent's business is material handling. Petitioner's job duties were to install and repair forklifts. His job involved kneeling, climbing, sitting and standing. It's very physical. He would go to customer locations. He would also work in the shop. He testified that prior to February 15, 2016 he was not under medical care for his right knee and was working without restrictions.

Petitioner testified that he had a prior right knee injury with a Worker's Compensation settlement in 1991. Petitioner received 20% loss of use of the right leg in case 91 WC 675 (RX 5). Petitioner was evaluated by Dr. Richard Shermer on September 17, 1990, and provided a history of a work-related injury on October 2, 1989, when he fell 12 feet and landed on his right knee and leg (RX 7, p. 236). Dr. Shermer states that an MRI scan of the right knee taken on October 5, 1989 did not show definite evidence of a meniscus tear (RX 7, p. 236). Petitioner underwent right knee arthroscopy with right patella shaving on May 10, 1991, at Mercy Center for Health Care Services (RX 7, p. 232). The post-operative diagnosis was chondromalacia of the right patella (RX 7, p. 232).

Petitioner saw Dr. Vincent Cannestra of Midwest Bone & Joint on February 25, 2013, for bilateral knee pain. He stated he had it for years, and it had steadily worsened over the last two years. Dr. Cannestra's impression was bilateral knee patellofemoral arthritis, right side more advanced and symptomatic, and a probable meniscus tear of the right knee. He did a cortisone injection and prescribed ibuprofen and knee braces. Petitioner was to return in 6 weeks to discuss possible MRI and surgery (RX 8). Petitioner was evaluated by Dr. Shadid of Genesis Orthopedics & Sports Medicine on April 8, 2013. He noted the problem was intermittent medial-sided right knee pain for a year and that it had been ongoing for couple of years. Petitioner denied that it was related to work. Dr. Shadid notes Petitioner reported he had shifted from an electrician to a forklift mechanic, which requires him to kneel. Dr. Shadid's impression was a right knee chronic medial meniscus tear and possible chondromalacia of the medial condyle (RX 10)

An April 18, 2013 MRI of the right knee revealed grade III to IV chondromalacia changes in the patellofemoral compartment and possible undersurface tears of both the lateral and medial meniscus (RX 11). Petitioner underwent a right knee arthroscopy and partial meniscectomy on June 18, 2013. Petitioner's post-operative diagnosis was a right knee medial meniscus tear and chondromalacia patella (RX 12). Petitioner returned to Dr. Shadid on July 31, 2013, and reported aching on the medial side of his right knee. He was given an injection. The diagnosis was right knee degenerative joint disease (RX 10).

Dr. Clark records low back complaints since 1986. Petitioner reported knee complaints in 1988 which Dr. Clark felt were coming from his back (PX 7, p 248). On October 9, 2013, Petitioner reported to Dr. Larson that he had low back pain for 5 weeks, getting worse. There was no reported injury (RX 6). X-rays note degenerative changes (RX 7, p 206-207). On June 9, 2014, Petitioner saw Dr. Larson with multiple complaints including his right ankle feeling like it will turn easily, muscle cramps especially in the calves, and low back pain and cramping (RX 6, p 11-16). Petitioner underwent x-rays of the right tibia and fibula on June 13, 2014 which found degenerative changes and a bone spur (RX 7, p. 210). Dr. Larson diagnosed myalgias (RX 6, p 19).

Petitioner underwent an evaluation with Dr. Alan Jacobsen on March 25, 2015 for his muscle and joint pain. He reported complaints in the posterior neck, upper back, elbows and knees. He noted right foot swelling, numbness in the right hand and achiness in the hips besides low back pain. Petitioner was assessed with arthralgias and myalgias which very well may represent fibromyalgia. He was placed on prednisone (RX 7, p 71-73). Petitioner presented to Dr. Larson on June 15, 2015 with complaints of pain in his shoulders, neck, medial knees, and elbows (RX 6, p. 35).

Petitioner identified PX 9 as a pain diagram he prepared for Dr. Larson with his symptoms from fibromyalgia on or about January 30, 2015. He testified that the pain varies. It is different from the pain he experienced after the accidents.

Petitioner testified that on February 15, 2016, he had met with a customer at their location. He was walking to his van to get tools from the van which was on an incline when his feet went out from under him on the ice. Petitioner testified that he came down straight on his knee and hit his right side and twisted. He hurt his right knee. He was helped up and went inside. On February 15, 2016, a WC-Accident Report Form and Employee Statement were prepared and signed by Petitioner (PX 15). Petitioner reported hitting his "left arm – leg & right inner knee" and injuries to the inner right knee and outer left knee.

Petitioner was seen at Concentra on February 15, 2016 with complaints in the right knee, left leg, left ankle, left hip and left shoulder. The history is that Petitioner was opening the side sliding door on his work vehicle that was parked on an incline when his feet slipped on the slush and he fell on his left side while twisting his right knee and left ankle (PX 5, p 2). Petitioner was diagnosed with a sprain of the medial collateral ligament of the right knee. He was released to return to work with restrictions (PX 5, p 9). Petitioner underwent physical therapy at Concentra through February 24, 2016 (PX 5).

Petitioner underwent an MRI of the right knee on February 26, 2016 at Castle Orthopaedics & Sports Medicine. The impression was a tear of the medial meniscus, patella femoral arthrosis and bursitis (RX 9) Petitioner was also evaluated by Dr. Mark Schinsky at Castle Orthopaedics & Sports Medicine on March 2, 2016. Petitioner gave a history of slipping on ice and falling with noted marked pain on his left side as well as the medial aspect of his right knee. He stated that his left-sided pain was improving. X-rays of the right knee were taken and revealed quite significant patellofemoral degenerative changes with near bone-on-bone arthritis and some degenerative changes in the medical compartment (RX 5). The diagnosis was a medial meniscus tear of the right knee, right knee pain, and primary osteoarthritis of the right knee as well as a sprain of the medial collateral ligament. Dr. Schinsky recommended an injection and additional physical therapy. He stated that if this is unsuccessful, Petitioner may require surgery. Dr. Schinsky notes that he was not approved for treatment by Workers' Compensation, only an evaluation (RX 5).

Petitioner sought treatment from Dr. Burra at Hinsdale Orthopedics. Dr. Burra testified that he first saw Petitioner on March 1, 2016 (PX 11). He wrote an order for a right knee arthroscopy with meniscectomy on March 7, 2016 (PX 2). On April 21, 2016, Petitioner underwent a right knee arthroscopy with partial medial and lateral meniscectomy and abrasion chondroplasty of the patellofemoral compartment. The post-operative diagnosis was medial and lateral meniscus tears as well as chondromalacia of the patellofemoral and medial compartments (PX 3).

Following surgery, Petitioner attended physical therapy and was released to return to work with restrictions (PX 5). On August 2, 2016, Petitioner advised Dr. Burra that he had been working with minimal restrictions

and without any problems. He noted a dull pain with kneeling but was feeling very good overall. Dr. Burra released Petitioner to work without any restrictions. He anticipated that he would be at maximum medical improvement in the next two months (PX 5, p 222, PX 10). On August 30, 2016, Dr. Burra felt Petitioner had recovered well from his right knee surgery (RX 13).

Petitioner testified he went back to his regular work for Respondent. He favored his right knee. He tried to avoid kneeling as much as possible. He was still experiencing slight discomfort. He worked until August 19, 2016 when he suffered an additional injury to his neck and shoulder which is the subject of consolidated case 17 WC 20981 decided in conjunction with this matter. Petitioner last saw Dr. Burra for his right knee on October 11, 2016. Petitioner reported he was working without any restrictions until he was put on jobs that required extended kneeling and he had some anteromedial pain. Dr. Burra advised Petitioner to continue his home exercises and to limit kneeling to no more that 15 to 30 minutes at a time (PX 2, p 72).

Conclusions of Law

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. If an injury can be traceable to a definite time, place and cause and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act. *E. Baggot Co. v. Industrial Comm'n.*, 290 Ill. 530, 533 (Ill. 1919)

While Petitioner has a prior knee injury with surgical repair in 1991 and again in 2013, his unrebutted testimony and medical histories state that he was working his regular physical job as a field service technician until the incident on February 15, 2016. Petitioner suffered his injury while at a customer's premises during a service call which is a place he was in order to perform his work assignment. He was required to travel to customer locations to perform his duties. The injury occurred in the course of his employment.

He fell on the icy surface while attempting to retrieve his tools from his van. This was a task in the performance of his duties. His testimony was that he fell while opening the sliding side door of the van on the icy incline. This activity is a risk connected with, or incidental to, his employment. It is a foreseeable activity in furtherance of his job responsibilities at the customer location. After this incident, he sought prompt medical treatment for complaints. The facts establish that this incident was arising out of the employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on February 15, 2016.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. It is well-established that an accident need not be the sole or primary cause, as long as employment is a cause, of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36 (1982).

A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). It is well established that prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000). The chain of events can be applied even if there is a pre-existing condition.

Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017).

Petitioner has a pre-existing condition of the right knee. Petitioner underwent right knee arthroscopy with right patella shaving on May 10, 1991. The post-operative diagnosis was chondromalacia of the right patella On February 25, 2013, He reported bilateral knee pain for years, which had steadily worsened over the last two years. The impression was bilateral knee patellofemoral arthritis, right side more advanced and symptomatic, and a probable meniscus tear of the right knee. An April 18, 2013 MRI of the right knee revealed grade III to IV chondromalacia changes in the patellofemoral compartment and possible undersurface tears of both the lateral and medial meniscus. Petitioner underwent a right knee arthroscopy and partial meniscectomy on June 18, 2013. Petitioner's post-operative diagnosis was a right knee medial meniscus tear and chondromalacia patella. Petitioner returned to Dr. Shadid on July 31, 2013, and reported aching on the medial side of his right knee. He was given an injection and his diagnosis was right knee degenerative joint disease. Petitioner was seen in 2015 with multiple complaints including his knees. He was diagnosed and treated for fibromyalgia.

Despite the pre-existing condition, the accident of February 15, 2016 aggravated or accelerated that condition. Petitioner was performing his regular, physical job duties as a field service technician during this time. The Arbitrator finds persuasive Petitioner's explanation that the complaints he advanced in 2015 that were diagnosed as fibromyalgia were qualitatively different. There was no treatment directed at any orthopedic condition in the knees during this care. The last treatment directed to the knees was in July 2013, over two years before the accident. Following his February 15, 2016 fall, Petitioner advanced immediate complaints in the right knee and pursued a continuous course of care including the April 21, 2016 right knee arthroscopy with partial medial and lateral meniscectomy and abrasion chondroplasty of the patellofemoral compartment.

He was under an active course of care through his release to return to full duty work by Dr. Burra on August 2, 2016.

Based on the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his condition of ill being in the right knee is causally connected to the accidental injuries sustained on February 15, 2016.

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

Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner would be entitled to reasonable and necessary treatment for his condition of ill being in the right knee.

Petitioner submitted PX 8 with claimed unpaid medical bills. The only item relating to treatment for the right knee is item #2, the April 21, 2016 bill from Adventist Bolingbrook Hospital of $11,767.18 for the surgery performed on Petitioner's right knee. The Arbitrator notes that the statement in the exhibit is dated May 9, 2016 and is not adjusted for fee schedule or negotiated rate. The Arbitrator finds this treatment was reasonable, necessary and causally related to the accidental injury sustained on February 15, 2016.

Respondent submitted a payment log as RX 14. The exhibit reflects payment of $6,543.83 to Adventist Bolingbrook Hospital for services on April 21, 2016 as well as payment for Bolingbrook Anesthesia for that date (RX 14, p 72). No fee schedule calculations or updated statement from the provider were submitted to allow the Arbitrator to determine if the payments represent full satisfaction of these bills.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $11,767.18 to Adventist Bolingbrook Hospital, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all payments and adjustments against the medical bill awarded.

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

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a field service technician at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that he was performing his full unrestricted duties at the time of his subsequent August 19, 2016 injury. The Arbitrator notes that this is a physical job involving kneeling. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident. Petitioner would be considered an older worker but would be expected to remain in the workforce for a few years. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released to unrestricted duty and performed those tasks up to the date of his second claimed accident. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner had a prior knee injury with surgical repair in 1991 and again in 2013. He was diagnosed with a medial meniscus tear and chondromalacia patella and degenerative joint disease Petitioner has previously received compensation for 20% loss of use of the Right Leg in case 91 WC 675. Following the accident, Petitioner underwent additional surgery consisting of right knee arthroscopy with partial medial and lateral meniscectomy and abrasion chondroplasty of the patellofemoral compartment. On August 2, 2016, Petitioner reported a dull pain with kneeling but and was feeling very good overall. Petitioner was released to return to unrestricted duty and was anticipated at maximum medical improvement within 2 months. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

In assessing permanent partial disability in this matter, the Arbitrator references *Kevin Bathon v. State of Illinois* 16 IWCC 379 (40-year-old correctional officer awarded additional 7.5% loss of the leg for arthroscopic meniscectomy and chondroplasty after credit of 25% for prior claim); *George Sanders v. City of Chicago,* 15 IWCC 599 (62 year old truck driver awarded additional 10% loss of the leg for aggravation of prior degenerative joint disease in knee resulting in retirement after credit of 20% for prior claim); *Henry Taylor v. City of Chicago,* 14 IWCC 838 (57 year old sheet metal foreman awarded additional 7% loss of the leg for arthroscopic medial and lateral meniscectomy with removal of loose bodies after credit of 25% for prior claim).

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained total permanent partial disability to the extent of 30% loss of use of Right Leg pursuant to §8(e) of the Act. Petitioner has previously received compensation for 20% loss of use of the Right Leg in case 91 WC 675, for which Respondent is entitled to credit against the permanent partial disability awarded herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Wisdom,

Petitioner,

vs.

NO: 17 WC 20981

19IWCC0361

Associated,

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 and medical expenses, and being advised of the facts and law, affirms the Decision of the Arbitrator with changes, 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).

The Commission notes that the Arbitrator stated he was "... unable to make a definitive finding as to the exact dollar amount to be paid on the medical bills which are found to be reasonable, necessary and causally related." (Arb.Dec.[17 WC 20981], p.9). The Commission notes that Petitioner submitted medical expenses totaling $346,453.93 at PX8, while Respondent submitted a payment log with 223 individual records of payment to multiple payees at RX14. As the Arbitrator pointed out, neither of these exhibits separated the bills and/or payments between the claims consolidated for trial (17 WC 4338 and 17 WC 20981). In addition, neither the exhibit containing the bills claimed nor the exhibit alleging the amounts paid detail the fee schedule calculation, let alone the final amounts due and owing after any applicable adjustments. Furthermore, Petitioner testified that some of the bills were paid through the group carrier, adding yet another wrinkle to any determination as to the amount due and any credit owed.

19IWCC0361

The Commission finds that while the evidence shows Petitioner is entitled to reasonable and necessary medical expenses pursuant to §8(a) with respect to the claimed date of accident as set forth in PX8, the parties failed to provide an adequate breakdown of the information necessary to arrive at a final amount outstanding, particularly with respect to application of the fee schedule (§8.2), and the specific amount of credit allowable pursuant to §8(j) of the Act.

The Commission rejects Respondent's argument, without citation, that Petitioner failed to prove his entitlement to medical expenses based on the Arbitrator's inability to make a definitive finding as to the dollar amount to be paid. Instead, the Commission notes that pursuant to the Act, it is the employer's responsibility to adjust the medical bills to conform to the fee schedule found in §8.2. 820 ILCS 305/8.2 (West 2010). (See *Tiburzi Chiropractic v. Kline*, 996 N.E.2d 1164, 1167, 375 Ill.Dec. 108, 111 (4th Dist. 2013). Furthermore, the Commission notes that it has been held by the appellate court that "[t]he Commission's decision ordering the employer to 'pay any unpaid, related medical expenses according to the fee schedule and provide documentation with regard to said fee schedule payment calculations to Petitioner' complies with the statutorily mandated procedures set forth in the Act. Therefore, we need not remand to the Commission for a determination of a dollar amount owed to claimant pursuant to the medical fee schedule." *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, 990 N.E.2d 284, 371 Ill.Dec. 384 (4th Dist. 2013).

The Commission, not unlike the Arbitrator, is unable to establish these amounts from the information submitted at PX8 and RX14, and notes that the parties are actually in a position to better ascertain said amounts. As a result, the Commission affirms the Arbitrator's finding that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule for reasonable, necessary and causally related medical services as set forth in PX8, pursuant to §§ 8(a) and 8.2 of the Act, and that Respondent shall be given a credit for any and all amounts paid on account of this injury pursuant to §8(j) of the Act.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 2/26/18 is affirmed and adopted with the changes stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner the sum of $760.00 per week from 8/5/17 through 12/19/17, for a period of 19-4/7 weeks, that being the period of temporary partial disability under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses as set forth in PX8, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment as recommended by Drs. Burra and Darwish, including arthroscopic right shoulder surgery, post-operative care, physical therapy and other reasonable and necessary care, pursuant to §8(a) and §8.2 of the Act.

19IWCC0361

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: JUL 18 2019
o:5/21/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. 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. 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 holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

WISDOM, DAVID
Employee/Petitioner

Case# **17WC020981**

17WC004338

ASSOCIATED
Employer/Respondent

19IWCC0361

On 2/26/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% 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:

2208 CAPRON & AVGERINOS PC
STEPHEN J SMALLING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

5265 WOLF LAW LTD
MARGARET A BENTLEY ESQ
25 E WASHINGTON ST SUITE 801
CHICAGO, IL 60602

19IWCC0361

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Wisdom
Employee/Petitioner

v.

Associated
Employer/Respondent

Case # 17 WC 20981

Consolidated cases: 17 WC 04338

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **December 19, 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. [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, **August 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 **$59,280.00**; the average weekly wage was **$1,140.00**.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $760.00/week for 19 4/7 weeks, commencing August 5, 2017 through December 19, 2017 (the date of hearing), as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule for reasonable necessary and causally related medical services as detailed in Petitioner's Exhibit 8 and the Arbitrator's finding with respect to Medical, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any payments made or adjustments taken pursuant to Sections 8(a) and 8.2 of the Act. To the extent medical bills have been paid by a group carrier, Respondent shall be responsible for the amount of the bill as paid by said carrier.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Burra including arthroscopic right shoulder surgery, post-operative care and other reasonable and necessary care and Dr. Darwish including physical therapy or other reasonable and necessary care.

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

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

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

Signature of Arbitrator

February 20, 2018
Date

ICArbDec19(b)

FEB 26 2018

19IWCC0361

Statement of Facts

This matter was tried in conjunction with consolidated case 17 WC 04338 (DOA 2/15/16). A single transcript was prepared. The Arbitrator has issues separate decisions in these matters. In the present case, Petitioner is seeking compensation as a result of a claimed injury on August 19, 2016. The Arbitrator incorporates the Statement of Facts in the Decision of the consolidated case 17 WC 04338 decided in conjunction with this matter with respect to the facts of Petitioner's work and medical history including the medical records and testimony concerning his treatment and symptoms related to fibromyalgia prior to the current date of accident.

Petitioner David Wisdom testified that he was employed by Respondent Associated since June 13, 2011 as a field service technician. Respondent's business is material handling. Petitioner's job duties were to install and repair forklifts. His job involved kneeling, climbing, sitting and standing. It's very physical. He would go to customer locations. He would also work in the shop. He testified that following his release to unrestricted duty by Dr. Burra on August 2, 2016 with respect to his right knee injury, (addressed in the consolidated case 17 WC 04338) he returned to his regular work duties without restrictions. Petitioner testified he was not under medical care for his neck or right shoulder. He had never been recommended for surgery to his neck or right shoulder.

Petitioner testified that on August 19, 2016, he went to the shop to pick up a battery charger. While he was there, he was informed that the customer needed a tire that he had submitted for warranty. In order to do that, he needed to press on a new tire. He was using the tire pressing machine. He identified PX 13 A-D as photographs of the machine and function he was doing. He testified that the tire he was doing weighed around 80-85 pounds with the rim. While doing this process, his knee gave out and the tire shifted to the right. He tried to grab the thing and all the weight went on his right arm. This occurred around noon.

Petitioner testified he was sore and his knee was very sore. He went back to the customer with the battery charger, finished his shift and then went home. He testified that he called Bob on his way home and told him about his knee giving out. As the night progressed, he noticed that the knee pain subsided, but his right arm got worse. He went to the Rush Copley Emergency Room the next morning, which was Saturday.

Petitioner was seen at Rush Copley on August 20, 2016 with complaints of arm pain. The history recorded is of intermittent spasm and tightness around the bicep for the past month. The pain radiates up his shoulder/neck area and is related to his right arm pain. For the past two nights, the pain to his right arm has significantly worsened. The past history notes sleep apnea, fibromyalgia and prior knee surgery (PX 7). Petitioner testified that he did not tell anyone he had pain for a month. He testified he told them he had been back to work for a month. He testified that this pain was totally different from the pain he experiences with fibromyalgia. Petitioner had a cervical CT scan which noted multiple level disc bulges. The impression was degenerative changes. The diagnosis was bulging cervical discs and musculoskeletal pain of the right upper extremity. Petitioner was discharged to follow up with his primary care doctor. Dr. Oland noted that Petitioner was advised that since the symptoms have been on and off for 3-4 weeks, they will not be resolved by a single dose of medication. Petitioner was also advised by Dr. Oland that he had cervical disc disease as well as right trapezius spasm and, thus, his right arm pain may be multifactorial (PX 7).

Petitioner testified he contacted Respondent over the weekend. He emailed his boss Matt Lupo and Bob Forgue on August 21, 2016 advising of his knee and pinched nerve in his shoulder installing a battery charger Friday (PX 10). Robert Forgue testified that in August 2016 he was Respondent's corporate safety manager.

He received notice of the injury by email and company cell phone. He advised Petitioner to report to his manager. He testified that he did not review the plant surveillance video or take further statements or do any further investigation. He did not question the injury reported. He did not believe it was suspicious. Petitioner prepared an accident report when he came to work on Monday, August 22, 2016. This document was prepared by his supervisor Matt Lupo (PX 14).

Petitioner was sent to Concentra on August 25, 2016. Dr. Phillips summarizes this record by noting Petitioner reported complaints in the right upper arm and shoulder pain and right neck pain. Petitioner reported pain occurred on August 19, 2016 while pressing tires. Petitioner was diagnosed with rotator cuff tendonitis and given a lifting restriction (RX 1). Petitioner saw Dr. Burra on August 30, 2016, referred by Dr. Leazzo from Concentra. Petitioner provided a history that he had to pick up a tire weighing 80 to 90 pounds. As he brought up the load, he felt a sharp pain in his right arm. Petitioner localized pain towards the biceps tendon groove but also described pain that radiates on the neck all the way to his hand. Dr. Burra's impression was rotator cuff biceps tendonitis and possible SLAP and C7-8 radiculopathy. He advised Petitioner should be restricted to no use of the right arm and total lifting of no more than 5 pounds to avoid pressure on the neck. He recommended follow up with a spine surgeon, cervical MRI and MR arthrogram of the right shoulder (RX 13).

The cervical MRI was performed on September 2, 2016 and noted cervical spine degeneration at C5-6 and C6-7 with central canal stenosis and an osseous mass at C6-7 narrowing the spinal cord (PX 2, p 63). Petitioner saw Dr. Ashraf Darwish on September 6, 2016, with a chief complaint of cervical pain. He gave a history of a work-related injury on August 19, 2016, as he was lifting a tire to a position waist high, when his right knee gave out, causing the majority of the tire weight to fall on his right arm with immediate right shoulder pain and right arm pain. Physical examination noted weakness in right wrist extension and grip strength Dr. Darwish diagnosed spinal stenosis, radiculopathy and disc degeneration. He noted Petitioner had a work-related injury to the cervical spine with neck pain and radiculopathy. He recommended the right shoulder MRI be completed to exclude confounding pathology and prescribed physical therapy and a right C5-6 epidural steroid injection (PX 2, p 5-7).

Petitioner had a right shoulder MR arthrogram on September 8, 2016. The impression was partial tear of the subscapularis tendon, AC joint degeneration, tendinosis, a possible small SLAP tear and a small focal chondrolabral tear (PX 2, p 64-65). Follow up to review the MRI at Hinsdale Orthopedics took place on September 13, 2016. Petitioner was advised of the treatment options for the pathology noted, He was prescribed physical therapy and to follow up for his cervical injections (PX 2, p 9-15).

On September 14, 2016, Petitioner has a C5-6 epidural steroid injection. The records note that Petitioner denies prior neck/shoulder or right arm pain. Petitioner reported significant pain relief on September 30, 2016 (PX 1). He reported 90-95% improvement in his pain to Dr. Darwish on October 4, 2016 (PX 2, p 16). On October 19, 2016, he reported increasing pain. On October 27, 2016, Petitioner underwent a second epidural injection at C6-7 (PX 1). On November 2, 2016, Dr. Darwish noted Petitioner had two injections with significant relief of his neck and mid-back pain. Petitioner reported working light duty with no increase in his neck pain. Dr. Darwish recommended continued physical therapy. He did not feel surgery was needed at that time. Petitioner was to continue to treat with Dr. Burra and follow-up with Dr. Darwish, as-needed (PX 2, pp. 20-22). Petitioner saw Dr. Burra on November 7, 2016 for an injection for the right shoulder (PX 2, p 24-28). On November 10, 2016, Petitioner has a follow up with Dr. Malhotra and reported significant pain relief from the injection (PX 1).

Petitioner underwent a Section 12 medical examination with Dr. Frank Phillips on November 17, 2016 (RX 1). Dr. Phillips examination was focused on Petitioner's cervical spine condition. Petitioner initially reported some neck pain. Most of his pain is focused around his shoulder. After examination and record review, Dr. Phillips' diagnosis was a cervical sprain/strain with a possible aggravation of radicular symptoms related to his underlying degenerative condition. Dr. Phillips opined that treatment to date was reasonable and related to the accident. He opined that, since Petitioner's cervical symptoms have resolved and has no cervical complaints at this time, Petitioner has reached maximum medical improvement from his temporary aggravation of symptoms. He also notes that Petitioner has a major issue related to his shoulder with significant pain. He suggested a complete evaluation of the shoulder by a specialist (RX 1).

Petitioner saw Dr. Burra on December 6, 2016. He noted only a few hours relief from the shoulder injection. He noticed weakness in his grip and dropping things. Dr. Burra notes Dr. Phillips opinions on the severity of the shoulder condition. He recommended right shoulder surgery. He states that the paresthesia or radicular symptoms or any grip strength weakness will not be improved and are not indications for shoulder surgery (PX 2, p 75-76).

On December 9, 2016, Petitioner was seen by Dr. Malhotra for continuing observation of his relief from the cervical the injection (PX 1). He saw Dr. Darwish on December 20, 2016. Dr. Darwish notes the independent medical examination opinion that the majority of the symptoms were related to the shoulder. He states that Dr. Phillips also recommended further evaluation of the findings at C6-7. Dr. Darwish recommended proceeding with shoulder intervention. He ordered an updated cervical MRI (PX 2. P 30-33). The January 5, 2017 MRI again noted the C6 defect unchanged with spurring and disc bulging at C5-6 (PX 2, p 35). On January 6, 2017, Dr. Darwish reviewed the MRI and recommended a C5-6 and C6-7 decompression and fusion. He scheduled Petitioner for a consult with Dr. Boco (PX 2, p 39). Dr. Boco saw Petitioner on January 20, 2017 and concurred with the surgical recommendation (PX 6).

On February 14, 2017, Petitioner reported to Dr. Malhotra that he had significant relief from the injection until the past few weeks. His pain was now 8/10 (PX 1). Petitioner presented to Dr. Darwish on February 14, 2017, reporting that his cervical pain had been getting progressively worse over the last month and it now radiated into his bilateral forearms with muscle spasms down his neck. Dr. Darwish continued to recommend a C5-6 and C6-7 decompression and fusion (PX 2, p. 40).

Dr. Phillips reviewed additional updated medical records and issued an addendum report on March 8, 2017. He opined that Petitioner was at MMI at the time of his IME. He has deteriorated since that time and developed neurologic symptoms. The recommended surgery is reasonable but does not address any traumatic pathology. He opined that the current condition is not related to the injury (RX 2).

Petitioner returned to Dr. Darwish on March 21, 2017. The records note that an additional injection was not approved. Dr. Darwish continued to recommend surgery (PX 2). Dr. Darwish testified by evidence deposition taken June 2, 2017 (PX 12). He testified to his surgical recommendation due to the failure of conservative care. He stated that patients can have temporary relief from the epidural injections. Part of the Petitioner's pathology is age related degenerative changes in the cervical spine. He opined that the work incident caused or aggravated the cervical condition and the need for surgery. The need for surgery is related to the injury based upon the symptoms that have arisen (PX 12).

Dr. Darwish testified he did not review the Rush Copley ER records or records of Petitioner's treatment prior to the accident. He does not know if Petitioner had immediate complaints of neck pain. The history provided is the most important thing in determining causation. When he examined Petitioner on November 2, 2016, his symptoms had resolved and he released him from care. He believes that the injection helped temporarily but his symptoms returned. The January 2017 MRI looked the same as the previous study (PX 12).

On September 25, 2017, Petitioner underwent surgery consisting of C5, C6, C7 laminectomy, C6-7 decompression and fusion of C5-6, C6-7 and C7-T1 (PX 2, p 97-98). Petitioner has had post-operative visits for his neck on October 3, 2017, October 10, 2017 and November 7, 2017 (PX 2). He testified he has not started therapy for fear it could aggravate his shoulder condition.

Petitioner was examined at Respondents request by Dr. Brian Forsythe on June 20, 2017 for his right shoulder (RX 3). Dr. Forsythe reviewed the treating medical records and performed a physical examination. He noted there was negative belly-press and negative lift-off and bear-hug signs on examination. Dr. Forsythe stated that Petitioner demonstrated moderate-to-severe symptom magnification during physical examination and his subjective complaints were not supported by any objective findings. Dr. Forsythe's diagnosis was a resolved right shoulder sprain. He recommended that Petitioner return to full duty work without restrictions, and did not recommend any additional right shoulder treatment, including surgery. Dr. Forsythe opined that Petitioner had reached MMI. He performed an AMA impairment rating and opined that Petitioner had a 0% impairment rating (RX 3). Dr. Forsythe prepared an addendum on August 19, 2017 after review of the Rush Copley ER records (RX 4). He agreed that the ER records do not support a causal connection between the Petitioner's shoulder condition and the accident. His initial opinion of causation was based upon the occupational history, history in the subsequent treating records and the subjective history and physical examination at the time of his examination (RX 4).

Dr. Burra testified by evidence deposition taken October 6, 2017 (PX 11). He testified to his treatment of Petitioner's shoulder beginning August 30, 2016 through his last visit on July 28, 2017. He identified his July 28, 2017 examination and office note (PX 11, Ex. 2). His diagnosis was subscapularis tear with biceps tendinitis and outlet-mediated impingement process. This is based upon his clinical examination and MRI arthrogram. He disagrees with Dr. Forsythe's opinions. He is recommending surgery. If he received authorization, he will perform the surgery. It is his opinion that the August 19, 2016 incident caused or contributed to the Petitioner's right shoulder condition (PX 11). Dr. Burra testified that he did not review the Rush Copley ER records. He did not review any other records. Petitioner did not report any prior shoulder injuries (PX 11).

Petitioner saw Dr. Burra on December 11, 2017. He reported that he was happy with his progress from the cervical surgery. He continued to complain of shoulder symptoms. Dr. Burra noted the plan to proceed with shoulder surgery (PX 2, p 99-103).

Petitioner testified he worked restricted duty until August 4, 2017. He has not returned to work or received benefits since August 5, 2017. He is still under treatment. His neck rehabilitation cannot be completed because of the condition of his shoulder. Shoulder surgery is scheduled. His understanding is that after the shoulder surgery, he will start physical therapy. He has a follow up appointment with Dr. Darwish in a couple of months.

Conclusions of Law

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. If an injury can be traceable to a definite time, place and cause and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act. *E. Baggot Co. v. Industrial Comm'n.*, 290 Ill. 530, 533 (Ill. 1919)

The Arbitrator heard the testimony and has reviewed the exhibits including the medical histories. The Arbitrator finds the Petitioner's testimony that he suffered the injury to his neck and shoulder while lifting a tire on August 19, 2016, supported by that of Mr. Forgue and the bulk of the medical histories is credible and persuasive. The Arbitrator does not find the history in the Rush Copley ER records sufficient to overcome the preponderance of the testimony. Based upon Petitioner's credible description of the mechanism of injury, the testimony and medical histories establish that he was working his regular job as a field service technician and suffered his injury while at his employer's premises which is a place he was in order to perform his work assignment. The was a task being performed was in the performance of his duties. This activity is a risk connected with, or incidental to, his employment. The facts establish that this incident was arising out of the employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on August 19, 2016.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. It is well-established that an accident need not be the sole or primary cause, as long as employment is a cause, of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). The accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being. An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36 (1982).

Petitioner presented the opinion of Dr. Burra that Petitioner's condition of ill being in the right shoulder is causally connected to the accident on August 19, 2016 and the opinion of Dr. Darwish that the Petitioner's condition of ill being in the cervical spine is causally connected to the accident on August 19, 2016. Respondent presented the opinions of Dr. Phillips with respect to the cervical spine and Dr. Forsythe with respect to the right shoulder.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having heard the testimony of the witnesses and reviewed the evidence submitted including the medical records, the Arbitrator finds the opinions of Dr. Burra and Dr. Darwish more persuasive. The Arbitrator notes that they were treating physicians rather than evaluators and that the initial referral to Hinsdale Orthopedics was through Concentra, Respondent's chosen occupational facility. The Arbitrator notes that none of the medical opinions stated that Petitioner's prior diagnosis of fibromyalgia was a factor in his current symptoms. The Arbitrator finds Dr. Burra's explanation of his diagnosis and treatment plan persuasive and supported by the treating records and diagnostic testing. The Arbitrator notes that Dr. Phillips, while focusing his examination on the cervical condition, strongly opined concerning the seriousness of the shoulder condition. The Arbitrator also notes that Dr. Forsythe examined Petitioner shortly after the second cervical epidural injection, when all treating records document Petitioner had a significant temporary improvement in his symptoms. Dr. Darwish had found a similar situation when he saw Petitioner on November 2, 2016. The Arbitrator finds Dr. Darwish's explanation of the increase of symptoms beginning in December and his plan of treatment persuasive. The Arbitrator also notes that Petitioner has undergone the cervical surgery and is reporting significant improvement as of the December 2017 visit to Dr. Burra.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his conditions of ill being in the right shoulder and cervical spine are causally connected to the accidental injury sustained on August 19, 2016.

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

Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner would be entitled to reasonable and necessary treatment for his condition of ill being in the right shoulder and neck. Petitioner submitted PX 8 with claimed unpaid medical bills. Respondent submitted a payment log as RX 14. The Arbitrator notes that these exhibits include bills and payments for both consolidated cases and are not itemized separately for this claim.

The Arbitrator has reviewed the bills listed in PX 8 and notes that the bill of Adventist Bolingbrook Hospital as well as charges from Hinsdale Orthopedics through August 2, 2016 are related to the February 15, 2016 knee injury addressed in the decision in consolidated case 17 WC 4338 and are not related to this matter. The Arbitrator has reviewed the remaining bills and the medical exhibits and finds that the remaining bills listed and included in PX 8 are for reasonable, necessary and related treatment for the conditions of ill being in Petitioner's cervical spine and right shoulder.

Respondent identified payments of $14,458.73 with respect to bills related to the cervical spine and shoulder treatment. No explanation of this calculation was provided. RX 14 does not detail the fee schedule calculation for these payments although some of the statements such as Hinsdale Orthopedics included adjustments. RX 14 also includes payments to providers not listed in PX 8. The Petitioner also testified that some bills were paid through health insurance, either Blue Cross or United Healthcare. Respondent did not claim these were plans for which credit would be allowed under Section 8(j). Nevertheless, to the extent that bills were paid by these plans, Petitioner would be entitled to only the amount paid and any out of pocket payments or outstanding balances. Having reviewed the exhibits and based upon the evidence submitted, the Arbitrator finds he is unable to make a definitive finding as to the exact dollar amount to be paid on the medical bills which are found to be reasonable, necessary and causally related.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule for reasonable necessary and causally related medical services as detailed in Petitioner's Exhibit 8, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any payments made or adjustments taken pursuant to Sections 8(a) and 8.2 of the Act. To the extent medical bills have been paid by a group carrier, Respondent shall be responsible for the amount of the bill as paid by said carrier.

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

Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner would be entitled to reasonable and necessary additional treatment for his condition of ill being in the right shoulder and neck. As more fully addressed in the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds the opinions of Dr. Burra and Dr. Darwish persuasive. Both Dr. Burra and Dr. Darwish have Petitioner under ongoing care. Petitioner is currently post-operative with respect to his cervical spine and was scheduled for his shoulder surgery at the time of trial. Dr. Burra detailed the expected post-operative shoulder course of care.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Burra including arthroscopic right shoulder surgery, post-operative care and other reasonable and necessary care and Dr. Darwish including physical therapy or other reasonable and necessary care

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

Temporary compensation is provided for in section 8(b) of the Workers' Compensation Act, which provides, "[W]eekly compensation *** shall be paid *** as long as the total temporary incapacity lasts," which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement.

Respondent provided work for Petitioner within his restrictions through a last day worked on August 4, 2017. He has not worked thereafter. Petitioner remained on restrictions from Dr. Burra, who was recommending right shoulder surgery, and from Dr. Darwish, who had prescribed the cervical fusion. Petitioner underwent the cervical fusion on September 25, 2017 and has been totally disabled thereafter while still awaiting his shoulder surgery and post-operative therapy. As discussed in the finding with respect to Causal Connection, the Arbitrator does not find the opinions of Dr. Phillips or Dr. Forsythe that Petitioner has reached MMI persuasive.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he is entitled to temporary total disability for 19 4/7 weeks, commencing August 5, 2017 through December 19, 2017 (the date of hearing), as provided in Section 8(b) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (with explanation)	☐ 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

JOSE A. RODRIGUEZ,

Petitioner,

vs.

CITY OF CHICAGO, DEPARTMENT OF STREETS & SANITATION,

Respondent.

19IWCC0362

NO: 11 WC 23380

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's imposition of penalties under §16 and §19(k) of the Illinois Workers' Compensation Act. After a careful review of the entire record, the Commission finds that Respondent's refusal to pay maintenance benefits after December 24, 2016 was unreasonable and vexatious given that the vocational rehabilitation records unequivocally show Petitioner's active and ongoing participation in vocational efforts.

A reasonable reading of Petitioner's actions documented in Petitioner's Exhibit 15, the Vocamotive vocational reports from September 19, 2016 to May 16, 2017, do not suggest Petitioner's noncompliance. Instead, the record shows Respondent was receiving reports from Petitioner's vocational counselor after December 24, 2016 that showed Petitioner was practicing his keyboarding skills and completing daily assignments as instructed. Additionally, Respondent was being hand-delivered job searches by Petitioner at City Hall every Friday up to the date of hearing on February 26, 2018. Based on these documentations, the Commission finds Respondent should have been aware of Petitioner's ongoing and continued vocational efforts.

Despite Petitioner's well-documented efforts, Respondent pointed to statements Petitioner had made in the vocational reports that regarded scheduling conflicts or expressed frustration. However, Respondent disregarded the fact that Petitioner never missed a vocational rehabilitation meeting or rescheduled without providing advanced notice. Respondent further disregarded the

19IWCC0362

fact that Petitioner had been handing in weekly job search logs and making daily contact with his vocational counselor, even if some of these contacts occurred after 3:00 p.m.

Petitioner's Exhibit 15 shows that Petitioner continued calling in daily to his vocational counselor months after Respondent had stopped paying his benefits. Petitioner was told to keep up his efforts even though he was not being paid, and Petitioner did as he was instructed. Petitioner also made consistent inquiries asking why he was not being paid and asking what he was doing that could be considered noncompliant. In doing so, Petitioner showed a constant intention to continue as instructed in the hopes of being paid his maintenance benefits.

Despite Petitioner's numerous inquiries, there was a lack of communication from Respondent to Petitioner. Respondent never petitioned the Commission to suspend Petitioner's compensation. Respondent also never sent a denial letter nor provided written notice to Petitioner as to why his compensation or vocational services were being terminated. Instead, after months of continually calling in his keyboarding scores to his vocational counselor and handing in weekly job logs to City Hall, Petitioner got a letter in the mail on May 16, 2017 from Vocamotive telling him to hand in his computer. Even after this termination of formal vocational services, Petitioner continued delivering weekly job logs directly to Respondent.

The Commission finds Respondent's conduct to be unreasonable and vexatious. For the aforementioned reasons, the Commission affirms and adopts the Arbitrator's award of §16 and §19(k) penalties, as well as the Decision of the Arbitrator in its entirety.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §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 the Circuit Court.

DATED: JUL 19 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 5/23/19
46

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

19IWCC0362

RODRIGUEZ, JOSE A
Employee/Petitioner

Case# **11WC023380**

CITY OF CHICAGO
Employer/Respondent

On 4/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.98% 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:

0140 PETER D CORTI LAW GROUP PC
MARK A DePAOLO
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

0010 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jose A. Rodriguez
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 11 WC 23380

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 **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **February 26, 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 **Compliance with Vocational Rehabilitation**

FINDINGS

On the date of accident, **December 21, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,797.52**; the average weekly wage was **$1,265.34**.

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

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

Respondent shall be given a credit of **$160,645.53** for TTD, **$0** for TPD, **$102,919.20** for maintenance, and **$0** for other benefits, for a total credit of **$263,564.73**.

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

ORDER

Respondent shall pay Petitioner maintenance benefits of **$843.56**/week for **193 3/7** weeks, commencing **6/14/2014** through **2/26/2018**, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$1,810.62** to **Pain Treatment Centers of Illinois**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$11,977.66**, as provided in Section 16 of the Act; **$29,944.15**, as provided in Section 19(k) of the Act; and **$0**, as provided in Section 19(l) 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.

___#001 Arbitrator George J. Andros 4/27/18____

Signature of Arbitrator Date

ICArbDec19(b)

APR 27 2018

FINDINGS OF FACT

The parties agree that Petitioner was 49 years old and working as a laborer for the City of Chicago in the Department of Streets and Sanitation. It is further agreed that on December 21, 2010, during the course and scope of his employment, Petitioner slipped on ice and fell while working outside and injured his lower back and left shoulder. Appropriate notice was given and Petitioner began an immediate course of medical treatment through Mercy Works, the occupational health clinic. (Px 1)

Following a course of physical therapy and having felt no improvement in his symptoms, Petitioner underwent an MRI on January 29, 2011 (Px 3) which showed that Petitioner had aggravated a pre-existing L5 spondylolysis and L5-S1 spondylolisthesis. Petitioner was referred to an orthopedic specialist and sought treatment with Dr. Theodore Fisher of Illinois Bone & Joint Institute on March 7, 2011. Dr. Fisher recommended a lumbar ESI and further physical therapy. (Px 4, Px 5) The ESI was administered on March 24, 2011 at Mercy Hospital. (Px3)

Petitioner's symptoms thereafter did not improve and he underwent a second ESI on May 3, 2011 (Px 3) and ongoing physical therapy. Petitioner did not experience any relief of his symptoms after the second ESI. On May 10, 2011, Dr. Fisher recommended surgery.

Petitioner then underwent a Section 12 examination by Dr. Edward Goldberg at Midwest Orthopaedics at Rush on May 25, 2011; Dr. Goldberg confirmed the need for surgery and confirmed that his condition was a result of his work accident of December 21, 2010. (Rx 6)

Dr. Goldberg then became Petitioner's treating physician and performed a laminectomy and L5-S1 instrumented fusion at Rush University Medical Center on June 28, 2011. (Px 7)

Petitioner continued to experience post-surgical uncontrolled pain and on July 11, 2011, Dr. Goldberg referred Petitioner to Rush Pain Center. Petitioner began a course of pain treatment and physical therapy but did not experience any relief in his symptoms. (Px 9)

Petitioner was then sent to another Section 12 exam on September 6, 2012, this time with Dr. Howard Konowitz. Dr. Konowitz found Petitioner's pain complaints to be warranted and further opined that Petitioner had sustained a fractured coccydynia. On September 6, 2012, Dr. Asokumar Buvanendra of Rush Pain Center prescribed a lumbar CT scan. This showed severe stenosis. Petitioner then underwent yet another Section 12 exam, this with Dr. Jesse Butler, on March 7, 2013. Dr. Butler opined that Petitioner had a "poor clinical outcome from surgery and closed management of a coccyx fracture....displaced fracture of the coccyx and pseudoarthrosis of lumbar fusion." This was a change in experts for the Respondent from Rush to Dr. Butler.

Petitioner was then treated by Dr. Alexander Ghanayem of Loyola University Medical Center and underwent surgery on May 14, 2013. Dr. Alexander Ghanayem and Dr. John Santaniello performed an anterior lumbar interbody fusion at L5-S1 and removed previously placed instrumentation at L5-S1. (See Px 12)

Petitioner then began a long course of treatment through Dr. Ghanayem and also returned to Dr. Buvanendran at the Rush Pain Center for management of his pain. He continued with physical therapy at this time. Petitioner finally reached medical maximum improvement on June 14, 2014 when Dr. Ghanayem released Petitioner to return to work with permanent restrictions of light duty work per a valid functional capacity examination Petitioner underwent on May 14, 2014.

Petitioner then began a job search. He has turned in logs of his job search every Friday to the City of Chicago from that time to the present.

In September of 2016, he was contacted by the Vocamotive company at the request of Respondent. The Vocamotive company began vocational rehabilitation contacts with the injured worker on September16,2016. In terms of actually performing services from the view of any claim of "non-cooperation" , this period to the date of the evaluation three months later was devoid of such assertions of any merit. The actual vocation evaluation was scheduled by Vocamotive for December 12, 2016 and completed on date. The manager of the service provider (seemingly organizing the purported program) was directly critical of this commercially unsophisticated post surgical laborer ab inititio. It was so obvious it was actually startling to this Arbitrator the worker was quickly labeled so negatively regardless of documented points of serious dedication to the tasks presented.

From the legal view, no Plan was presented to the IWCC under Rule 7110 by which a true analysis of any non- cooperation could be analyzed by both parties and the Arbitrator; No Petition to Suspend Compensation was either filed or presented by the Respondent before or after the Respondent claims agent directed the CRC to shut the case down , so to speak. Zero remediation is shown after the fact of the Respondent directing the CRC to " close the file". Nothing in the reports of Vocamotive shows the Respondent's legal representative had even filed an Appearance prior to the unilateral decision by a claims adjuster to close the file , so to speak.

Petitioner testified that he has been a laborer his entire life; he did not graduate high school, has never worked in an office environment, has never owned a computer and did not know how to operate one.

Through the Vocamotive facility, Petitioner began keyboard training at home with a computer furnished by Vocamotive. Per his own testimony, Petitioner had a slow start with regard to his training. At first, he did not even know how to turn the computer on.

Petitioner continued his training exercises through May 16, 2017 when his computer was picked up by the Vocamotive facility and was informed that his participation in the program had been terminated. No reason or explanation as given to him at that time.

CONCLUSIONS OF LAW

WITH REGARD TO THE ISSUE OF WHETHER PETITIONER WAS IN COMPLIANCE WITH VOCATIONAL REHABILITATION, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Respondent contends that Petitioner was non-compliant with vocational services and that his maintenance benefits were therefore terminated as of December 23, 2016. Petitioner disputes that he was non-compliant.

The Arbitrator notes that Petitioner underwent vocational testing at the request of Vocamotive on December 12, 2016. Thereafter, Petitioner engaged in the daily keyboarding exercises as well as occasional field meetings with Vocamotive personnel. Petitioner testified that he had changed the time of a few of the meetings, but always with advance notice. The Arbitrator notes that the record of Vocamotive indicate that Petitioner did change the time of two meetings with advance notice. It is also noted that Vocamotive cancelled meetings with Petitioner due to employee illness.

After examining the entire record of Vocamotive, the Arbitrator notes that there is not a single reference to non-compliance that could possibly rise to the level required to terminate maintenance benefits. (Px 15) Petitioner's maintenance benefits were terminated as of December 23, 2016. Petitioner's vocational testing was performed on December 12, 2016. During the two weeks leading up to the termination of benefits, Petitioner was in constant contact with Vocamotive. Though several appointments were changed, Petitioner appeared to be cooperative. Indeed, the record demonstrates numerous instances where Petitioner called in for more detailed "one-on-one" instruction.

Based upon all of the above, the Arbitrator finds that Petitioner was compliant with vocational services and is therefore entitled to maintenance benefits in the amount of $843.56 per

week for a period of 193 $^{3}/_{7}$ weeks, that is, from June 14, 2014 through February 26, 2018 and continuing.

WITH REGARD TO THE ISSUE OF WHETHER PENALTIES SHOULD BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS:

The Arbitrator assesses penalties and attorneys' fees in favor of Petitioner and against Respondent. In so finding, the Arbitrator notes as follows:

1. There has been no Petition or Motion filed by Respondent to terminate Petitioner's maintenance benefits. Apparently, the benefits were terminated unilaterally by the Respondent.

2. There had been no notice to Petitioner that his maintenance benefits were terminated or the reason therefor despite black letter Rules of The IWCC . Petitioner testified that he received a letter months after his participation in the program had ended in May of 2017 that "I had failed." There is NO notice of a termination of benefits whatsoever in the record; indeed, the record indicates that Petitioner continued in the program through April and into May of 2017 and continued to inquire as to his benefit check for most of that time.

3. The records of the Vocamotive facility indicate that, not only was Petitioner compliant with the process, but that he was making progress in his keyboarding training. Again, the Arbitrator notes no conduct by the Petitioner which could be even remotely considered as non-complaint. Commercially unsophisticated ? Yes. Non compliant ? Absolutely Not !

4. The Arbitrator notes that the Labor Market Survey performed by Vocamotive at Respondent's request suggests that if Petitioner's vocational training were successful, Petitioner could become employed at a greatly reduced wage resulting in a significant wage differential per Section 8(d)1 of the Act. Even with this document, there is no testimony that the limited list of jobs actually rises to the level of a statistically valid category of a " survey"- as opposed to a mere sampling.

5. If Petitioner were truly non-compliant with the Vocational training process, Respondent's best case scenario would be the payment of a wage differential using the evaluation report by Vocamotive as a basis. Respondent did not do so. Rather, Respondent, without notice, without a hearing, and, without a reason, chose to terminate all benefits.

This Arbitrator by review of IWCC case precedents rarely if ever issues an Award of penalties. However, in the case at bar this Arbitrator therefore assesses penalties in favor of Petitioner and against Respondent pursuant to Section 19(k) and Section 16 as follows:

Maintenance due 6/14/2014 through 2/26/2018	193 3/7 wks	$162,807.51
Less maintenance paid (credit)	132 wks	$102,919.20
		$ 59,888.34
Section 19(k) penalties (50%)		$ 29,944.15
Section 16 attorney fees (20%)		$ 11,977.66

WITH REGARD TO WHETHER OR NOT THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The parties agree that the services of Pain Treatment Centers of Illinois were reasonable and necessary. The bill in the amount of $1810.62 (Px 16) is awarded per the fee schedule. Respondent is awarded credit for all payments made. No penalties or fees are awarded regarding the medical bills.

The Arbitrator further sayth naught.

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: TTD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Gabriel,

Petitioner,

19IWCC0363

vs.

NO: 16 WC 4699

Power Generation Services a/k/a
Adirondack Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability benefits, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. *Findings of Fact*

Petitioner was employed as a millwright mechanic for Respondent when he sustained two separate work accidents on November 14, 2015. Petitioner first bumped his head while walking to retrieve his tools underneath a generator on which he had been working. Petitioner testified his head had bent backwards and his neck immediately hurt. Petitioner continued working, but shortly thereafter on the same day, he sustained another injury to his low back while pulling on a two-foot breaker bar wrench to tighten a bolt on the same generator. Petitioner testified he continued to experience neck and back pain as he finished working the remaining hours of his shift.

Petitioner's job with Respondent was through his union and ended two days after the

accidents. Petitioner testified he took it easy but continued to work those two remaining days. Petitioner testified that after he was laid off by Respondent, he continued to feel neck, back, and right leg pain along with foot and toe numbness. Petitioner eventually presented to his family doctor, Dr. Mary Kanashiro of Primary Healthcare Associates, on December 10, 2015. Petitioner testified he had waited a few weeks after his accidents before going to the doctor, because he thought his pain would go away.

At the December 10, 2015 visit, Petitioner complained of continued low back pain radiating through his lower extremities and neck pain radiating to his shoulders. He further reported foot and toe numbness as well as an abnormal gait with his right foot dragging on three post-accident occasions. Petitioner also noted waking up that morning with numbness and tingling in his right forearm, hand, and fingers. Dr. Kanashiro diagnosed Petitioner with lumbago and cervicalgia with paresthesia, but did not give Petitioner any work restrictions at that time.

Upon Dr. Kanashiro's referral, Petitioner saw neurologist Dr. Sreepathy Kannan on December 11, 2015. Dr. Kannan diagnosed Petitioner with cervical disc disorder with radiculopathy and other intervertebral lumbar disc disorders. Dr. Kannan did not address restrictions but noted Petitioner was laid off. Petitioner returned to Dr. Kanashiro requesting muscle relaxers or pain medication for his backache on December 14, 2015. Petitioner told Dr. Kanashiro that Dr. Kannan was bad and had failed to do much for him. Dr. Kanashiro indicated Petitioner would thereafter see another neurologist, Dr. Kevin Fagan, and did not address any work restrictions. On December 15, 2015, Dr. Fagan diagnosed Petitioner with cervical and lumbar radiculopathy and noted Petitioner likely had radicular symptoms into his upper extremities and right leg. Work restrictions were also not addressed by Dr. Fagan at this visit.

Shortly thereafter, on December 22, 2015, a lumbar MRI revealed a moderate L5-S1 central disc protrusion resulting in mild narrowing of the neural foramen bilaterally without significant central stenosis. A cervical MRI taken the following day showed severe changes of degenerative disc disease at C5-C6 and C6-C7 with disc osteophyte complexes contributing to effacement of the ventral margin of the thecal sac and mild bilateral inferior foraminal narrowing. A January 8, 2016 EMG further found evidence of mild chronic bilateral L5 and S1 root level involvement. A separate EMG of the hands was obtained on January 13, 2016 and showed moderate chronic bilateral median neuropathies localized to the wrist.

When Petitioner returned to Dr. Fagan on January 12, 2016, Petitioner declined Dr. Fagan's offer to provide work restrictions. Nevertheless, Dr. Fagan urged Petitioner to avoid lifting over 25 pounds. Petitioner then began physical therapy on January 13, 2016 and attended sessions on an intermittent basis due to insurance issues until September 8, 2016. While participating in physical therapy, Petitioner also sought a second opinion from Dr. George Miz of Illinois Bone and Joint. On March 17, 2016, Dr. Miz diagnosed Petitioner with cervical radiculopathy related to an aggravation of cervical spondylosis but noted his upper extremity EMG was negative for cervical radiculopathy findings. Dr. Miz further diagnosed Petitioner with lumbar radiculopathy related to an aggravation of L5-S1 degenerative disc disease and foraminal stenosis. Dr. Miz then took Petitioner off work unless a limited sedentary position was available.

Petitioner was thereafter taken off work by Dr. Miz on April 12, 2016. When Petitioner

returned on May 24, 2016, he told Dr. Miz his cervical symptoms would be worse one day while his lumbar symptoms would be worse the next. Dr. Miz recommended Petitioner see a pain specialist and kept him off work. Petitioner first saw pain specialist Dr. Howard Robinson on June 13, 2016, at which time Dr. Robinson diagnosed him with herniated lumbar and cervical discs. Petitioner was thereafter consistently kept off work by either Dr. Miz and/or Dr. Robinson until January 1, 2018.

On August 15, 2016, Petitioner presented for a Section 12 examination at Respondent's request with Dr. Steven Mather, a board certified orthopedic surgeon. Although Dr. Mather's written report was not entered into evidence, Dr. Mather testified as to his findings at a May 22, 2017 deposition and the transcript of his deposition was admitted as Respondent's Exhibit 1. Dr. Mather testified his Section 12 examination of Petitioner was normal except for Petitioner's pain complaints with cervical and lumbar range of motion. Dr. Mather opined that Petitioner had suffered a cervical lumbar strain as a result of his November 14, 2015 accidents but had reached maximum medical improvement and was capable of working without restrictions at the time of his Section 12 examination. Dr. Mather attributed Petitioner's ongoing complaints to psychogenic pain, which he described as a nonorganic source of pain that could be conscious or unconscious. Dr. Mather found Petitioner did not have any ongoing structural problems with the cervical or lumbar spine and did not require further medical care as a result of his work accidents.

In addition to the normal examination, Dr. Mather gave four bases for his opinion. First, Dr. Mather noted Petitioner's alleged numbness in the C8 distribution was not confirmed by EMG or MRI and no physician had found Petitioner had any problem at C7-T1. Second, Dr. Mather testified Petitioner's MRIs showed only degenerative changes one would expect in someone over 40 years old, and there was no nerve root compression on any studies that correlated with Petitioner's symptomatology. Third, Dr. Mather testified Petitioner had quickly pulled away during a pinprick test, which suggested his complaints of numbness were not real. Finally, Dr. Mather believed there were inconsistencies between Petitioner's pain complaints on flexion and extension as well as inconsistencies in his restrictions on examinations that suggested Petitioner was not credible.

Following his Section 12 examination, Petitioner underwent L5 and S1 transforaminal epidural steroid injections on October 3, 2016. When he returned to Dr. Robinson on October 18, 2016, Petitioner reported 50% post-injection improvement of his low back pain but complained of worsening numbness and tingling in his legs. Petitioner thereafter underwent repeat L5 and S1 transforaminal epidural steroid injections on November 23, 2016. Petitioner reported only 10% to 15% improvement from these injections to Dr. Robinson on December 14, 2016. When Petitioner next saw Dr. Miz on January 19, 2017, he had no change on clinical examination and no neurologic deficit. Dr. Miz then opined that should Petitioner find his back and radicular leg pain intolerable, he was a candidate for a L5-S1 decompression with a transforaminal lumbar interbody fusion and a posterolateral fusion.

When Petitioner returned to Dr. Robinson on January 25, 2017, he no longer wanted to pursue surgery. Petitioner indicated his low back pain seemed to be improving, but he continued to complain of radiating neck pain with hand numbness and tingling. Petitioner thereafter underwent C7-T1 interlaminar epidural steroid injections on February 1, 2017. Another course

of physical therapy followed from April 18, 2017 to June 12, 2017, at which time Petitioner was discharged with all goals met. When Petitioner next presented to Dr. Robinson on July 25, 2017, he reported slowly progressing at a rate of 1% to 1.5% improvement per month. Dr. Robinson offered Petitioner injections and a surgical re-consultation, but Petitioner declined both.

When Petitioner last saw Dr. Robinson on October 24, 2017, Dr. Robinson reported Petitioner still had not made up his mind on if he wanted to proceed with surgery. Dr. Robinson kept Petitioner off work until January 1, 2018 and again recommended reevaluation by Petitioner's surgeon. At the time of hearing, Petitioner had still not decided if he wanted to undergo surgery and testified he was afraid of what would happen with surgery.

Petitioner sustained no other injuries to his neck or back before or after his November 14, 2015 accidents. Petitioner testified he had not returned to work since December 15, 2015 and had not looked for work at any time since he first saw a doctor after the accidents. Before the one-week job for Respondent, Petitioner worked on other jobs out of the union with many contractors. However, Petitioner testified he did not go back to the union hall after his accidents. Petitioner also owned and worked for M&M Portable Sandblasting for 30 years before the company went out of business. Petitioner testified the last job he did with M&M Portable Sandblasting was a year before his accidents.

This matter proceeded to a Section 19(b) hearing on November 7, 2017. In the Amended Decision issued on July 16, 2018, the Arbitrator found Petitioner's current condition of ill-being was not causally related to the November 14, 2015 accidents and denied Petitioner's claims for temporary total disability benefits and prospective care.

II. *Conclusions of Law*

Following a careful review of the entire record, the Commission finds Petitioner is entitled to temporary total disability benefits from April 12, 2016 to August 15, 2016. In so finding, the Commission relies on Dr. Mather's opinion that Petitioner had reached maximum medical improvement for a work-related cervical lumbar strain at the time of his August 15, 2016 Section 12 examination.

Petitioner's treating doctors failed to provide a strong competing causal opinion that related Petitioner's current symptoms to his work accidents. Specifically, Dr. Robinson did not articulate a clear causal opinion relating Petitioner's disc bulges or herniations to the work accidents. Likewise, although Dr. Miz diagnosed Petitioner with aggravations of lumbar and cervical conditions, he did not clearly relate these aggravations to the November 14, 2015 accidents.

On the other hand, Dr. Mather clearly articulated his reasons for finding that there was no current causation. Additionally, Dr. Mather's Section 12 examination was normal except for Petitioner's cervical and lumbar pain complaints, which Dr. Mather attributed to nonorganic psychogenic pain. As Dr. Mather's detailed explanations for his opinions were corroborated by Petitioner's normal examination findings and the treatment records, the Commission is persuaded by his opinion and finds there is a lack of significant objective findings to support Petitioner's current complaints.

In relying on Dr. Mather's opinion, the Commission further finds that Petitioner's entitlement to temporary total disability benefits ceases on August 15, 2016, the date Dr. Mather placed Petitioner at maximum medical improvement and found him capable of working without restrictions.

To next determine when temporary total disability benefits should begin, it is relevant that Petitioner continued working for two days after his accidents until the union job with Respondent ended. When Petitioner then presented for treatment four weeks later on December 10, 2015, work restrictions were not provided nor addressed. Work restrictions were not discussed by any of Petitioner's treating doctors until his January 12, 2016 appointment with Dr. Fagan. At that time, Dr. Fagan offered to provide work restrictions, but Petitioner declined. Dr. Fagan urged Petitioner to avoid lifting over 25 pounds, but pursuant to Petitioner's wishes, no work restrictions were given.

Dr. Miz first placed work restrictions on Petitioner on March 17, 2016. At that time, Dr. Miz took Petitioner off work unless a limited sedentary position was available. However, Petitioner testified he did not return to work after December 15, 2015 and never looked for work since he first saw a doctor. He also did not return to his union hall after his accidents to see if work accommodations were available to him. As Petitioner never tried to go back to work or find new work within these sedentary restrictions, his entitlement to temporary total disability benefits does not start on March 17, 2016.

After being put on sedentary duty on March 17, 2016, Petitioner was thereafter taken off work completely by Dr. Miz and/or Dr. Robinson from April 12, 2016 to January 1, 2018. As such, the Commission modifies the Decision of the Arbitrator to find Petitioner is entitled to temporary total disability benefits from April 12, 2016, the date Petitioner was placed off work, to August 15, 2016, the date he achieved maximum medical improvement for his work-related cervical lumbar strain.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated July 16, 2018 is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay temporary total disability benefits to Petitioner in the sum of $1,035.75 per week for 18 weeks, commencing 4/12/16 through 8/15/16, as provided in Section 8(b) 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 Section

19IWCC0363

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. 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: JUL 19 2019

Deborah L. Simpson

Barbara N. Flores

DLS/met
O- 5/23/19
46

DISSENT

I respectfully dissent from the decision of the majority. I would have reversed the decision of the Arbitrator on the issues of causal connection, medical expenses, temporary total disability and prospective medical care. Petitioner's timely complaints, examination findings of his treating physicians and diagnostic test results establish that his current condition of ill being is related to the November 14, 2015 accidents.

Shortly after his accidents, on December 10, 2015, Petitioner visited his primary care physician and reported lower back pain radiating to his buttocks and to the lateral aspects of his calves. He also reported numbness in his forefoot and toes. Petitioner also described neck pain radiating to his shoulders with numbness in his upper extremities. These complaints remained consistent through the date of hearing and correlated to the lumbar MRI ordered by neurologist, Dr. Fagan, which showed a moderate-sized disc protrusion at L5-S1, narrowing the neural foramen bilaterally, and the cervical MRI, which showed disc degeneration at C5-6 and C6-7, causing paresthesia in the C7 distribution.

After consulting with Dr. Fagan, Petitioner sought a second opinion with orthopedic surgeon, Dr. Miz, who confirmed Dr. Fagan's diagnoses of cervical and lumbar radiculopathy. Dr. Miz referred Petitioner to pain specialist, Dr. Robinson, who prescribed physical therapy and administered steroid injections to reduce Petitioner's symptoms. In January of 2017, Dr. Miz, after noting that conservative care was not resolving Petitioner's lumbar symptoms, recommended a fusion at the L5-S1 level.

The majority is persuaded by Respondent's Section 12 examiner, Dr. Mather, who examined Petitioner only one time, on August 15, 2016, and concluded that his work injuries,

which he determined were cervical and lumbar strains, had resolved by the time of his exam and that Petitioner had reached MMI with regard to those strains. Dr. Mather concluded that Petitioner's complaints at the time of hearing were "psychogenic" and required no further treatment.

Prior to Petitioner's November 14, 2015 accidents, Petitioner had no lumbar or cervical complaints. After that date, he reported paresthesia in both his bilateral upper and lower extremities and low back pain radiating down both legs. His complaints remained consistent up through the date of hearing. Dr. Fagan, Dr. Robinson, Dr. Miz, and radiologist, Dr. Fuller, all found objective evidence supporting Petitioner's subjective complaints. Both his cervical and lumbar MRIs showed damaged discs, and the lumbar EMG demonstrated chronic bilateral L5 and S1 root level involvement. Whether Petitioner jerked when the sole of his foot was pricked with a pin during his Section 12 exam or whether he teared up or hesitated while testifying, as noted by the arbitrator, should not outweigh the objective evidence of injury to his cervical and lumbar spine. The arbitrator and the majority clearly believe that Petitioner suffered two work accidents and ordered Respondent to pay medical and temporary total disability up to the date of his Section 12 examination. However, Petitioner continues to suffer from the same complaints he had at the time of his first doctor's appointment. I would have found that Petitioner sustained his burden of proof that his current condition of ill-being is causally related to his work accidents and awarded past and prospective medical and lost time benefits. Therefore, I respectfully dissent from the decision of the majority.

Marc Parker

Marc Parker

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

19IWCC0363

GABRIEL, MICHAEL
Employee/Petitioner

Case# **16WC004699**

POWER GENERATION SERVICES A/K/A ADIRONDACK SERVICES
Employer/Respondent

On 7/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2995 STYKA & STYKA LLC
SYLVIA A STYKA
134 N LASALLE ST SUITE 1410
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
MARK VIZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

19IWCC0363

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

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

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

Michael Gabriel
Employee/Petitioner
v.
Power Generation Services A/K/A Adirondack Services
Employer/Respondent

Case # 16 WC 4699

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 New Lenox, on **November 7, 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. [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 **November 14, 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 **$80,788.76**; the average weekly wage was **$1,553.63**

On the date of accident, Petitioner was **59** 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 **$3,698.77** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$3,698.77.**

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

ORDER

Medical benefits

Respondent shall pay the bills totaling **$36,810.78**, subject to the fee schedule and pursuant to §8 and §8.2 of the Act. The claim for prospective medical treatment is denied

Temporary Total Disability

Claim for Temporary total disability 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.

Christine MOny

Signature of Arbitrator

July 12, 2018

Date

IC ArbDec19(b)
ICArbDec p. 2

JUL 16 2018

19IWCC0363

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Gabriel	)
Petitioner,	)
vs.	) **No. 16 WC 4699**
Power Generation Services	)
A/K/A Adirondack Services	)
Respondent.	)

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

This matter proceeded to hearing under the provisions of §19b/§8a in New Lenox on November 7, 2017. The parties agree that on November 14, 2015 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent and that petitioner gave notice of the accident within the time limits stated in the Act. They agree petitioner's wage in the year pre-dating the accident was $ 80,788.76 and his average weekly wage calculated pursuant to §10 was $1,553.63.

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 medical expenses incurred.
3. Whether petitioner is entitled to payment for prospective medical treatment.
4. Whether petitioner is due TTD.

STATEMENT OF FACTS

Petitioner, Michael Gabriel, Testimony

Petitioner was employed by respondent as a millwright mechanic. On November 14, 2015, petitioner was rebuilding a generator, which was 100 feet long and dark inside. As he was going for tools he bumped his head causing his head to bend back injuring his neck. Shortly after that, he was replacing a housing. He braced himself with his hip against the shaft and had his foot on the machine while trying to remove a bolt. As he pulled on the wrench, something let go in his back. He handed the wrench to his partner and stepped back.

He continued working that day for an additional four or five hours. When he got home his back, legs and shoulders hurt. He took ibuprofen and a hot bath. He worked the next two days; his back, neck and right leg continued to hurt. He was then laid off. He thought it would get better so did not seek medical treatment.

When he did not get better, he went to his PCP, Dr. Kanashiro, who referred him to neurologist, Dr. Kannan. He saw Dr. Kannan on December 11, 2015, who ordered MRIs. As Dr. Kannan was not in petitioner's HMO, he returned to his PCP, Dr. Kanashiro, who referred him to Dr. Kevin Fagan. Dr. Fagan ordered MRIs and restricted him from work.

Petitioner obtained a lumbar MRI on December 22, 2015 and the cervical MRI on December 23, 2015. He had an EMG on January 8, 2016. He also started physical therapy at Ingalls Hospital on January 6, 2016.

Petitioner was next referred to Dr. Miz of Bone and Joint, whom he first saw on March 16, 2016. At that time, he was having pain going down his right leg, across his back and down his leg. His calves and feet had numbness. He tried more physical therapy as it was helping. He saw Dr. Miz in April and May, 2016 and was then referred to pain specialist, Dr. Robinson.

He first saw Dr. Robinson on June 13, 2016, who recommended epidural steroid injections (ESI), physical therapy and Gabapentin. He had his first ESI on October 3, 2016 in his lower back. It did not have lasting effect. He continued with physical therapy. He had his second ESI on November 23, 2016; with dry needling added. He returned to Dr. Miz who found he was a candidate for L5-S1 fusion.

On January 25, 2017, petitioner returned to Dr. Robinson as his neck pain was getting worse. He received an ESI on February 1, 2017 in his neck. It helped for a week. He had numbness in his right foot. In June, 2017 Dr. Robertson referred petitioner back to Dr. Miz. He continued to be kept off work by Dr. Robinson. In October, 2017, petitioner discussed additional injections and surgery. Petitioner did not agree to the surgery at that time as he was afraid of the outcome.

He was examined by Dr. Mather on August 15, 2016 pursuant to §12. He was not able to take Dr. Mather poking his foot so fast. He indicated his neck was stiff and sore when Dr. Mather examined him by moving his neck right and left. He was not able to look at the ceiling as it hurt too much.

His neck is sore and aches; it kinks and feels like it is "sloppy" in his neck. His shoulder is stiff and sore. He has numbness, and aching down into his fingers. Sitting down is worse for his back. He is awakened every two to three hours due to numbness. He always hurts. His lower back is sore. His legs go numb. It affects his sleep as back of legs get spasms. The most he can lift is a gallon of milk. He can't bend over. He can only walk a block and stand for only ten to fifteen minutes. His urinating is slow to turn on. Lying flat on his back helps, but does not help his neck. Petitioner denied having any new injuries to his back and neck.

On cross-examination petitioner admitted he had only worked for respondent for one week before he was hurt. Petitioner had worked for many contractors out of the union. He owned M & M Portable Sandblasting for 30 years, which was now out of business.

He had not returned to the union hall asking for work. He has not looked for work anywhere else.

Primary Healthcare Associates Internal Medicine Records (PX. 1)

Petitioner was first seen by Dr. Mary Kanashiro on December 10, 2015 for back pain. He provided a history of back pain for three weeks. He stated the pain started when he was working on November 14, 2015 and pulled a wrench. He had pain in lower back radiating to buttocks and down the lower extremities, right greater than left. He also complained of numbness in forefeet toes. He was able to work for two days. He also reported neck pain after striking his head on a tank the same day. He reported his gait has been abnormal and he has dragged his foot on three occasions since then. He reportedly woke with numbness and tingling with right forearm and fingers which lasted for a half hour.

The diagnosis was lumbago, cervicalgia, hypertension and obstructive sleep apnea. He was referred to a neurologist.

He was seen again by Dr. Kanashiro on December 14, 2015 and reported he has an appointment the following day with Dr. Fagan. He was seen again by Dr. Kanashiro on February 8, 2016 due to high blood pressure.

Center for Brain & Nerve Disorders/Dr. Sreepathy Kannan Records (PX.2)

Petitioner was seen on December 11, 2015 as an emergency referral by PCP due to pain in his neck/shoulder blades and hands falling asleep. He attributed this to hitting his head at work in mid-November, 2015. He also reported he pulled on a wrench and popped his back the same day he had hit his head. MRIs of the neck and back were ordered.

Dr. Kevin Fagan Records (PX.3)

Petitioner was first seen by Dr. Fagan on December 15, 2015 with history of hitting his forehead on low-hanging steel and propelling his neck which had occurred a month before while at work. He also reported he felt pain in his back as he was supporting himself with his right leg as he was using a very large wrench to undo bolts. Dr. Fagan ordered an EMG and cervical and lumbar MRIs.

Petitioner was seen in follow up on January 12, 2016 after obtaining the EMG and MRIs. Dr. Fagan reported the EMG showed chronic bilateral L5 and S1 radicular findings. The cervical MRI showed degenerative changes at C5-6 and C6-7 with no compression of the spinal cord. The lumbar MRI showed a moderate disc protrusion at L5-S1with no significant central stenosis. Dr. Fagan would not recommend surgeries to petitioner's neck or lumbar spine given the clinical exam. Dr. Fagan offered to release petitioner to work with restrictions, which petitioner denied. Dr. Fagan believed petitioner could lift up to 25 pounds.

The January 13, 2016 upper extremities EMG were suggestive of moderate bilateral median neuropathies as seen with patients who have carpal tunnel syndrome.

Dr. George Miz/Bone & Joint Physicians Records (PX.4)

Petitioner was first seen by Dr. Miz on March 17, 2016. Petitioner's history was consistent with the previous histories. Dr. Miz diagnosed an aggravation of cervical spondylosis and lumbar radiculopathy related to an aggravation of his L5-S1 degenerative disc disease. Dr. Miz recommended continued physical therapy. Dr. Miz discussed possible injections and/or possible surgical intervention for the neck and lumbar spine. Dr. Miz released petitioner to sedentary work only.

Petitioner followed upon April 12, 2016. Additional therapy was prescribed. Petitioner was kept off work. On May 24, 2016, Dr. Miz asked petitioner to see a pain specialist.

On July 21, 2016, petitioner advised he was seen by Dr. Robinson who had recommended an injection; which petitioner was hesitant to received. Dr. Miz ordered more physical therapy and kept off work until seen by Dr. Robinson.

On January 19, 2017 petitioner reported he had received two injections with only 10 to 15% improvement. A lumbar decompression fusion at L5-S1 was discussed. A Functional Capacity Evaluation was requested.

Primary Healthcare Associates Pain Management Records (PX.5 & 7)

Petitioner was first seen by Dr. Howard Robinson on June 13, 2016 and injections were discussed. On September 20, 2016 petitioner decided to proceed injections. Dr. Robinson kept

petitioner off work from September 20, 2016 to October 18, 2016. A right-sided L4 and L5 transforaminal epidural injection was performed on October 3, 2016.

He followed up with Dr. Robinson on October 18, 2016 and reported a 50% improvement of the low back pain. He was kept off work.

On November 16, 2016 additional injections were ordered. Petitioner was kept off work until the next appointment on December 14, 2016. Petitioner underwent a right-sided L5 and S1 transforaminal epidural steroid injection on November 23, 2016. He followed up with Dr. Robinson on December 14, 2016; who then referred petitioner back to Dr. Miz and kept off work until January 31, 2017.

Petitioner returned on January 25, 2017 and cervical injections were scheduled. He was kept off work until March 31, 2017. Petitioner underwent C7-T1 epidural steroid injection on February 1, 2017. Petitioner returned to Dr. Robinson on February 15, 2017; he was kept off work until April 30, 2017.

At the April 12, 2017 visit, petitioner complained the neck and back pain returned. Physical therapy was prescribed and acupuncture was recommended. He was to stay off work until August 1, 2017.

On May 23, 2017, petitioner returned and asked to discontinue the dry needle physical therapy even though it did provide some benefit. At the July 25, 2017 visit, petitioner rejected further injections or surgery; he was kept off work until November 1, 2017.

Petitioner was seen in follow up on October 24, 2017 by Dr. Robinson and was offered more injections and surgery which were rejected by petitioner.

Ingalls Memorial Hospital Records (PX.6)

These are petitioner's physical therapy records. They also include MRIs, EMGs and operative reports of the injections that were discussed in other petitioner's exhibits.

Primary Healthcare Associates Bills (PX.8)

$405.00 Dr. Mary Kanashiro's bill (12/10/15 to 02/08/2016)
$7,717.00 Dr. Howard Robinson's bill (06/13/2016 to 11/23/2016)

Dr. Kevin Fagan Bill (PX.9)

$1,408.78 Dr. Fagan's bill (12/15/2015 to 01/13/2016)

Dr. George Miz/Bone & Joint Bill (PX.10)

$1,030.00 Dr. George Miz's bill (03/17/2016 to 01/24/2017)

Ingalls Memorial Hospital Bill (PX.11)

$130.00 Services (12/21/2015)
$4,469.00 Lumbar MRI (12/22/2015)
$4,472.00 Cervical MRI (12/23/2015)
$17,400.00 Physical Therapy (01/07/2016 through 05/25/2016)
$2,323.00 EMG (01/08/2016)
$2,681.00 EMG (01/23/2016)
$6,243.00 Physical Therapy (07/28/2016 through 09/09/2016)
$273.00 Services (09/21/2016)
$3,356.00 Injection (11/23/2016)

$2,252.00 Injection (02/01/2017)
$9,482.00 Physical Therapy (04/28/2017 through 06/12/2017)

Dr. Steven Mather May 22, 2017 Deposition (RX.1)

Dr. Steven Mather, board certified orthopedic surgeon; concentrating in spine surgery, testified via deposition in behalf of respondent.

Dr. Mather examined petitioner on August 15, 2016. Petitioner provided a history of striking his head on low-hanging metal while working inside a turbine. He continued working. Later he was pulling a wrench on a nut that would move and injured his lower back. A couple of days later the job was over. Three weeks later he went to see his primary care physician, Dr. Kanashiro, who referred him to a neurologist. The neurologist referred him for MRIs and EMGs. He was then referred to spine surgery, Dr. George Miz. Dr. Miz sent him for physical therapy and referred him for pain management, Dr. Robinson. At the time of Dr. Mather's exam, petitioner was on sedentary work restrictions. (7-9)

Petitioner's exam was normal, including the Spurling's maneuver; only complaining of pain with some range of motion of the lumbar and cervical spine (10-11). Dr. Mather reviewed the MRIs of the cervical and lumbar spine which showed some old degenerative changes at the L5-S1 level with no nerve compression and degenerative changes at C5-6 and 7, with no nerve compression (11). Dr. Mather also reviewed the EMGs of the lower and upper extremities which were normal except for nonspecific findings (14).

Based upon his examination of the petitioner and review of the medical records and studies, Dr. Mather concluded petitioner had sustained cervical and lumbar strain and the ongoing complaints were referable to psychogenic pain; which is non-organic (15). Dr. Mather did not believe petitioner had any ongoing structure problems as a result of the work accident of November 14, 2015 (15).

Dr. Mather did not believe petitioner required any further treatment as of the date of his exam on August 14, 2016 and was capable of working as a millwright (16). Dr. Mather did not believe petitioner was credible given his complaints during Dr. Mather's examination as compared with the exams by Dr. Miz and during physical therapy (17).

Dr. Mather agreed the treatment petitioner received to the date of his exam was reasonable and necessary (21). Dr. Mather did not find petitioner met the criteria for an ESI and thus an ESI was not reasonable despite the fact petitioner's condition improved with ESIs (22).

CONCLUSIONS OF LAW

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

Petitioner became overly emotional and cried when discussing his daily activities. He also mumbled and was evasive on cross examination.

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

The diagnostic studies, including the cervical and lumbar MRIs from December, 2015 showed degenerative changes at C5-6 and C6-7, with no nerve compression, and moderate disc protrusion with no significant central stenosis at L5-S1. The January 8, 2016 EMG showed mild chronic bilateral L5 and S1 root level involvement. After reviewing these studies, the neurologist,

Dr. Fagan, stated: "I personally would not want to have back or neck surgery given [petitioner's] clinical exam" and also, "the last thing I would consider [for the petitioner] is surgery".

Dr. Mather also reviewed these studies, examined the petitioner on August 15, 2016 and concluded petitioner sustained a cervical and lumbar strain as a result of the work accident. Dr. Mather found no objective structural damage to substantiate petitioner's complaints of pain which Dr. Mather described as psychogenic pain; which was non-organic.

Based upon the foregoing, specifically the lack of objective findings on the MRIs as noted by both Dr. Fagan and Dr. Mather, the Arbitrator finds petitioner sustained a cervical and lumbar strain as a result of the work accident of November 14, 2015 with no lasting effects.

In addition, the fact that petitioner had worked for only a week for respondent, worked for two days after the accident and then did not seek medical treatment until almost four weeks after the accident calls into question petitioner's claim of ongoing problems from the accidents of November 14, 2105.

Therefore, the Arbitrator finds petitioner's present state of ill-being is not causally connected to the two occurrences on November 14, 2015.

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

Dr. Mather concluded petitioner's treatment to the date out of his exam on August 15, 2016 were reasonable and necessary. Dr. Mather further determined petitioner had reached maximum medical improvement as of that same date.

Therefore, the Arbitrator finds the following bills are reasonable and necessary and awards same in accordance with §8 and §8.2 of the Act and the fee schedule:

Primary Healthcare Associates
- $270.00 for Kanashiro's bill from December 10, 2015 and February 2, 2016
- $370.00 for Dr. Robinson's bill from June 13, 2016.

Dr. Fagan's $1,408.78 bill from December 15, 2016 to January 8, 2016
Dr. George Miz's $270.00 bill from March 17, 2016
Ingalls Memorial Hospital bills:
- $130.00 Services on December 21, 2015
- $4,469.00 Lumbar MRI on December 22, 2015
- $4,472.00 Cervical MRI on December 23, 2015
- $17,400.00 Physical Therapy from January 7, 2016 through May 25, 2016
- $2,323.00 EMG on January 8, 2016
- $2,681.00 EMG on January 23, 2016
- $3,017.00 Physical Therapy from July 28, 2016 through August 15, 2016

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

The Arbitrator determined petitioner reached maximum medical improvement as of August 15, 2016 and denies an award for any medical treatment incurred after that date and into the future. Furthermore, in reliance on both the treating neurologist, Dr. Fagan, and the examining physician, Dr. Mather, the Arbitrator specifically denies an award for the proposed lumbar fusion.

19IWCC0363

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

Petitioner was capable of working after the accident, until he was laid off two days later. There was no mention of any disability by the first physician, Dr. Kanashiro, whom he did not see until December 10, 2015. There was no discussion of disability with the next physician he saw, Dr. Kannan, which on December 11, 2015.

The first mention of any disability was by Dr. Fagan, but that was not until petitioner's second visit on January 12, 2016, at which time Dr. Fagan offered to release petitioner to return to work with a 25-pound weight restriction, which petitioner refused.

The next physician to see petitioner was Dr. Miz; which was not until March 17, 2016. At that time, Dr. Miz released petitioner to sedentary work.

Petitioner admittedly did not seek work within the restrictions given by either Dr. Fagan or Dr. Miz. Furthermore, there was no objective evidence to support even these restrictions. The fact petitioner was capable of working without restrictions until he was laid off and then did not seek treatment for almost four weeks after the occurrences calls into question any disability.

For all of these reasons, the Arbitrator denies petitioner's claim for temporary total disability.

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: causal connection prospective care	☐ Second Injury Fund (§8(e)18)
☐ Modify:	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA LOPEZ,

Petitioner,

19IWCC0364

vs.

NO: 16 WC 32285

BRODER BROS COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds Petitioner's current condition of ill-being is causally related to a compensable work accident sustained on September 7, 2016. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. *Findings of Fact*

Petitioner was employed as a picker for Respondent, and in this position, she was required to operate a pack mule to pick up products. On September 7, 2016, Petitioner was driving a pack mule that collided with another pack mule driven by her coworker, Liliana Pelayo. Petitioner testified that when the impact occurred, she was standing in her pack mule and grabbed the steering wheel with her left hand as her body moved to the right. Petitioner testified her legs and lower hips went numb in the accident. Ms. Pelayo testified at hearing that the pack mules never collided with each other, but the boxes on her pack mule had hit the boxes on Petitioner's pack mule.

Petitioner testified that a company team lead named "Chris" had witnessed her accident,

but she could not recall Chris' last name. Christopher Hunt, an outbound team lead for Respondent, also testified at the hearing. Mr. Hunt testified that he did not witness the accident, but he was three or four aisles away from Petitioner when he heard a commotion and muffled sound. When Mr. Hunt went toward the sound to investigate, he discovered Petitioner and Ms. Pelayo and was informed there had been an accident. Mr. Hunt observed that there had been some damage to the boxes on the front of the pack mule.

Petitioner presented to Edward Hospital on September 8, 2016, complaining of pain in her left arm, lower leg, low back, neck, and left shoulder. X-rays of the cervical spine, chest, and ribs were obtained and yielded negative results. Petitioner was then diagnosed with an acute left-sided thoracic strain, acute bilateral cervical paraspinal muscle strain with spasm, left medial elbow strain, and left anterior knee sprain. The doctor prescribed Ibuprofen, Cyclobenzaprine, and light duty restrictions, which Respondent thereafter accommodated.

On September 12, 2016, Petitioner returned to Edward Hospital and reported additional low back pain that had begun after her first treatment visit. Petitioner denied lower extremity numbness, tingling, or weakness at that time. After lumbar X-rays showed degenerative changes at the L4-L5 disc space and facet joints, the doctor added low back strain to Petitioner's diagnoses. At her next appointment on September 30, 2015, Petitioner continued to complain of neck, back, and left knee pain, but again denied lower extremity numbness, tinging, or weakness. Petitioner also denied left elbow pain, which led the doctor to list her diagnosis of left elbow strain as resolved.

Petitioner then presented to orthopedic specialist Dr. Steven Mash of DuPage Medical Group on October 11, 2016 and complained of neck discomfort, low back pain, left knee pain, and left elbow pain. Dr. Mash indicated that Petitioner's most significant difficulty was left-sided low back pain without radicular symptomatology. He found the X-rays of Petitioner's cervical spine, lumbar spine, left elbow, and left ribs to be normal. Dr. Mash thereafter diagnosed Petitioner with multiple contusions with cervicalgia, low back syndrome, and contusions to the left elbow and left knee. He then provided Petitioner with a five-pound lifting restriction.

Shortly thereafter, Petitioner saw Dr. Samir Sharma of the Illinois Orthopedic Network on October 19, 2016. Dr. Sharma noted that Petitioner's low back pain was radiating into her bilateral buttock, posterior thigh, calves, and feet. Several X-rays were also obtained at this visit. X-rays of Petitioner's left knee and chest were unremarkable; however, cervical X-rays showed degenerative disc disease and lumbar X-rays indicated facet osteoarthritis, degenerative disc disease, and L4-L5 subluxation. Dr. Sharma diagnosed Petitioner with a neck sprain, lumbar strain, and low back pain. He prescribed Mobic and LidoPatch in addition to light duty restrictions, which included no carrying, lifting, pushing, or pulling greater than 20 pounds. Petitioner thereafter participated in physical therapy from October 26, 2016 to December 19, 2016.

While Petitioner was attending physical therapy, an October 28, 2016 lumbar MRI revealed straightening of the lumbar spine, disc desiccation at L4-L5 and L5-S1, and simple renal cortical cysts. At the L4-L5 level, there was a three-millimeter diffuse disc protrusion with annular tear effacing the thecal sac, a compromised spinal canal, and neuroforaminal narrowing without significant impingement of exiting nerve roots. At the L5-S1 level, there was another three-

millimeter diffuse disc protrusion without effacement of the thecal sac as well as disc material and facet hypertrophy causing bilateral neuroforaminal narrowing that effaced the L5 exiting nerve roots.

On November 8, 2016, Dr. Mash opined that Petitioner's subjective complaints exceeded the objective findings. He found Petitioner to be at maximum medical improvement and capable of working without restrictions. However, Dr. Mash reported that Petitioner had elected to seek additional care with Dr. Sharma and Hinsdale Orthopedics; and therefore, any further care at his office was inappropriate. When Petitioner returned to Dr. Sharma on November 22, 2016, her diagnoses included a neck sprain, lower back pain, and discogenic syndrome. On November 29, 2016, a cervical MRI further revealed early disc desiccation throughout the cervical spine, a one-millimeter to two-millimeter diffuse disc protrusion with effacement of the thecal sac at C3-C4 and C6-C7, and spinal canal and neural foramina patent at all cervical spine levels.

On December 20, 2016, Dr. Sharma added lumbar osteoarthritis and disc degeneration to Petitioner's diagnoses. Petitioner thereafter underwent a bilateral L4-L5 epidural steroid injection on March 10, 2017. When Petitioner returned to Dr. Sharma on March 30, 2017, she reported 50% pain relief and increased function from the injection. However, Petitioner continued to complain of radicular leg pain with lower extremity numbness. On April 27, 2017, Dr. Sharma reported Petitioner's symptoms had further improved. Nevertheless, he referred Petitioner to an orthopedist for a second opinion spine consultation.

Petitioner presented for the consultation with Dr. Cary Templin on May 5, 2017. After noting that Petitioner's neck and back pain extended to her lower extremities, Dr. Templin diagnosed Petitioner with a cervical strain injury, lumbar spondylolisthesis, and facet arthropathy with lateral recess stenosis that was contributing to her lower back pain. Dr. Templin opined that these conditions were likely preexisting but aggravated by the work accident. A functional capacity evaluation followed on May 17, 2017 that placed Petitioner's job at the medium physical demand level and her physical capabilities at the light physical demand level. The evaluation found that Petitioner provided consistent effort and the results of the functional capacity evaluation were valid. Petitioner thereafter underwent bilateral L4-L5 facet joint injections on June 2, 2017.

When Petitioner returned to Dr. Sharma on June 8, 2017, she reported improvement with increased function and denied radicular pain or lower extremity numbness. However, when Petitioner saw Dr. Templin on July 7, 2017, she again complained of low back pain extending into her bilateral legs. Dr. Templin opined that Petitioner's low back pain with L4-L5 mobile spondylolisthesis was aggravated by her work injury and recommended Petitioner consider surgery. When Petitioner next presented to Dr. Sharma on July 11, 2017, she again denied radicular leg pain, numbness, and weakness. Dr. Sharma continued Petitioner's work restrictions per the functional capacity evaluation and advised Petitioner to return as needed, given Dr. Templin had now recommended surgery.

Petitioner thereafter presented for a Section 12 examination at Respondent's request with Dr. Babak Lami on July 25, 2017. Petitioner was working full-time at the time of the examination and did not report any radicular symptoms going down her legs. Petitioner indicated that 40% of her symptoms involved her thoracic area and 60% of her symptoms involved her low back. She

also expressed pain in her bilateral wrists, anterior knee, and feet. Dr. Lami's examination revealed Petitioner had full range of motion of the cervical spine and left knee. He indicated Petitioner could flex her lower back to 90 degrees, extend to 30 degrees, and laterally bend to 30 degrees bilaterally. Dr. Lami thereafter diagnosed Petitioner with work-related sprains and contusions of the neck, mid-back, low back, left elbow, and left knee. However, at the time of the examination, Petitioner did not report any symptoms involving her elbow or neck. Dr. Lami opined that Petitioner's treatment to date had been reasonable and necessary, but she had reached maximum medical improvement when she was released from Dr. Mash's care. He believed Petitioner's complaints at the time of his examination were instead related to her preexisting condition and found no evidence to support any permanency as a result of the work accident. Dr. Lami also opined that Petitioner was capable of working without restrictions, noting that Petitioner was already working full duty at the time of the examination.

Dr. Lami further indicated that Petitioner's cervical MRI was normal and she did not have any cervical issues. Regarding the lumbar MRI, Dr. Lami observed degenerative discs at L4-L5 and L5-S1 but found no evidence of the aggravation of such symptoms. Dr. Lami believed Petitioner's initial medical records failed to show any radicular symptoms or neurological deficit, and for this reason, he opined that Petitioner would not benefit from low back surgery. Dr. Lami believed Petitioner did not require any additional diagnostic testing or treatment.

Petitioner last treated with Dr. Templin on September 1, 2017. Dr. Templin disagreed with Dr. Lami's statement that Petitioner had not complained of radicular symptoms and instead stated that Petitioner had consistently complained of pain extending from her back into her legs and feet consistent with radicular symptoms. Dr. Templin continued to recommend a L4-L5 stabilization fusion and indicated that Petitioner's restrictions pursuant to her functional capacity evaluation would be permanent if the surgery was not approved.

Petitioner testified she had been taken off work by her doctor in July 2017, but she was back working at the time of hearing. She indicated she had gone back to work in September 2017, because she had bills to pay. Petitioner further testified she was not able to work without pain, bed over, tie her shoes, walk often, go upstairs, or get out of bed well. Petitioner had sustained no pre-accident injuries to her low back nor sought any pre-accident treatment for low back pain.

This matter proceeded to a Section 19(b) hearing on November 7, 2017. In the Decision subsequently issued on July 16, 2018, the Arbitrator found Petitioner's current condition was not causally related to her work accident and denied Petitioner's claim for temporary total disability benefits and prospective medical care.

II. *Conclusions of Law*

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner sustained a causally related aggravation of her preexisting conditions and is accordingly entitled to prospective medical care.

The Commission first acknowledges that although Petitioner's accident was not an issue disputed on review, some details of Petitioner's testimony regarding the accident conflict with the

testimony of Ms. Pelayo and Mr. Hunt. Specifically, Petitioner testified Mr. Hunt witnessed the accident, whereas Mr. Hunt testified he had not witnessed the accident and had instead walked onto the accident scene after hearing the commotion. Additionally, Ms. Pelayo testified the pack mules did not directly hit each other, but the boxes on the pack mules had collided. Regardless of such discrepancies, all witnesses agreed that some impact had occurred. As these discrepancies concern only minor details that Petitioner could have easily mistaken in the commotion of the accident, the Commission finds they do not rise to the level of damaging Petitioner's credibility.

In turning to the issue of causal connection, the Commission recognizes that Petitioner's treating doctors and the Section 12 examiner agreed that Petitioner had sustained work-related injuries. However, Dr. Mash and Dr. Lami both believe Petitioner had reached MMI for the work-related conditions as of her November 8, 2016 discharge from Dr. Mash's care. Although Dr. Sharma continued treating Petitioner after Dr. Mash's discharge, Dr. Sharma failed to offer a clear causation opinion. It was Dr. Templin who later opined that Petitioner had preexisting lumbar spondylolisthesis and facet arthropathy that was aggravated by the work injury.

Dr. Templin's opinion is supported by the fact that Petitioner had suffered no pre-accident low back injuries and sought no prior treatment for low back pain. As Petitioner was not symptomatic for any preexisting back problems and is now symptomatic to the point of Dr. Templin recommending a fusion surgery, the Commission finds that Petitioner's preexisting condition was aggravated by her work accident. The valid functional capacity evaluation's finding that Petitioner's capabilities fell at the light physical demand level lends further support to Dr. Templin's opinion that Petitioner was not fit for regular duty work.

It is further important that Dr. Lami even attributed Petitioner's complaints at the time of his Section 12 examination to Petitioner's preexisting condition. All doctors in the present matter acknowledged the presence of some degenerative lumbar issues. Despite having such preexisting problems, there was no evidence that Petitioner was symptomatic in any way prior to her September 7, 2016 work accident.

When considering if an accident aggravated a preexisting condition, the Commission may infer that if a claimant is in a certain condition before an accident occurs and the condition deteriorates following the accident, the interviewing accident caused the deterioration. *Schroeder v. Comm'n*, 2017 IL App (4th) 160192WC. A claimant may also recover when an accident accelerates the need for surgery. *Id.* In the present matter, the evidence shows that Petitioner did not become symptomatic from any preexisting condition until after the September 7, 2016 accident. As such, the Commission infers that the work accident caused Petitioner's deterioration and accelerated the need for the surgery recommended by Dr. Templin. For these reasons, the Commission is persuaded by Dr. Templin's opinion and finds Petitioner sustained a causally related aggravation on September 7, 2016.

However, the Commission does not find the current condition of Petitioner's elbow to be causally related to her work accident. When Petitioner presented to Edward Hospital on September 30, 2016, she denied left elbow pain and her left elbow strain was marked as resolved. None of the treatment that followed focused on Petitioner's elbow strain. The Commission's finding as to current causation is instead concerned with Petitioner's ongoing lumbar condition.

19IWCC0364

In reliance on Dr. Templin's opinion, the Commission further finds that Petitioner has proven entitlement to prospective medical care, including but not limited to, the lumbar surgery as recommended by Dr. Templin. Lumbar surgery was first suggested by Dr. Templin on July 7, 2017, and at Petitioner's last treatment visit on September 1, 2017, Dr. Templin more specifically recommended a L4-L5 stabilization fusion procedure. Dr. Templin's surgical recommendation is further supported by the valid functional capacity evaluation and Petitioner becoming symptomatic post-accident with consistently ongoing pain complaints.

Lastly, the Commission must consider Petitioner's claim for temporary total disability benefits from July 25, 2017 to September 6, 2017. Petitioner testified she was taken off work by her doctor sometime in July 2017 and went back to work in September 2017. Petitioner did not specify the exact dates in July or September. However, the Commission finds the treatment records do not corroborate Petitioner's testimony that she was taken completely off work by a doctor from July 2017 to September 2017. Instead, the May 17, 2017 functional capacity evaluation placed Petitioner's capabilities at the light physical demand level. Thereafter, Dr. Sharma and Dr. Templin recommended work restrictions consistent with the functional capacity evaluation. At Petitioner's last treatment visit on September 1, 2017, Dr. Templin found these functional capacity evaluation restrictions would be permanent if the recommended surgery was not approved.

Based on the treatment records, Petitioner was not taken off work completely and instead remained under light duty restrictions. Petitioner's testimony indicated that prior to July 2017, Respondent was accommodating her light duty restrictions. The Commission finds there was no evidence in the record showing that Respondent had stopped offering accommodations for Petitioner's light duty restrictions. It is further notable that Petitioner had reported to Dr. Lami that she was working full duty at the time of the Section 12 examination on July 25, 2017. As the treatment records do not show Petitioner was taken off work and there was no testimony that Respondent would cease accommodating Petitioner's restrictions in July 2017, the Commission finds Petitioner failed to meet her burden of proving entitlement to temporary total disability benefits from July 25, 2017 to September 6, 2017.

For these reasons, the Commission finds Petitioner's current condition of ill-being is causally related to the September 7, 2016 work accident and Petitioner has established entitlement to prospective medical care. The Decision of the Arbitrator is reversed accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated July 18, 2018, is hereby reversed as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being of her lumbar spine is causally related to her September 7, 2016 accident.

IT IS FURTHER ORDERED that Respondent is liable for Petitioner's prospective medical care for her related low back condition, including but not limited to, the treatment and surgical procedures recommended by Dr. Templin on September 1, 2017.

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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 Section 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. 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: JUL 19 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 5/23/19
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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cerelina DeLeon,

Petitioner,

vs.

NO: 11 WC 17902

Fresenius Medical Care,

19IWCC0365

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below. The Commission finds Petitioner sustained injuries that arose out of and in the course of her employment on the date of accident. The Commission also finds that Petitioner's current condition of ill-being regarding her lumbar and cervical spine are causally related to the work accident. Furthermore, the Commission awards temporary total disability, certain medical bills, and permanent partial disability.

Findings of Fact

Petitioner began working for Respondent in August 2004 as a patient care technician. (Tr. at 9). She began working at her current location in early 2009. On December 22, 2010, Petitioner arrived at work at around 4:30 a.m. and parked in the lot adjacent to the building. *Id.* at 20. Petitioner testified that when she started working at the location, a manager told the employees that they were not supposed to park in the parking spots closest to the clinic. *Id.* at 62-63. She testified that approximately five spots closest to the entrance are designated for patients; however, there are no signs designating any spaces other than the handicapped spots. Petitioner testified that there are two entrances the employees use, and she slipped and fell on ice in front of her usual entrance. *Id.* She testified that she hit her back first and then her head when she fell. *Id.* at 22. Petitioner testified that she injured her head, neck, low back, and left shoulder.

Petitioner initially returned to work without restrictions on January 17, 2011. *Id.* at 37. She testified that she had trouble performing more strenuous tasks and her left arm, neck, and low back complaints continued to worsen. *Id.* at 38. She testified that Dr. Riera took her off work on May 10, 2011, due to her complaints and cleared Petitioner to return to work full duty on August 2,

19IWCC0365

2011. *Id.* at 42-43. Petitioner returned to work on August 8, 2011. She testified that she continued to have problems with her back, left shoulder, and neck when after returning to work and continued to treat with her primary care physician. *Id.* at 44.

Petitioner complained of continued pain in her back, left shoulder, and neck. *Id.* at 46. She testified that her head occasionally hurts, and she takes over-the-counter medicine. She can perform all her work duties, albeit with some difficulty. Petitioner testified that she has trouble cleaning the house, cooking, doing laundry, and feels pain in her left shoulder and back when she sleeps. She testified that her pain is constant. Petitioner denied any pre-accident issues with her neck, back, and left shoulder. *Id.* at 48. She admitted to injuring her back in October 2014 after falling in a restaurant. *Id.* at 50. She testified that her symptoms returned to baseline approximately three months afterward. Petitioner continues to have trouble carrying, pushing, and pulling heavy objects. *Id.* at 54.

Jessie Espinosa testified on behalf of Respondent. She was the clinical manager for the North Center facility for five years beginning in January 2010. Ms. Espinosa testified that Respondent does not own the building or the parking lot. She testified that Respondent does not maintain the parking lot. *Id.* at 101. Ms. Espinosa testified that she calls the landlord's contact person any time there is an issue with the parking lot, such as snow and ice removal. *Id.* at 102. Respondent shares the building with two other businesses and they share the parking lot. She testified that the parking lot is open to the public and she is unaware of any parking restrictions employees must follow. Ms. Espinosa testified that there are no spots designated for patients only. *Id.* at 106. Oliver Soriano also testified on behalf of Respondent. He has worked at the facility since January 2010 as a patient care technician. He testified that he was told as a courtesy to the patients to park as far back as possible. *Id.* at 159. He testified that the only specially designated parking spaces are the handicapped spaces; otherwise, he testified no one told him he could only park in a certain area. *Id.* He testified she was partially still in the parking lot when she fell. *Id.* at 167.

Petitioner visited the ER on the date of accident with complaints of a headache and back pain after fall on ice. (PX1). She reported falling backwards and landing first on her low back/buttocks and then hitting her head. A CT of the brain was normal and lumbar x-rays showed minor bone spurs of upper lumbar vertebral bodies with no evidence of spondylolisthesis. Petitioner followed up with Dr. Fabros-Munez, her primary care physician, two days later. (PX2). She complained of continued pain at the back of her head and in the low back. She also complained of some pain from biting the tip of her tongue during the fall. During the exam, the doctor noted subjective occipital soreness and subjective low back pain. There was also evidence of a healing bite on the tip of the tongue with mild erythema. Dr. Fabros-Munez cleared Petitioner to return to work on January 17 with a 10-lb. lifting restriction for one month. On February 5, 2011, Petitioner reported returning to work on January 17, 2011, and functioning well with the lifting restrictions. (PX2). Her low back pain was improving.

In early May 2011, Petitioner returned to Dr. Fabros-Munez primarily to follow up on a recent hospitalization related to chest pain. She also complained of left shoulder pain worsened with lifting the arm. Dr. Riera, an internist, first examined Petitioner on May 10, 2011. (PX4). Petitioner complained of low back pain radiating to her thighs as well as numbness in the right leg.

She also complained of left shoulder and neck pain. After examining Petitioner, Dr. Riera diagnosed a sprain/strain of the cervical and lumbar spine. A May 13, 2011, lumbar MRI revealed diffuse lumbar spondylosis with multilevel annular disc bulging and hypertrophy of posterior elements with no evidence of high-grade spinal canal or neural foraminal stenosis. A left shoulder x-ray was unremarkable, and a cervical x-ray revealed degenerative disc disease at C4-5 and C5-6.

Petitioner returned to Dr. Riera in June 2011 and reported improvement in her low back but continued complaints along the neck and left shoulder with numbness and tingling in the left arm. The doctor recommended a steroid injection, but Petitioner refused because of a past poor reaction. He noted that Petitioner was a "poor historian, and not very reliable concerning the treatment and care of her diabetes." He prescribed additional physical therapy. A June 9, 2011, MRI of the cervical spine revealed cervical spondylosis, multilevel spinal stenosis particularly at C4-5 and C5-6, and mild spinal cord compression at C4-5. The results of a June 2014, 2011, EMG/NCS of the left arm and cervical paraspinal muscles were compatible with left C5-6 radiculopathy. On August 2, 2011, Dr. Riera cleared Petitioner to return to work full duty and prescribed two additional weeks of physical therapy. On August 30, 2011, Petitioner reported she did not have any problems completing her work but occasionally had some discomfort along the cervical spine and numbness of the left hand. The doctor noted minimal pain on palpation along the paracervical muscles. He released her from his care and recommended Petitioner visit a pain specialist if her cervical pain continued.

On March 23, 2012, Petitioner returned to her primary care doctor with complaints of left shoulder pain radiating down the arm to her hand. (PX2). She also complained of numbness in her hand and occasional neck pain. Petitioner reported a recurrence of her left shoulder and arm pain since December 2011, worsened by carrying her bag or lying on her left side. The doctor noted subjective complaints of shoulder pain during the exam. X-rays of the left shoulder had the impression of a pronounced bony excrescence along the undersurface of the acromion which could predispose Petitioner to subacromial impingement and rotator cuff pathology. (PX2). It also showed an ovoid calcified or ossified body projecting in the region of the axillary recess measuring approximately 5mm. An April 2012 left shoulder MRI had the impression of a 1cm wide full thickness rotator cuff tear and tendinosis of the supraspinatus tendon. (PX3).

Dr. Guelich, an orthopedic surgeon, examined Petitioner on May 2, 2012. (PX7). Petitioner complained of increasing left shoulder pain and difficulty with routine activities. Dr. Guelich noted Petitioner's left shoulder showed significant weakness within the rotator cuff and pain with resisted elevation. There were no signs of frozen shoulder, but there were positive impingement signs. Dr. Guelich diagnosed left shoulder pain and a full thickness rotator cuff tear with impingement syndrome. The doctor recommended left rotator cuff surgery; however, as of the date of hearing Petitioner had not undergone surgery. On October 20, 2014, Petitioner returned to her primary care physician following a fall in a restaurant two days earlier. *Id.* She complained of left leg, right hip, and low back pain after slipping on a shiny floor. Lumbar spine x-rays revealed a slight reversal of the normal lumbar lordosis in the upper lumbar spine and moderate intervertebral disc height loss at L1 with associated early degenerative spondylosis. (PX2).

Dr. Ghanayem, an orthopedic surgeon, examined Petitioner at Respondent's request on

February 20, 2012. (RX5). Petitioner reported her left arm pain had resolved but complained of continued pain at the cervical base. The cervical spine exam revealed some muscular discomfort at the cervical base with good range of motion. Dr. Ghanayem opined Petitioner likely sustained a cervical strain/whiplash type injury with an aggravation of her underlying cervical spondylosis. He opined her injury had essentially resolved with only some residual muscular type discomfort at the cervical base. Dr. Ghanayem placed Petitioner at MMI. In a subsequent addendum, Dr. Ghanayem opined Petitioner's cervical injury was only a soft tissue injury with no residual disability. Dr. Ghanayem testified via evidence deposition on July 2, 2014. (RX7). Regarding his addendum, he testified:

> "My fundamental opinion that she, you know, aggravated her neck is unchanged. You know, I guess there was some discrepancy if she actually hurt her neck. And she told me she did. I felt she did…She had some residual muscular symptoms."

Id. at 10-11.

Conclusions of Law

Petitioner bears the burden of proving each element of her claim by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). She must show by a preponderance of the evidence that she suffered a disabling injury which arose out of and in the course of her employment. *Id.* The phrase "in the course of employment" refers to the time, place, and circumstances surrounding the injury. *Id.* To satisfy the "arising out of" prong, Petitioner must show that the injury "had its origin in some risk connected with, or incidental to, the employment." *Id.* After carefully considering the evidence and relevant law, the Commission finds Petitioner met her burden of proving her injuries arose out of and in the course of her employment.

As an initial matter, the Commission finds Petitioner testified credibly. Her testimony that supervisors told employees to not park in the spaces closest to the entrance to the facility was corroborated by Respondent's own witness, Mr. Soriano. Mr. Soriano also corroborated Petitioner's testimony regarding the icy condition of the parking lot early that morning as well as the fact that Petitioner regularly used her key to enter through the door to the right of the main entrance. While Mr. Soriano testified that the entrance Petitioner used was an emergency exit, he also testified that no one ever told him he could not enter through that door. After considering the totality of the evidence, the Commission finds that Petitioner slipped and fell on ice while walking from the parking lot to her usual entrance to the building. Petitioner fell in front of the entrance where the parking lot meets the walkway.

When analyzing the question of whether Petitioner's injury occurred in the course of her employment, the Commission must first determine whether the injury occurred on Respondent's premises. "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, or within a reasonable time before and after work are generally deemed to have been received in the course of the employment. *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC, ¶18. Likewise, the "fact that the employer leases space and the area where the injury occurs is used by

other tenants or the public does not necessarily mean it is not the employer's premises." *Suter*, 2013 IL App (4th) 130049WC at ¶34 (quoting *County of Cook v. Indus. Comm'n*, 165 Ill. App. 3d 1005, 1009 (1988)). Instead, the proper inquiry is whether the employer maintains and provides the lot for its employees use. *Mores-Harvey v. Indus. Comm'n*, 345 Ill. App. 3d 1034, 1040 (2004). If so, then the parking lot constitutes part of the employer's premises. *Suter*, 2013 IL App (4th) 130049WC at ¶30. Here, there is no dispute that Respondent leases its space and the evidence shows that the lease requires the landlord to provide sufficient parking for Respondent's employees as well as its patients. Additionally, there is no dispute that Respondent's employees customarily park in the parking lot. In similar circumstances, the Illinois Supreme Court determined that "if the employer provides a parking lot which is customarily used by its employees, the employer is responsible for the maintenance and control of that parking lot. *De Hoyas v. Indus. Comm'n*, 26 Ill. 2d 110, 113 (1962). After analyzing the relevant facts, the Commission finds the parking lot is part of the employer's premises. Thus, Petitioner did sustain an injury in the course of her employment.

To determine whether Petitioner's injury arose out of her employment, the Commission must consider the type of risk to which Petitioner was exposed. In Illinois, there are three categories of risk to which an employee may be exposed: 1) risks distinctly associated with one's employment, 2) risks that are personal to the employee, 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. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶31. However, courts have consistently reasoned that a neutral risk analysis in unnecessary when the injury is the direct result of a hazardous condition on the employer's premises. Instead, courts have deemed injuries resulting from a hazardous condition or defect such as ice on the employer's premises to be "risks distinctly associated with the employment." *See, Dukich*, 2017 IL App (2d) 160351WC at ¶40. Based on the credible testimony of Petitioner and Mr. Soriano, the Commission finds Petitioner's injuries were the direct result of a hazardous condition on Respondent's premises and therefore arose out of her employment. For the foregoing reasons, the Commission reverses the Arbitrator's Decision and finds Petitioner met her burden of proving she sustained a compensable injury arising out of and in the course of her employment.

The Commission must now address the question of whether Petitioner's current condition of ill-being is causally related to the work injury. After carefully reviewing the totality of the evidence, the Commission finds Petitioner sustained a head contusion, lumbar strain, and cervical strain with radiculopathy due to the work accident. It is undisputed that Petitioner slipped and fell on ice. The medical evidence corroborates Petitioner's testimony that she hit her head and injured her low back and neck when she fell. Petitioner's head contusion completely resolved within approximately one month. Petitioner continued to actively treat for her lumbar and cervical complaints until her final appointment with Dr. Riera on August 30, 2011. Respondent presented no evidence that Petitioner did not sustain cervical and lumbar strains due to the work accident. In the absence of any evidence suggesting Petitioner's current complaints regarding her neck and back are not related to the work accident, the Commission finds Petitioner's current condition of ill-being relating to her cervical and lumbar spine is causally related to the work injury. The Commission further finds that Petitioner reached MMI for her lumbar and cervical strains on August 30, 2011.

After evaluating the evidence, the Commission finds Petitioner did not meet her burden of proving her left shoulder condition is causally related to the work accident. Petitioner complained of head pain and low back pain immediately after her fall. By January 7, 2011, Petitioner began complaining of some occasional neck discomfort. However, Petitioner did not mention any complaints regarding her left shoulder until May 2011—almost five months after the work accident. Even then, Petitioner's primary complaint was of neck pain radiating down to her shoulder. Dr. Riera diagnosed Petitioner with cervical radiculopathy in June 2011 and she received treatment for that diagnosis until reaching MMI in August 2011. There is no evidence of any treatment for Petitioner's left shoulder condition until March 2012. The Commission notes that by March 2012, Petitioner had returned to work full duty twice and had no complaints of left shoulder pain until almost 2.5 years after the date of accident and approximately six months after Dr. Riera placed Petitioner at MMI for her work-related complaints. Petitioner did not submit any medical opinions supporting her claim that the findings on the April 2012 left shoulder MRI are causally related to the work accident. Given the significant delay in complaints and active treatment relating to her left shoulder, the Commission must find that Petitioner failed to meet her burden of proving a causal connection between her left shoulder condition and the work accident.

As Petitioner's current condition of ill-being regarding her lumbar and cervical spine is causally related to the work accident, the Commission awards appropriate medical expenses. The Commission finds Respondent is liable for any outstanding medical expenses for reasonable, necessary, and causally related treatment for Petitioner's head contusion, lumbar strain, and cervical strain through August 30, 2011. The Commission denies all medical expenses for treatment relating to Petitioner's left shoulder condition.

Pursuant to the above findings regarding accident and causal connection, the Commission awards temporary total disability benefits to Petitioner. Petitioner's weekly TTD rate is $421.50. Respondent does not dispute that Petitioner was off work from December 23, 2010, through January 16, 2011, or 3-4/7 weeks. She returned to work on January 17, 2011, and continued to work until Dr. Riera once again restricted Petitioner from work from May 10, 2011, through August 7, 2011, or 12-6/7 weeks. Petitioner returned to work on August 8, 2011. For the foregoing reasons, the Commission finds Petitioner is entitled to TTD benefits from December 23, 2010, through January 16, 2011, and from May 10, 2011, through August 7, 2011, totaling 16-3/7 weeks or $6,924.82. The parties agree that Respondent has paid $1,501.57 in TTD and $4,726.49 in nonoccupational indemnity disability benefits. Respondent shall receive a credit in the amount of $6,228.06.

Finally, the Commission finds Petitioner sustained a permanent partial disability due to her injuries relating to the work accident. The Commission notes that the date of accident precedes the effective date of the amendment to the Act of September 1, 2011; thus, an analysis pursuant to §8.1b of the Act is not necessary. Petitioner sustained a lumbar strain and a cervical strain with radiculopathy due to the work accident. She briefly suffered from a head contusion and associated pain; however, the medical evidence shows her head contusion quickly resolved. While Petitioner testified regarding the difficulty she has performing her work duties, there is no evidence of continued complaints to any doctor regarding her lumbar or cervical spine after August 30, 2011. Petitioner's injuries were treated very conservatively with pain medication, and physical therapy. While Dr. Riera recommended a cervical steroid injection, Petitioner declined. Petitioner's most

19IWCC0365

significant complaints during the hearing related to her unrelated left shoulder condition. Furthermore, Petitioner has continued to work full duty at her regular job for several years with no serious complaints regarding her neck or back.

Based on the totality of the evidence, the Commission finds Petitioner sustained a 5% loss of use of the whole person due to the work injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 23, 2016, is reversed in its entirety.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being relating to her lumbar and cervical spine is causally related to December 22, 2010, work accident. Petitioner's left shoulder condition is not causally related to the work accident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges that relate only to treatment for Petitioner's head contusion, lumbar strain, and cervical strain through August 30, 2011, as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for charges relating to Petitioner's left shoulder condition.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $**421.50**/week for **16-3/7** weeks, commencing **December 23, 2010** through **January 16, 2011**, and from **May 10, 2011** through **August 7, 2011** as provided in Section 8(b) of the Act. Respondent shall receive a credit in the amount of $6,228.06 for temporary total disability and nonoccupational indemnity disability benefits previously paid to Petitioner.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of **$379.36** for **25** weeks, because Petitioner's injuries caused a 5% loss of use of the whole person, as provided for in §8(d)2 of the Act.

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

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

19IWCC0365

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

DATED: JUL 19 2019

o: 5/21/19
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

DISSENT

I respectfully dissent. "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]. 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). Moreover, as the court noted in *Illinois Bell Tel. Co. v. Industrial Commission*, "when an employee slips and falls, or is otherwise injured, at a point off the employer's premises while traveling to or from work, his injuries are not compensable." 131 Ill. 2d 478, 483-484 (1989) (quoting *Reed v. Industrial Commission*, 63 Ill. 2d 247, 248-49 (1976)). Two exceptions to this general rule exist: 1) when an employee falls in a parking lot provided and maintained/controlled by the employer; or 2) when an employee is required to be at a place in fulfillment of her job duties, and the employee is exposed to a risk to a greater degree than the general public. *Illinois Bell Tel. Co.* at 484. Neither exception applies.

19IWCC0365

Petitioner testified she parked and traversed the parking lot prior to her fall. T. 30. Petitioner testified she slipped on ice in front of one of the entrances to Respondent's premises. T. 20. As the majority noted, Petitioner was credible in her testimony. As such, unlike the majority, I find the parking lot exception inapplicable. Even assuming *arguendo* Petitioner fell in the parking lot, I do not find the exception applies to these facts.

Petitioner testified she was instructed to park away from Respondent's entrance. T. 32-33; 64-65. Mr. Soriano, a co-employee, testified no specific directives were provided as to where to park other than to be courteous to patients by leaving the closer parking spots available. T. 159. Ms. Espinosa, Petitioner's supervisor, testified employees were not directed to park in any certain area other than to avoid the handicapped parking spots. T. 104; 127.

Ms. Espinosa further testified Respondent neither owns nor maintains the parking lot. T. 102. Respondent's Exhibit 2 (RX2) is a lease agreement between Respondent and Bryton Properties, LLC (Bryton), the owner of the premises. Under the terms of the lease agreement, Bryton is liable for the maintenance, repair, and restoration of the parking area. RX2, Art. 5. The lease further provides that a minimum of 22 spaces adjacent to the premise will be provided. *Id.*, Art. 27. Given such facts, I do not find the parking lot exception applies.

In *Doyle v. Industrial Commission*, the Supreme Court examined the underpinnings of the "premises rule" that being "accidental injuries occurring on the premises while an employee is traveling to or from work are compensable, while injuries occurring off the premises of the employer are not. [Citations omitted]." 95 Ill. 2d 103, 106-7, 447 N.E.2d 310 (1983). The Court went on to quote Professor Larson "'while the employee is on the employer's premises, the connection with the employment environment is physical and tangible.' [citation omitted]. The rule is easily applied, and supposedly more equitable rules create unmanageable administrative

problems. [citation omitted]." *Id.* at 107. The Court then discussed what is commonly referred to the "parking lot exception" noting *DeHoyos v. Industrial Commission*, 26 Ill. 2d 110 (1962) and *Chmelik v. Vana*, 31 Ill. 2d 272 (1964) stating "in each case the employer was exercising continuing dominion over the parking lots which were provided for the employees." *Id.* at 107. Again, in referencing *DeHoyos*, the Court noted "the employer is responsible for the maintenance and control of the parking lot." *Id.* at 108. Deeming such parking lots part of the employer's premises is wholly consistent with the "premises rule." In *Illinois Bell Tel. Co. v. Industrial Commission*, the Supreme Court again examined the "premises rule" specifically noting two exceptions:

> Recovery has been permitted for off-premises injuries incurred by an employee when the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons. [citations omitted]. Recovery has also been permitted for injuries sustained by an employee in a parking lot provided by and under the control of an employer. [citation omitted]. 131 Ill. 2d 478, 484, 546 N.E.2d 603 (1989).

Since the inception of the parking lot exception, there have been countless cases decided by the Appellate Court with varying results given the fact specific nature of the inquiry. The Appellate Court, though, consistent with the above discussed precedents has required the employer to both provide and maintain/control the parking lot. See *Mores-Harvey v. Industrial Commission*, 345 Ill. App. 3d 1034, 1040 (2004) ("Whether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. If this is the case, then the lot constitutes part of the employer's premises"); *Vill v. Industrial Commission*, 351 Ill. App. 3d 798, 803 (2004) ("First, recovery has been permitted where the employee is injured in a parking lot provided by and under the control of the employer"); *Suter v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 130049WC,

¶ 21 ("Second, there is a 'parking lot exception' where courts have allowed recovery when the employee is injured in a parking lot provided by and under the control of the employer"). Such requirements are consistent with the overriding purpose to hold employers responsible for conditions which exist on their premises under their control.

In the present matter, Respondent provided parking for its employees. The testimony establishes Respondent's employees customarily used the parking lot. The lease agreement establishes at least 22 spots would be available to Respondent's employees and patients.

Respondent, though, did not maintain nor control the parking lot. Under the terms of the lease agreement, Bryton is charged with the maintenance, repair, and restoration of the parking lot. The mere fact the lease required Bryton to provide parking spaces for Respondent's employees and patients does not impart control of the lot to Respondent. Neither does Respondent's request that the employees park away from the entrance. Respondent was in no manner responsible for the maintenance of the parking lot nor did it exert any control over the condition of the parking lot. Respondent provided a convenience for its employees. Yet, in doing so, under the majority's analysis, Respondent is now liable for a hazard which it has no ability to ameliorate.

The second exception is no more applicable. Petitioner testified Respondent's premises could be accessed by one of two doors, left and right. T. 24. Petitioner testified she was instructed by Ms. Wieckerak to use the door on the right and was provided a key for the same. T. 25-26. In contrast, Mr. Soriano testified he utilized the door on the left as this was the entrance for employees. T. 161. Mr. Soriano characterized the door on the right as an emergency exit. Id. Moreover, Mr. Soriano testified he was unable to use the door on the right as he was not provided a key. T. 170.

Ms. Espinosa, Petitioner's direct supervisor at the time of her fall, testified consistently

with Mr. Soriano characterizing the door on the right as an emergency exit. T. 107. Ms. Espinosa further testified employees were not to use the door on the right and should not have a key to the same. T. 107-09. Ms. Espinosa stated during certain staff meetings, employees including Petitioner were directed not to use the door on the right except in a case of an emergency. T. 113-4.

I find Petitioner was free to choose either door to access the building. As the Supreme Court noted in *Bommarito v. Industrial Commission*, 82 Ill. 2d 191, 196-7, 412 N.E.2d 548 (1980), "Injuries sustained off the employer's premises have been held compensable when the injuries occurred while the employee was acting under the direction of the employer or for his benefit or accommodation. [Citation omitted]."

In *Bommarito*, the claimant sustained injury when she fell in a hole while traversing an alley full of debris. It was undisputed that the claimant's employer required her to utilize one entrance which was only accessible through the debris ridden alley. *Bommarito*, 82 Ill. 2d at 196. In awarding compensation, the Court reiterated the well-established principle "when an employee incurs injuries at a place off the employer's premises while traveling to and from work, the injuries are not compensable unless the employee's presence at the place where the accident occurred was required in the performance of his duties. [Citations omitted]." *Id.* at 194. Moreover, the employee must be exposed to the risk to a greater degree than the general public. *Id.* Unlike the employer in *Bommarito*, Respondent did not require Petitioner to use the door on the right.

Certainly, the testimony establishes Petitioner at some point was provided with a key to the door on the right. Such testimony does not negate Mr. Soriano's and Ms. Espinosa's testimony that such door was an emergency exit. Moreover, Ms. Espinosa unequivocally testified that employees were directed not to use the door on the right, an understanding Mr. Soriano shared.

As the Arbitrator aptly noted "If the right door was a mandated employee entrance, then Soriano would have had a key. Perhaps Petitioner was instructed to use the right door when she began work at the Addison facility, but use of the right door was not mandated at the time of Petitioner's accident."

Even assuming her presence was mandated, Petitioner failed to prove she was exposed to a risk to a greater degree than that of the general public. To that end, the matter of *Illinois Bell Tel. Co v. Industrial Commission*, 131 Ill. 2d 478, 546 N.E.2d 603 (1989), is instructive and on point.

In *Illinois Bell Tel. Co*, the claimant's employer was located in a mall. After completing her work day, the claimant left the employer's premises, and while walking through the mall, fell on a slippery floor. In denying benefits, the Supreme Court reiterated the principle that employees who fall or are otherwise injured off the employer's premises while travelling to or from work are not entitled to benefits. The Court noted the two exceptions: 1) parking lots provided and maintained/controlled by the employer; 2) the employee's presence is required in fulfillment of her job duties, and she is exposed to a risk to a greater degree than the general public. *Id.* at 483-4. The Court found the claimant was not required by her employer to use any particular entrance, and as such, she failed to prove she was required to be in the place where she fell. Moreover, the Court found the claimant failed to prove she was exposed to a risk to a greater degree than the general public. The Court specifically stated:

> Claimant argues that she was compelled to cross the common areas for access to reach her place of employment; her risk, therefore, was greater than that of the public. This court has held, however, that "the mere fact that the duties take the employee to the place of the injury and that, but for the employment, [s]he would not have been there, is not, of itself, sufficient to give rise to the right of compensation." [Citations omitted]. *Id.* at 485-6.

Petitioner is exposed to the same risk of snow and ice as any member of the general public who

19IWCC0365

might enter or exit the building. The fact she would be required to walk through the door twice a day, coming to and leaving work, does not establish the requisite increased risk.

Falls or injuries which occur off an employer's premises while an employee is commuting to or from work are not compensable as the employer has no interest in where an employee lives and/or how she commutes to work. Two exceptions exist as the employer in those two circumstances exerts control over the employee's actions. Therefore, the purpose of those exceptions is to hold the employer liable for a risk that it requires its employee to confront by the virtue of the employee's job duties. For the reasons state above, I find Petitioner failed to prove she sustained an injury which occurred in the course of her employment. Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DeLEON, CERELINA
Employee/Petitioner

Case# **11WC017902**

FRESENIUS MEDICAL CARE
Employer/Respondent

19IWCC0365

On 5/23/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.37% 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:

0140 PETER D CORTI LAW GROUP
JOHN C SERKLAND
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0766 HENNESSY & ROACH PC
JASON D KOLECKE
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

C Deleon v Fresenius Medical Care , 11 WC 017902

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

Cerelina DeLeon
Employee/Petitioner
v.
Fresenius Medical Care
Employer/Respondent

Case # 11 WC 017902

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 **January 14, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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 **12/22/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this 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 **$32,877.52**; the average weekly wage was **$632.26.**

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$1,501.57** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,501.57.**

Respondent is entitled to a credit of **$4,726.49** under Section 8(j) of the Act.

ORDER

Claim for Compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on December 22, 2010.

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 23, 2016
Date

ICArbDec p. 2

MAY 23 2016

FINDINGS OF FACT

Petitioner was employed by Respondent as a Patient Care Technician (PCT). She was hired by Respondent in August of 2004. She began working at Respondent's facility at 2620 W. Addison St. in Chicago in 2009. Previously, she had worked at Respondent's facility on Belmont in Chicago.

In her job as a PCT, Petitioner helps dialysis patients. Her daily activities included mixing bicarbonate solutions, cannulating patients, setting up dialysis machines, assisting patients in and out of chairs and various cleaning tasks associated with dialysis treatment. Physically, Petitioner would bend and twist in various positions, lift and reach overhead, kneel, lift and assist patients and carry objects. Petitioner treated about 8 to 12 patients a day, 3 days per week.

Respondent's facility on Addison is located in an office building shared by a childcare center, a vascular clinic and Respondent's dialysis clinic. There is a parking lot to the north of the building where members of the public and employees of the office tenants park. The lot is not owned, maintained or controlled by Respondent. There are two north facing glass doors at Respondent's facility as shown on Petitioner's Exhibit 8(1). The doors will be referred to herein as the "right door" and "left door" as they are shown on PX8(1). To the right of the right door is a steel door that leads to a supply area. To the left of the left door is the entrance to the vascular clinic (2608 W. Addison) and a play area for the childcare facility (PX8(2), PX10) There is a sidewalk running along the north wall of the building running from the supply door east to the play area. (PX8(1),(2),(7)) The sidewalk is 71 inches wide. (PX8) Respondent does not own, maintain or control the sidewalk, although employees of Respondent have spread salt on the walk when it was icy.

Petitioner parks away from the building because she was asked to do so by management when the facility opened in 2009 and, obviously, as a courtesy to patients. Testimony by a co-worker, Oliver Soriano and the former Clinic Manager, Jessie Espinosa, establishes that there were no specific parking spots designated for employees of Respondent. There are parking spaces provided for the disabled. Soriano confirmed that it was suggested that clinic employees leave the spaces close to the building open for patients. Interestingly, the supervisor, Espinosa, testified that she parked wherever there was an open spot (but not in a disabled parking spot).

On December 22, 2010, Petitioner arrived at work between 4:20 and 4:30 am. Soriano arrived at the same time. It was dark. The parking lot was icy and slippery. The sidewalk was icy. The ice in the lot was white and rough. The ice on the walk was clear and smooth. Petitioner walked from the place where she parked her car towards the right door. Petitioner had a key to the right door, which she called the employee entrance. Soriano walked to the left door. Soriano had a key to the left door and did not have a key to the right door. As Petitioner approached the right door, she slipped on ice and fell. Her back hit the ground first, and then her head. She lost consciousness for 4 seconds. She noticed immediate pain. Her head was swollen. She was bleeding from her mouth (she had bitten her tongue). Her back hurt. She could not get up. Soriano helped her to get up and they entered through the right door, using Petitioner's key. Petitioner testified that had some water, iced her head and went home. She did not drive herself home. She did not seek immediate medical care. Petitioner testified that she later was driven to Illinois Masonic Hospital, by her husband, where she was treated in the emergency room.

Petitioner marked the location of the fall on PX8(1) with an X. This spot appears to be some 10 feet north of the sidewalk. Petitioner testified that she was not at the right door when she fell. Soriano did not see Petitioner fall. He saw her on the ground after the fall. Petitioner marked the location where she slipped on PX8(5) with an X. This location appears to be about 3 feet from the left door, on the sidewalk. Soriano testified that he saw

Petitioner partially on the sidewalk and partially on the parking lot, "nowhere near the door" and marked the spot with a circled X on PX8(5) This spot appears to be 7 or 8 feet from the left door. The Arbitrator notes that there are 3 PX8(5) pictures in evidence. The one with the markings by Petitioner and Soriano is easily identified.

The right door opens into the patient treatment area. Petitioner testified that she was instructed to enter via the right door "employees' entrance" when she began working at the Addison facility. Petitioner had a key, which may have been a master key, which allowed her to enter through the right door. Other employees that transferred from the Belmont facility to the Addison facility had keys to the right door. Subsequent to the accident, the locks were changed and Petitioner was required to surrender her key. She was then given a key to the left door. Petitioner did not use the left door prior to the accident. An entrance alarm is located near the left door. Soriano and Espinosa referred to the right door as an emergency exit. Soriano did not recall if he was told that the right door was for emergencies only. Employees were not to enter via the right door, per Espinosa. Per Soriano, the employee and patient entrance was through the left door. Soriano was not instructed to enter through the right door. He did not recall a specific instruction to use the left door, but he only had a key to the left door.

Petitioner first presented to PCP Acute Care at Advocate Medical Group on December 22, 2010 at 1:30pm. The history was of a fall that morning with head pain and low back pain. There was no documentation of neck or left shoulder pain. Because of the history of a LOC, Petitioner was referred to the ER at Illinois Masonic. (PX3)

Petitioner presented to the Illinois Masonic ER at 2:56 pm on December 22, 2010 with the history of a slip and fall and injury to the head and low back. The physical exam revealed pain in occiput and bifrontal, no neck pain, mild low back tenderness, no neurologic complaints and no pain in the arms or legs. A brain CT was normal. Low back x-rays were negative for acute pathology. The diagnosis was: strain and contusions. Petitioner was to follow up with her PCP. (PX1)

Petitioner had follow up care with her PCP at Advocate Medical Group, beginning on December 24, 2010. Petitioner testified that she told the doctor that she had pain in her head, the left side of her neck and her left shoulder. The chart note says that she had pain in her back and the back of her head. There were no complaints regarding the neck or the left shoulder listed on December 24, 2010. Petitioner was taken off work and had continued care at this facility for her injuries through February 5, 2011. When she was seen on January 7, 2011, complaints of mild neck pain "off and on" were noted, along with headache and back pain complaints. The neck exam on January 7, 2011 was said to be normal, as was noted in the visit of January 14, 2011. At the January 14, 2011 visit, Petitioner was released to return to work on January 17, 2011, with restrictions. At the February 5, 2011 visit, Petitioner had head complaints when she combed her hair. Her back pain was getting better. There were no neck or left shoulder complaints or findings noted. (PX3)

Petitioner testified that, after she returned to work, her symptoms worsened. Her PCP's records show that Petitioner was seen three times in April and May of 2011 and no neck, head, low back or left shoulder complaints or findings were noted. On May 6, 2011, Petitioner had complaints of chest pain and left shoulder pain that was worse with lifting. The chart note on May 6, 2011 does not indicate that the left shoulder complaints were related to the 12/22/2010 fall. (PX2, 3)

The Application For Adjustment of Claim in this case was filed on May 9, 2011.

Petitioner began treatment at Michigan Avenue Medical Associates (with Dr. Rogielo Riera, an internist) on May 10, 2011. Petitioner gave a history of the fall on 12/22/2010 with main complaints of back pain, right leg

numbness, and left shoulder and neck pain. Petitioner said that she had constant left shoulder pain. The diagnosis was sprain/strain cervical and lumbar spine and pain in the left shoulder. Petitioner remained under the care of this provider through August 30, 2011, with MRI studies of the C-Spine, L-Spine, EMG/NCV and left shoulder x-rays being performed. The C-Spine MRI showed a small left sided disc protrusion at C6-7 and DDD. The L-Spine MRI showed DDD. The left shoulder x-ray was said to be normal. The EMG/NCV showed left C5-C6 radiculopathy. (PX4, 5) Petitioner had PT at Premier Physical Therapy from May 11, 2011 through August 29, 2011. (PX6)

Petitioner was paid group disability benefits from May 12, 2011 through August 7, 2011. She received $4,726.78 in benefits. (RX4)

Petitioner was seen by Dr. Ghanyem for a §12 exam at the request of Respondent on February 20, 2012. Dr. Ghanayem apparently reviewed some medical records, took a history from Petitioner and examined Petitioner. Petitioner advised that she hurt her head and neck when she slipped and fell on ice at work. She had arm pain, which had resolved. Dr. Ghanayem thought that Petitioner had suffered a cervical strain/whiplash type injury with an aggravation of her underlying cervical spondylosis that had essentially resolved. As Petitioner did not voice low back complaints at the time of the exam, he did not think that she had suffered a low back injury. Petitioner had reached MMI for the neck injury, was capable of full duty work and needed no further medical care as of February of 2011. Dr. Ghanayem maintained his position that the fall aggravated Petitioner's cervical spine in an Addendum Report and at his Evidence Deposition. (RX5, 7)

Petitioner presented to her PCP with left shoulder complaints on March 23, 2012. She was diagnosed with subjective left shoulder pain complaints. (PX3) Petitioner testified that she was referred to Dr. Guelich by her PCP.

Petitioner was seen by Dr. Guelich on May 2, 2012. The history was of left shoulder pain since a fall in 2010. Dr. Guelich said that a Left Shoulder MRI showed a full thickness rotator cuff tear. He recommended surgical repair. (PX7) Petitioner declined surgery.

Petitioner continues to work full-duty for Respondent. She denied prior head, low back, neck and left shoulder injuries. She is a diabetic. She had a prior right RTC repair. She did injure her low back again in a fall at Cheesecake Factory in October of 2014. Petitioner testified that there were no subsequent head, neck or left shoulder injuries. Petitioner is right handed.

Petitioner testified that she experiences pain at work and with activities of daily living.

Respondent's Exhibit 2 is the lease agreement for Respondent's facility. Respondent has no maintenance responsibilities for the sidewalk or the parking lot.

Respondent submitted retro bill reviews by Charles Bodem, DC regarding "39 chiropractic visits" (denied based upon causation) and "MRI and EMG/NCV" ("no change in original peer review"). (RX6) This does not appear to be a UR review (UR does not address causation), there weren't 39 chiropractic visits and we don't know what the original peer review finding was.

CONCLUSIONS OF LAW

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

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner's accident did not arise out of her employment by Respondent. Petitioner was injured when she slipped and fell on ice at a location off of Respondent's premises (either on the sidewalk or on the parking lot at a point not near to the right door of Respondent's facility) as she walked from her car to Respondent's premises prior to starting her work day. The risk of slipping and falling on ice at this point is a risk incident to the public at large. Respondent has no maintenance responsibilities for the sidewalk or the parking lot. Parking is not restricted to only employees of Respondent. If the accident had occurred when Petitioner was standing at the right door, trying to unlock it, then her accident possibly could be said to have arose out of her employment. The place of the fall is in an area traversed by other users of the building and lot and there really can't be said to be an increased risk of injury related to Petitioner's employment. The risk of injury for Petitioner is the same as that of the public at large.

As to whether Petitioner was required to use the right door as an employee entrance, the Arbitrator finds that Respondent did not require that employees use the right door. First, the proofs show that Petitioner was the only non-management employee that had a key to the right door at the time of the accident. If the right door was a mandated employee entrance, then Soriano would have had a key. Perhaps Petitioner was instructed to use the right door when she began work at the Addison facility, but use of the right door was not mandated at the time of Petitioner's accident. Further, if the dialysis room was on the other side of the right door (as the Arbitrator finds), the risk of infection would increase by the employees continually entering the dialysis room from the outside. Obviously, the alarm would most likely be placed near the employee entrance and it was located near the left door. The right door was not a mandated employee entrance on the date of accident.

As to whether Petitioner was required to park in the rear of the lot, the Arbitrator believes that Petitioner was encouraged to park away from the building as a courtesy to patients and Petitioner did so. The Arbitrator finds that Petitioner was not required by Respondent to park in the rear of the lot.

Petitioner has failed to prove that her injuries arose out of her employment by Respondent. Accordingly, the claim for compensation is denied.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has found that Petitioner's injuries did not arise out of her employment by Respondent, the Arbitrator needs not decide the issue of causal connection.

In this case, it is appropriate to comment on this issue. Petitioner suffered a sprain/strain to her low back and a head contusion as a result of the fall. Her injuries resolved by February of 2011, when she stopped receiving treatment for these conditions from her PCP. Dr. Ghanayem's opinion that Petitioner suffered a cervical injury as a result of the fall is not persuasive and not supported by the medical records. Further, the left shoulder condition diagnosed by Dr. Guelich is not causally related to the accident. There was no mention of any left shoulder injury in the initial medical records and the arm and neck exams during the first several visits with the PCP were benign.

WITH RESPECT TO ISSUES (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, AND (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has found that Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment by Respondent, the Arbitrator needs not decide these issues.

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

Katie Frailey,

Petitioner,

vs.

NO: 15 WC 42607

SIU-Carbondale,

19IWCC0366

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, 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 May 16, 2018, is hereby affirmed and adopted.

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

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

JUL 19 2019

DATED:
TJT:yl
o 7/9/19

Thomas J. Tyrrell

Maria E. Portela

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRAILEY, KATIE
Employee/Petitioner

Case# **15WC042607**

SIU-CARBONDALE
Employer/Respondent

19IWCC0366

On 5/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% 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:

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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

MAY 16 2018

DONALD A. RASCIA, Assistant Secretary
Illinois Workers' Compensation Commission

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

19 IWCC0366

- [ ] 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

Katie Frailey
Employee/Petitioner

v.

SIU - Carbondale
Employer/Respondent

Case # **15** WC **42607**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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 **September 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 not*** causally related to the accident. Petitioner's condition of ill-being through November 28, 2016 ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**27,384.17**; the average weekly wage was $**526.62**.

On the date of accident, Petitioner was **26** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

Respondent is entitled to a general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act. The parties further agreed that all medical bills awarded shall be paid directly to the medical providers per the Illinois Medical Fee Schedule or PPO agreement, whichever is less and that Respondent shall receive a credit for all medical bills previously paid.

ORDER

Causal Connection.

Petitioner failed to prove that her current condition of ill-being in her head, spine (cervical, thoracic and lumbar), hips and legs were causally related to her accident of September 22, 2015. Petitioner did establish the requisite causal connection between her head, spine (cervical, thoracic, and lumbar), and right hip/leg injuries through November 28, 2016 but failed to prove causation thereafter.

Medical Bills.

Respondent shall pay the following causally related reasonable and necessary medical service expenses:

Memorial Hospital of Carbondale (PX 2); Service date of 9/22/15:	$7,129.29
Cape Radiology Group (PX 3); Service dates of 9/22/15 and 9/23/15:	$451.00
Cedar Court Imaging (PX 4); Service date of 3/30/16:	$1,691.00
Graham Family Medicine (PX 5); Service dates of 9/24/15 and 10/08/15:	$440.00
Jackson County Ambulance (PX 6): Service date of 9/22/15:	$615.40
Southern IL Med. Services (PX 7): Service date of 9/22/15:	$251.00

As to the medical bills of the chiropractor, Dr. Baxter, the Arbitrator relies upon her causation determination and awards Petitioner only those medical bills from Dr. Baxter for services prior to November 28, 2016:

Angela Baxter, LLC (PX 1A): Service dates of 10/14/15 – 11/28/16:	$11,749.60

Bills for services with Dr. Baxter after December 3, 2016 are denied.

As stipulated by the parties, Respondent shall pay these expenses directly to the providers pursuant to Sections 8(a) and 8.2 of the Act, and shall have credit pursuant to Section 8(j) for any medical bills paid by its group medical plan and shall hold Petitioner harmless from liability with regard to those bills.

Permanent Partial Disability.

Respondent shall pay Petitioner permanent partial disability benefits of **$315.97/week** for **25 weeks** because the injuries sustained caused the **5% loss of the person as whole** as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued between **September 22, 2015** and **March 14, 2018** and shall pay the remainder of the award, if any, in weekly installments.

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

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

Nancy Lindsay
Signature of Arbitrator

May 13, 2018
Date

MAY 16 2018

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 22, 2015, Petitioner was employed as an office accountant and manager with Respondent when she sustained an injury after being struck by a vehicle while crossing the street on her way to her vehicle after completing her work day. While the facts are largely undisputed the pivotal issue appears to be whether Petitioner's accident arose out of and in the course of her employment. Other disputed issues are notice, causal connection, medical bills, and the nature and extent of any injury.

The Arbitrator finds:

On September 22, 2015, a Southern Illinois University Carbondale Police Department Voluntary Statement was obtained from ambulance driver, Justin Emery. (RX3). Mr. Emery stated a pedestrian was hit while crossing the street. (RX3). A Southern Illinois University Carbondale Police Department Voluntary Statement was also obtained from Monica Summers. (RX3). Ms. Summers stated the vehicle in front of her collided with a young woman walking across the crosswalk. (RX3).

On September 22, 2015, a Illinois Traffic Crash Report was generated which indicated an accident occurred between a vehicle and an individual in the crosswalk which runs east and west across Lincoln Drive at the southern end of the intersection of Travel Service Drive and Lincoln Drive. (RX4).

On September 22, 2015, a traffic citation was issued to Sheri D. Sulser for failure to yield to a pedestrian in a crosswalk. (RX5).

On September 22, 2015, Petitioner was transported by Jackson County Ambulance to Memorial Hospital of Carbondale as the result of a pedestrian/motor vehicle accident. (PX2). Petitioner complained of head and right hip pain. (PX2). Petitioner underwent a chest x-ray, CT scan of her cervical spine, CT scan of her head, and x-ray of her pelvis, all of which showed no acute findings. (PX2). Petitioner was diagnosed with a head injury/contusion and buttock trauma, discharged with pain medication, and told to follow up with her primary care provider. (PX2).

On September 24, 2015, Petitioner presented to Dr. Eric Graham at Graham Family Medicine with complaints of a neck strain. (PX5). Dr. Graham noted Petitioner had not had any confusion, loss of consciousness, forgetfulness, or dizziness. (PX5). Dr. Graham diagnosed a neck strain, occipital region contusion, and post concussive syndrome. (PX5). Petitioner was prescribed a muscle relaxer, naproxen, flexeril, and told to use range of motion exercises. (PX5).

On October 8, 2015, Petitioner returned to Dr. Graham with complaints of a left-sided neck strain, lumbar pain, and headaches. (PX5). Dr. Graham diagnosed a trapezius strain, headache, and lumbar region pain. (PX5). Petitioner was referred to a chiropractor, Dr. Baxter. (PX5).

On October 14, 2015, Petitioner began her chiropractic treatment with Dr. Angela Baxter. (PX1A). Petitioner described her accident and reported difficulty lifting, sleeping, looking over her shoulder and using a computer for over ten minutes. Petitioner's complaints included neck pain, trapezius pain, thoracic pain, lumbar pain, and bilateral hip pain. Petitioner was diagnosed with a cervical strain/sprain, thoracic sprain/strain, lumbalgia, pelvic segmental dysfunction, myalgia and myositis, sacroiliitis, tension headaches and deconditioning syndrome. A course of treatment, involving visits three times a week for six weeks, was recommended.

Petitioner continued seeing Dr. Baxter and extensive notes are found in her records. They show that Petitioner attended therapy and gradually showed signs of improvement albeit with waxing and waning symptoms depending upon her level of activity. On occasion, Petitioner described herself as "doing great with no headaches" but she still had ongoing symptoms elsewhere. (PX 1A 11/4/15 o/v).

Petitioner signed her Application for Adjustment of Claim herein on December 17, 2015. (AX 2)

Petitioner continued seeing Dr. Baxter into January of 2016 at which time she was attending therapy one time per week. She had no visits between January 11 and 24, 2016. (PX 1 A)

On January 13, 2016, Sarah Vanvooren completed a Supervisor's Report of Injury or Illness outlining the reported injury as described by Petitioner. (RX2). Ms. Vanvooren indicated the driver failed to yield to Petitioner as she crossed appropriately in a crosswalk in front of the Student Center on September 22, 2015. (RX2).

Petitioner returned to seeing Dr. Baxter more frequently in late March and early April. (PX 1A)

On March 30, 2016, Petitioner underwent an MRI of the lumbar spine at Cedar Court Imaging, per the Order of Dr. Baxter. (PX4). The impressions of Dr. Daniel Fulk included congenitally short pedicles which added to the degree of narrowing described, moderate neural foraminal narrowing at L4-5 on the right, mild to moderate narrowing at L3-3 bilaterally, and L4-5 on the left and L5-S1 bilaterally, along with no spinal canal narrowing. (PX4).

Petitioner had no visits between April 30th and May 15, 2016. She then had three visits between May 16, 2010 and June 1, 2016 and five visits in June of 2016. Her symptoms ranged from cervical to lumbar issues and headaches. (PX 1A)

On May 25, 2016, Petitioner completed a Workers' Compensation Employee's Notice of Injury reporting an accident which occurred September 22, 2015. (RX1). Petitioner was walking to a parking lot through a crosswalk when she was struck by a vehicle driven by "Sherry Swiser" (Sheri Sulser). (RX1). The injury was described as affecting the head, neck, back, bilateral hips, and right shoulder. (RX1).

As of June 18, 2016, Petitioner was reporting to Dr. Baxter that her last visit had really helped and her sciatica and numbness had not returned which had allowed her to start exercising again. She had woken up with a bad headache on Thursday but didn't have one on the day of her visit. Her neck and upper back pain was a "2/10", her low back pain was a "2-3/10" and her hip pain had decreased to a "1-2/10." Dr. Baxter described Petitioner's prognosis as excellent and her case uncomplicated with continuous improvement expected and no residual complaints. Petitioner reported being pain free after receiving her treatment. (PX 1A)

Petitioner missed her June 25, 2016 appointment because she was out of town working. (PX 1A)

In July of 2016 Petitioner changed jobs with Respondent. (PX 1A, 1B)

Petitioner did not return to see Dr. Baxter until July 25, 2016. At that time she reported doing well until she changed jobs and had been traveling so much and in/out of hotels. Petitioner reported "horrible" headaches in the previous two weeks and being unable to get rid of them with medication or anything else. She also had continuous aching and tightness in her neck. She was also experiencing some light sensitivity and nausea with her headaches. Petitioner's complaints also included upper back tightness and discomfort along with throbbing discomfort in the low back and right hip. After extensive treatment, Petitioner reported her headache was gone and she could turn her neck without sharp pain. She was told to use ice when she got home. (PX 1A, p. 82/110)

Petitioner returned to see Dr. Baxter on July 26, 2016 reporting her migraine returned while reading and she was undergoing a great deal of stress with a sick cat. Due to an exacerbation, Dr. Baxter recommended Petitioner be seen two times a week which Petitioner proceeded to do. Dr. Baxter's records show improvement in the headaches and ongoing complaints of back and neck stiffness. Again, Petitioner symptoms appeared to vary depending upon sleep and activities, such as driving. (PX 1A)

Petitioner did not see Dr. Baxter between August 11, 2016 and September 9, 2016. When she returned to see Dr. Baxter on September 10, 2016 she reported having a new job with Respondent and having to travel a lot and sleep in different beds resulting in increased neck pain and left leg pain and left hip pain. The right hip was sore but not like her left one. She also mentioned having to lift and move things in and out of her car and being on her feet a great deal. After the extensive treatment that day Petitioner reported pain less than a "2" and resolution of her headaches, sharp pain, and hip and sciatica pain. She remained "sore and tight." Given the exacerbation therapy was recommended to ramp up to two times per week for 4-6 weeks but Petitioner was concerned if she could come in that often given her new job. (PX 1A)

Petitioner did not return to Dr. Baxter's office until September 26, 2016. She reported traveling a lot and had been all over Illinois and Missouri and was doing well until the day before. It was noted that it was a year ago that she'd been hit by the car. Her primary complaints were an intense headache with neck pain and upper back pain and knots. Petitioner returned on October 1, 2016 reporting that she was doing well until the weather changed and she then had an intense headache with shoulder pain and neck pain. Similar complaints were noted at the next visit on October 10, 2016 and October 22, 2016. (PX 1A)

Petitioner returned to see Dr. Baxter on November 3, 10, and 16, 2016. She presented again on November 19, 2016 reporting that she was doing better and didn't have a headache until she had to travel again and was in the car for hours without getting out. When she did so she had leg and low back pain and a sharp pain into her hip which she hadn't had for a long time. Her neck and headache pain was increased more than normal and her traps were "all knotted up." After treatment, Petitioner reported her headache, neck and back pain were gone. It was further noted that Petitioner was really busy and would try to come in when she could due to her schedule. The doctor was recommending weekly visits. Petitioner reported that the chiropractic treatment was helping her more than anything since the accident. (PX 1A)

When Petitioner returned to see Dr. Baxter on November 28, 2016 she reported feeling overall better since the last visit. She denied any further headaches and was rating her pain at a 2 in her neck and upper back and she denied hip pain or sciatica whatsoever. In her low back, she was feeling a dull ache. Her prognosis was good. (PX 1A)

On December 3, 2016, Petitioner reported to Dr. Baxter that she had been involved in two car accidents: a collision at a gas station on November 17, 2016 and a rear end collision on November 28, 2016. (PX1A, 1B). Petitioner termed the first accident as minor but the second as causing a" terrible increase in her pain." She was stopped in a Jeep Renegade at a stop light on Spillway Road and was rear-ended and she heard tires squeal. She stated "her head got whipped forward and back and [she] had immediate neck, upper back and headache pain." She was nauseated right afterward and had been having a headache she couldn't get rid of. Petitioner reported severe neck pain and migraines and the inability to sleep due to pain. She also reported knots, swelling and spasms when moving or trying to turn her head and neck. It had been difficult for Petitioner to drive to the appointment because of her migraine and this was the first day Petitioner felt like she could get in for treatment. Dr. Baxter noted Petitioner was having difficulty performing activities of daily living and that almost any movement, such as carrying, concentrating, coughing and sneezing, extended computer use, getting out of bed, repetitive motions, trying to get up in the morning and working were difficult. Dr. Baxter noted, "She states she did not have headaches or pain at work before the accident." (PX 1B, p. 3/78) Dr. Baxter noted that the complicating factors for Petitioner included: "previous disc herniation, work requirements, driving for work, and previous AA." (PX 1B, p. 13/78) Petitioner was advised to undergo therapy three times a week for six weeks. Petitioner did not believe she could do that with her work schedule as she sometimes had to be gone for weeks at a time; however, when she could come in she would try and come in twice a week. She felt better by the end of the appointment. (PX1A, 1B).

Petitioner returned to see Dr. Baxter on December 5, 2016 reporting she had been sore all over from the accident but her neck and headache pain was less intense. She had begun getting sciatica on the left side and pinching in her low back the night before after a long drive. Her headache was described as more of a tension headache than a migraine headache. As of December 6, 2016 Petitioner was reporting problems with neck and back pain since the most recent accident which was making it hard for her to sleep. Petitioner returned to see Dr. Baxter on December 15th with ongoing complaints. She then returned on January 2, 2017 reporting that, overall, she was feeling worse since her last treatment. Petitioner had been gone for work and the holidays and had

been doing a lot of driving resulting in pinching and sharp pain in her left hip. Petitioner had been unable to engage in exercises or work out due to pain. Petitioner continued to see Dr. Baxter for headaches associated with sleep problems. As of January 19, 2017, Petitioner reported she was feeling better and trying to do things she had not been able to do around her house since the accident and she reinjured her neck and back just trying to clean and move things, such as furniture. (PX 1B)

Petitioner continued seeing Dr. Baxter. In the March 4, 2017 office note Dr. Baxter indicated Petitioner told her she had not been having pain driving before her "last accident" nor was she having the frequency and intensity of headaches. Currently, she was getting about two a week although with all the driving she was currently doing she had been having one for the last four days. Petitioner also advised the doctor that she had been getting closer to her pre-injury status before all the traveling and now it has increased her pain again and she's getting pinching and sharp pain in her right hip and buttocks and aches and knee pain bilaterally with more pain right than left. Due to an exacerbation, the doctor recommended therapy two times a week for six weeks. (PX 1B)

As of April 15, 2017, Petitioner was reporting her back was doing great since her last visit with the doctor and she was having less headaches and less intense neck and upper back pain. Petitioner wished she could be more consistent with treatment but work seemed to get in the way. As of her next visit on April 19, 2017 Petitioner was reporting that she had been doing well until she had to do along drive again for work and it hurt her low back and hip resulting in sharp pain on the left and into her leg and buttocks. She didn't sleep well due to low back and left hip pain. As of May 4, 2017, Petitioner was reporting an increase in pain from work and a headache for three days straight. She reported an increase in sciatica on the left form working and having to drive and be gone so much and her low back and hip were "killing her". "She states this is all from the car accident and is an exacerbation of pain from working. She states she never used to have pain driving like this before all this happened and is frustrated. She states she tries to work out, get treatment, do yoga, and working, lifting, driving, seems to increase her pain the most." That day her sciatica was all the way to her left foot with intermittent numbness and tingling. (PX 1B)

Petitioner continued to see Dr. Baxter. As of June 28, 2017 Petitioner was reporting waking up with a catch in her neck and low back pain and pain into her right and left hips. She was reportedly sore all over as she was packing, moving, lifting, etc. all of which increased her pain. "She states that kind of stuff never hurt her before the car accident." (PX 1B)

Petitioner's last office note of a visit with Dr. Baxter is dated June 29, 2017. Petitioner reported low back pain of a "4" with stiffness and decreased pain going down her leg. Her neck and upper back were a "3" with stiffness and aching. No headaches were mentioned. (PX 1B)

According to medical bills submitted into evidence (PX 1A) Petitioner continued to see Dr. Baxter; however, there are no office notes/records contained within the record. Those visits would have been on August 24, 2017, August 28, 2017, October 24, 2017, and November 16, 2017. (PX 1A – bills)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on March 14, 2018. Again, the disputed issues were accident, notice, causal connection, medical bills, and the nature and extent of any injury. Respondent's representative at the hearing was Sarah Vanvooren. Both Petitioner and Ms. Vanvooren testified at the hearing.

Petitioner testified she began working for Respondent in August of 2014 as the office accountant and manager. Petitioner explained she helped plan events, completed payroll, addressed HR needs, and things of that nature. Petitioner confirmed she drove her personal vehicle to and from work and would typically park in the south parking lot across the street from the student center in front of travel services. Petitioner said the lot is designated for employee use only as there are separate lots for students or visitors. Petitioner stated she had a permit to park in the lot. Petitioner indicated she had to use her own vehicle daily to travel while working for SIUC at that time of the year. Petitioner described the lot in relation to her office by saying she worked at the south end of the Student Center on the second floor. Petitioner would leave the building by going down the escalators to the east side of the exit. She would then walk south down the sidewalk and across the loading dock driveway leading to the Student Center. Petitioner said she would then cross the south crosswalk to the parking lot. Petitioner indicated she was paid mileage when driving her personal vehicle for work purposes. Petitioner confirmed there is a lot of vehicular and pedestrian traffic in that area on a regular basis.

On direct examination, Petitioner testified that Respondent owns the parking lot, buildings, and all of the surrounding property. Petitioner agreed that Respondent maintains the crosswalks that she used to go to and from her car. Petitioner said the crosswalks are clearly marked with paint on the ground and signs telling drivers to yield for pedestrians, although the one in which the accident occurred does not.

Petitioner testified her accident occurred at approximately 4:40 p.m. Petitioner stated she entered the crosswalk which spans three lanes of traffic. Petitioner explained she was carrying her things to her car and was walking in the center lane or turn lane when she was hit by a car. Petitioner admitted she did not see it coming and does not remember anything after that point. Petitioner believed she lost consciousness since she only remembers landing and being immediately put into an ambulance because it happened to be waiting at the intersection as well. Petitioner stated she was taken to Memorial Hospital of Carbondale and released later that same day. Petitioner described her pain as being located in her head, neck, right hip, and lower back. Petitioner said her hips were hit by the car.

Petitioner testified she followed up with her family doctor, Dr. Eric Graham, after the accident and he referred her to his own personal chiropractor, Dr. Angela Baxter, due to her migraines and upper body pain. Petitioner confirmed she then began a lengthy course of physical therapy with Dr. Baxter which continued until November of 2017.

Petitioner testified she notified her supervisors of her accident. Petitioner said they were notified when she was in the hospital. Petitioner stated Jackie Welch, one of her supervisors, met her in the hospital.

Petitioner testified she suffered a second accident when she was rear-ended while stopped at a red light on her way into work. Petitioner stated the frequency of her treatment with Dr. Baxter increased after that accident. Petitioner explained she had to go back to seeing Dr. Baxter twice a week while she had been seeing her once a week if her schedule allowed prior to the rear-end collision. Petitioner said she had never treated with a chiropractor prior to her alleged work accident. Petitioner indicated she stopped treating in November of 2017 as she was "too pregnant to see her."

Petitioner testified she currently has migraines lasting days which sometimes cause her to lose vision in her right eye, along with sciatic pain because of what she called a lower disc issue. Petitioner also described occasional discomfort while sleeping or riding in a vehicle. Petitioner explained she accepted another position with Respondent following the accident which required her to drive more frequently, and she ultimately left due, in part, to the driving issues. Petitioner described her sciatica as occurring daily, migraines as occurring weekly, loss of vision as occurring monthly, and back pain as occurring less often. Petitioner said she goes to sleep to address the temporary right-sided vision loss.

Petitioner testified the time of day her accident occurred was particularly busy because everyone was leaving campus at 4:30 p.m. and using that particular exit. Petitioner confirmed that other employees drive in the same manner as the individual that hit her. Petitioner said she always used the same crosswalk because it was the most convenient. Petitioner stated she would also use that same crosswalk when leaving for errands in the middle of her workday.

Petitioner testified that she just gave birth six days prior to the arbitration hearing and was somewhat sleep deprived on the day of the hearing.

On cross-examination, Petitioner testified her work hours were typically 8:00 p.m. to 4:30 p.m., depending on if there were any additional after hour events. Petitioner stated employees and students use the crosswalk where the accident occurred as it is generally open to the public. Petitioner confirmed that people visiting the campus would also be able to use the crosswalk in question. Petitioner said she did not have an assigned parking spot. Petitioner explained she would need to park in the lots which coincided with the decal she was required to purchase as an employee which was a blue decal denoting faculty or staff parking. Petitioner then agreed she could park in any of the blue lots located all over campus. Petitioner said the crosswalk she used leads to the edge of the blue lot in which she was parked. Petitioner used Respondent's Exhibit 7B to point to the lot she was parked in on the date of accident which was Lot Number 13A. Petitioner drew a line where she believed the crosswalk is located on Respondent's Exhibit 7A. Petitioner agreed she began on the side of the street in front of the Student Center, crossed three lanes of traffic, and would have come to a sidewalk. Petitioner stated the sidewalk splits the roadway from the parking lot. Petitioner could not recall if she drove her personal automobile for purposes of her employment during her workday on September 22, 2015. Petitioner said she would have driven it to and from work that day.

Petitioner testified Ms. Welch visited her at the hospital on the day of her injury. Petitioner stated Ms. Welch was an event coordinator. Petitioner retracted her previous statement that Ms.

Welch was her superior and, instead, stated she was a co-worker in the same office as Petitioner. Petitioner agreed that she would not have called in sick to Ms. Welch, but instead would have felt obligated to reach out to her direct supervisor. Petitioner described Ms. Welch as someone who could get a message through to her direct supervisor if needed.

Petitioner testified she believed her rear end automobile collision likely occurred in in September of 2017. Petitioner stated she was still seeing Dr. Baxter, a chiropractor, at that time. Petitioner indicated she ended her treatment with Dr. Baxter in November of 2017 as she was too pregnant to continue. Petitioner was unaware if Dr. Baxter treats pregnant women. Petitioner claimed several people recommended she not see a chiropractor while pregnant though her OB physician said it was acceptable to get massages if the person providing them had particular training. Petitioner said Dr. Baxter's staff did not have the type of training required.

Petitioner was asked how she was able to determine whether her migraines and sciatica were due to her work accident or pregnancy. Petitioner testified that her migraines were extremely consistent in that if she was sitting at her desk all day, she would almost definitely have a migraine by the end of the day. Petitioner also said her drive to her home in Benton at that time was awful which would cause her to stop at her parent's home in Royalton. Petitioner explained that after her second accident, her migraines became more frequent. Petitioner said she just dealt with the migraines during pregnancy. Petitioner claimed her migraines and loss of vision began at the hospital after the alleged work accident. Petitioner described her migraines as lasting for about two weeks following her injury, followed by difficulty making it through the work day for approximately a month. After that, Petitioner described the migraines as something that improved with treatment from Dr. Baxter, but something that would never fully go away. Petitioner agreed the frequency of her migraines decreased ever since the accident but have not fully gone away. Petitioner does not take and has not been prescribed medication for any of her ailments she claims were caused by her alleged work accident, including her migraines, loss of vision, or sciatic pain. Petitioner confirmed she had not treated with a chiropractor since November of 2017 and had no future appointments scheduled. Petitioner was never referred to an orthopedist.

Petitioner testified, that in addition to Ms. Welch, she notified her direct supervisor and director of continuing outreach, Karen Stallman, of the accident. Petitioner stated Ms. Stallman and Sarah Vanvooren were notified the night of her accident. Petitioner claimed she told them she was filing a workers' compensation claim that same night. Petitioner indicated she was familiar with Respondent's Exhibit 1, the Workers' Compensation Employee's Notice of Injury form and had completed it three times. Petitioner claimed the form, dated May 25, 2016, was actually the third version she had completed. Petitioner had no copies with her of the earlier versions she claimed had been completed; however, they were at home. Petitioner had no explanation for the gap of time between Petitioner's accident of September 22, 2015 and the completion of the Workers' Compensation Employee's Notice of Injury form on May 25, 2016.

On redirect examination, Petitioner testified the rear-end collision actually occurred in November of 2016, according to Dr. Baxter's records and agreed she could not remember the exact time. Petitioner confirmed she was previously mistaken in saying it occurred in late 2017. Petitioner testified visitors at SIUC are not allowed to park just anywhere. Petitioner stated Respondent controls where visitors, employees, and students park.

Sarah Vanvooren testified on behalf of Respondent. Ms. Vanvooren testified she was employed as the assistant director of conference and scheduling services on September 22, 2015 and is familiar with Petitioner's accident. Ms. Vanvooren agreed with the location of the crosswalk as previously noted by Petitioner on Respondent's Exhibit 7A. Ms. Vanvooren stated she uses that same crosswalk every day and it is used by employees, students, the general public, and visitors. Ms. Vanvooren agreed there are no restrictions as to the crosswalk's use. Ms. Vanvooren confirmed the Student Center is on one side of the crosswalk, which is an active location. Ms. Vanvooren indicated there are several parking lots coded in different colors on the side of the street opposite the Student Center. Ms. Vanvooren also noted Travel Services is located on the other side of the blue lot. Ms. Vanvooren explained that the burgundy lot, Lot Number 13, is a visitor lot, and the red lot, Lot Number 11, is a student lot. Ms. Vanvooren confirmed that the road between the lots is a dead-end leading only to Travel Services and the Physical Plant. Ms. Vanvooren said the building south of the Student Center is called Neckers which is primarily a math and science building where classes occur. Ms. Vanvooren described the activities occurring at the Student Center as including general student use, eating, a bowling and billiards center, a craft shop, other spaces for rent, and offices including conference and scheduling services and student organizations. Ms. Vanvooren explained the Student Center is primarily used by students and departments, but they also have off campus rentals. Ms. Vanvooren testified that anyone who intended to visit the Student Center, Neckers, or anything past those buildings on campus would have the option to use the crosswalk in which Petitioner's accident occurred. Ms. Vanvooren agreed Petitioner's work hours were typically 8:00 a.m. to 4:30 p.m. Ms. Vanvooren testified she was aware of Petitioner's accident at 5:30 p.m. on September 22, 2015. Ms. Vanvooren stated she was not aware it was a workers' compensation issue for approximately one to two months after the injury and wasn't aware that forms needed to be completed until January of 2016.

Ms. Vanvooren testified Petitioner no longer works under her as she voluntarily moved to the position of admissions coordinator in July of 2016. Ms. Vanvooren stated she was aware of Petitioner's symptoms prior to July of 2016 and they included headaches and severe back pain. Ms. Vanvooren said Petitioner appropriately took sick time off work to deal with her symptoms or attend appointments which she did not believe was excessive. Ms. Vanvooren confirmed she was not aware of the involvement of workers' compensation or the payment of TTD at that time.

On cross-examination, Ms. Vanvooren testified Respondent owns and controls where employees, students, and visitors park on campus. Ms. Vanvooren further testified that Respondent owns the streets and crosswalk in question.

On redirect examination, Ms. Vanvooren testified there is nothing wrong with the crosswalk as it is clearly marked with paint on the roadway. Ms. Vanvooren also testified that it is a particularly busy intersection as a bottleneck is created there with students, visitors, and staff all leaving at the same time.

Respondent did not have Petitioner examined by a doctor of its own choosing.

The Arbitrator concludes:

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

Petitioner sustained an accident on September 22, 2015 that arose out of and in the course of her employment with Respondent.

Petitioner bears the burden of proving each and every element of his case in order to recover under the Illinois Workers' Compensation Act. *Shelton v. Indus. Com'n*, 267 Ill. App. 3d 211, 221, 641 N.E.2d 1216, 1224 (5th Dist. 1994). In order to satisfy the "arising out of" portion of the Act, the Petitioner must show that the injury was derived from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.App.2d 193, 203, 797 N.E.2d 665, 672 (3rd Dist. 2003). The "in the course of requirement speaks to the time, place, and circumstances of the injury." *Orsini v. Indus. Com'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005 (1987). If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his/her duties and while he/she is performing those duties or doing something incident thereto, the injury is deemed to have occurred in the course of employment. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 38 (1980). The parties appear to agree that Petitioner's accidental injuries occurred in the course of her employment. After all, an injury accidentally received on the employer's premises by an employee going to or from his actual employment by a customary or permitted route, within a reasonable time before or after work, is considered in the course of one's employment. *Chmelik v. Vana*, 31 Ill. 2d 272, 278, 201 N.E. 2d 434 (Ill., 1964). The pivotal issue in this case appears to be whether Petitioner's accident "arose out of her employment."

The 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 a hazardous condition of the employer's premises. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App. (2d) 160351WC. The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment and, therefore, 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 member of the general public. *Id.* Such injuries are not analyzed under "neutral risk" principles; rather, they are deemed to be risks "directly associated" with the employment. *Id.*

In *Chmelik v. Vana*, 31 Ill.2d 272 (1964), the Illinois Supreme Court addressed the compensability of an accident very similar to the one at bar. The claimant in *Chmelik* was walking across the employee parking lot to his car at the conclusion of his work day when he was struck by the defendant's car, who was also leaving work. *Id.* at 274. The Court stated:

> [T]he courts of this jurisdiction have consistently concluded that an injury accidentally received on the premises of the employer by an employee going to or from his actual employment by a customary or permitted route, within a

> reasonable time before or after work, is received in the course of and arises out of the employment. *Id.* at 279.

The Illinois Supreme Court found it significant that the employee parking lot was furnished and maintained by the employer to facilitate arrival and departure from work, and that it was contemplated that employees would use the parking lot coming and going from work. *Id.* at 279-80. The Court noted that the parking lot was connected to the employer-employee relationship because the parking lot was provided by the employer and used as an incident of the employment. "The lot was used as an adjunct of the employer's plant, it was furnished and maintained by the employer to facilitate arrival and departure from work, and it was contemplated that employees would use the lot in going to and from their employment. " *Id.* In response to a second argument in which the employer contended that the employees using the lot were exposed to no greater peril than the general public, the Illinois Supreme Court stated that even if such a showing had been made (it wasn't) that the public used the lot or were exposed to its perils, "would be of little avail" because "[t]he regular and continuous use of the parking lot by employees, *most particularly at quitting time when there is a mass and speedy exodus of the vehicles on the lot*, would result in a degree of exposure to the common risk beyond that to which the general public would be subjected." *Id.* [Emphasis added.]

In *Jewel Companies, Inc. v. Industrial Comm'n*, 57 Ill.2d 38 (1974), the Supreme Court reached the same conclusion when an employee was injured while riding his motorcycle on the employer's roadway as the employee drove to an on-site cafeteria for lunch.

In *Hammel v. Industrial Comm'n*, 253 Ill.App.3d 900 (3rd Dist. 1993), the employee was injured while driving her car away from work after her work day had concluded. *Id.* at 901. The employee had left the employer's parking lot and was driving on a roadway designated by the employer for ingress and egress. *Id.* In holding the accident arose out of the employment, the appellate court stated the configuration of the employer's parking lot required semi-trucks to cross employee traffic and created a hazard "*particularly at the end of a shift*," to which the public was not exposed. *Id.* at 903.

In *Oscar Mayer Foods Corp. v. Industrial Comm'n*, 146 Ill.App.3d 315, 496 N.E. 2d 515 (1986) the Appellate Court addressed yet another very similar issue to the one at bar. In *Oscar Mayer* the claimant was leaving work at 3:30 p.m. along with approximately 100 other employees, when she was struck by an automobile driven by a co-employee while crossing the main entrance road between the plant and the parking lot. The employer owned both the parking lot and the road where the accident occurred. At issue in the case was whether Petitioner's accident arose out of her employment. The employer maintained that there was really no difference between what happened to the claimant at the plant than what might happen with traffic in a shopping center or a grocery store and, therefore, there was no "evidence that the danger causing the injury was peculiar to the employee's work." *Id.*, p. 319. The Court rejected that argument. The Court further noted that the fact that the accident occurred on the road rather than in the parking lot wasn't significant (citing *Mast v. Rogers*, 118 Ill. App.2d 288, 292, 254 N.E.2d 179, 181) *Id.* The Appellate Court found the accident arose out of the employee's employment. In so deciding it followed the Illinois Supreme Court's decision in *Chmelik v. Vana*, 31 Ill. 2d 272, 201 N.E. 2d 434 (1964).

The Appellate Court recently addressed a similar issue, albeit within a different factual context, in *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351 WC. In *Dukich* the employee was injured when she walked down a handicap ramp, lost her footing on the wet ramp and fell. The claimant in *Dukich* contended that the risk she encountered when she fell was distinctly associated with her employment because the wet pavement that caused her fall was located on her employer's premises and, as such, was an employment-related hazard rather than a neutral risk (requiring a different analysis). The Court held that the claimant's injury was not caused by a "hazardous condition" on the employer's premises because the ramp was wet due to rainfall and rainfall doesn't constitute a "hazardous condition." *Id.* Having determined that the claimant's injury was not caused by a "hazardous condition" on the employer's premises, it turned to the "neutral risk" analysis and determined that the claimant's fall was not compensable because the dangers created by rainfall are dangers to which all members of the general public are exposed on a regular basis. *Id.* The Court noted, "Although the employer provided the claimant a designated parking space, there is no evidence that the employer exercised any control over the particular route the claimant took to her car or required the claimant to traverse the particular handicap ramp on which she was injured." *Id.* The Court also noted that there was no evidence suggesting the claimant's employment duties somehow contributed to her fall or enhanced the risk of slipping on wet pavement. *Id.*

In the instant case, Petitioner was leaving work and walking to her car. At all times she was on Respondent's property. As she was crossing the street during a busy time of day she was struck by a vehicle being driven by another of Respondent's employees. Both witnesses testified that Respondent owns and controls where employees, visitors and students park on campus. Respondent also owns the streets and crosswalk where the accident occurred. They agreed that Respondent maintains the roads, parking lots, and crosswalks on the campus. Petitioner testified that while other crosswalks are clearly marked with signs, this particular one was not. Ms. Vanvooren did not address the lack of signage; rather, she pointed out that the cross walk was clearly marked by paint on the roadway. Both witnesses agreed that the place where Petitioner was struck is a particularly busy intersection as a bottleneck is created there with students, visitors and staff all leaving at the same time which was what was occurring when Petitioner was struck. Based upon the foregoing, the Arbitrator concludes that Petitioner's accident arose out of and in the course of her employment with Respondent. The accident occurred on Respondent's premises, shortly after work, during a time where the employer's premises are particularly dangerous as a result of the increased traffic. The Arbitrator finds that the road and the crosswalk, especially at the end of the work day when there was a "bottleneck", created a hazardous condition. Alternatively, if one views the facts of the case under the "neutral risk" analysis one can also conclude that Petitioner was exposed to a greater risk of being hit by a car than that of the general public as Petitioner traversed the road more often than that of the general public because she was required to do so to get to and from her office and car and made more than just two trips a day. Petitioner's testimony that she used her car on a daily basis to run errands as part of her job was unrebutted.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner provided timely notice of her accident to Respondent.

Under 820 ILCS 305/6(c), an injured employee must give notice to the employer as soon as practicable but not later than 45 days after sustaining an accident injury arising from the employment. In *Gano Electric Contracting v. IC*, the Appellate Court held that the purpose of notice is to enable an employer to investigate an alleged accident and if some notice has been given, although inaccurate or defective, the employer must show that it has been unduly prejudiced. *Armando Escamilla v. K Tel Construction,* 09 IL.W.C. 16131 (2016), citing *Gano Electric Contracting v. IC*, 206 Ill. App. 3d 92, 631 N.E.2d 724 (4th Dist. 1994).

There is no factual dispute that Karen Stallman, and Sarah Vanvooren, all of whom were in a supervisory role of some sort over Petitioner, were made aware of the accident on the day of accident. Petitioner's testimony to that end was unrebutted. She also testified that she told Jackie Welch, who met her at the hospital. The Employee's Notice of Injury statement states that notice was provided to Sarah Vanvooren on September 22, 2015. (PX 1). The Supervisor's Report of Injury or Illness, signed by Sarah Vanvooren on behalf of Respondent, states that written notice of the accident was received on September 22, 2015, at 17:30 from Jackie Welch. (RX 2).

Any argument by Respondent as to a delay in the reporting of a work accident causing undue prejudice to it is disingenuous. The accident was responded to, and handled by, Respondent's own law enforcement personnel. Ms. Vanvooren candidly acknowledged being unfamiliar with the workers' compensation process and knowing about the accident before the reports were completed in January of 2016. She believed she knew about the accident within a month or two thereafter but didn't know paperwork needed to be completed until January. (RX 3,4,5)

Additionally, the parties stipulated to payment of medical bills by Respondent's group health plan. (AX 1) Under Section 8(j) of the Worker's Compensation Act, the period of time for giving notice of an accidental injury does not commence to run until the termination of said payments. See *Crow's Hybrid Corn Co. v. Industrial Commission*, 72 Ill.2d 168, 380 N.E. 2d 777 (1978)

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

Petitioner failed to prove that her current condition of ill-being is causally connected to her work accident after November 28, 2016, the date she was involved in a significant motor vehicle accident.

Petitioner denied any problems with her head, neck, low back, right hip and left thigh before her work accident.

Petitioner received emergency treatment after her accident and was then referred to her primary care doctor who, in turn, referred her to Dr. Baxter for chiropractic treatment. Dr. Graham diagnosed her with a neck strain, occipital region contusion and post-concussion syndrome. Her treatment with Dr. Baxter, her chiropractor, centered on Petitioner's headaches, neck strain/sprain, and upper, mid and lower back strain/sprain. Petitioner also had occasional complaints regarding her right hip and sciatica down her right leg. Her left hip was mentioned a few times, at best. Petitioner's treatment with Dr. Baxter began approximately one month after the work accident.

Petitioner appears to have voluntarily changed positions while employed with Respondent in July of 2016. She accepted a position with the University as an admissions coordinator which resulted in increased overnight travel over greater distances. After beginning her new employment position, Petitioner's complaints to Dr. Baxter were amplified as supported by the medical records and Petitioner's testimony at trial. Her complaints revolved around driving long hours for work and staying multiple nights in hotel rooms with beds and pillows she was not accustomed to. Petitioner also had three, one-month long gaps in treatment after accepting her new position with Respondent. As reflected in Dr. Baxter's notes, however, these gaps were often the result of travel demands associated with Petitioner's new job. Dr. Baxter's initial treatment of Petitioner was clearly related to her injury of September 22, 2015. As time progressed, Petitioner's symptoms improved with treatment but never completely resolved. While more and more of her complaints after July of 2016 were associated with job demands, her complaints were rooted to injuries sustained in her accident on September 22, 2015. She was not yet asymptomatic. However, as of November 28, 2016, Petitioner was reporting that, overall, she was feeling better since her last treatment (11/19/16) and had not had any headaches. Her pain was rated a "2/10" in her upper back and neck and she denied any hip pain or sciatica whatsoever. Regarding her low back, she described a dull ache. Petitioner's prognosis was described as good.

Petitioner then returned to see Dr. Baxter on December 3, 2016. At that time, Petitioner reported being involved in two unrelated automobile accidents. The first appears to have been relatively minor and occurred on November 17, 2016. Petitioner reported having tightness after it but no spasms or headaches. This accident was not mentioned or described by Petitioner during her testimony. The second, and more significant accident, occurred on or about November 28, 2016. Petitioner was involved in a rear end collision. Petitioner's testimony confirmed this was a non-work accident and caused a sudden increase in her symptoms. Petitioner's symptoms as noted in the doctor's notes were significantly greater than they had been for some time prior to the previous visit of November 28, 2016. Petitioner complained of horrible headaches and migraines since the third accident and described a whiplash-type injury to her head followed by nausea and an unending headache. Petitioner also described tenderness throughout her spine and, for the first time, complaints of nerve pain in her left hip and leg. Petitioner reported difficulty with activities of daily living, carrying, concentrating, sneezing, extended computer use, getting out of bed, and repetitive activity. Petitioner's visits with Dr. Baxter increased as a result of third accident. There was absolutely no specific mention of the September 22, 2015 accident during the December 3, 2016 visit.

A review of Dr. Baxter's billing records and office notes indicates that the insurance company listed for Petitioner's treatment after the third accident was a different insurance company than on any previous occasion, "USAA." (PX 1A, PX 1B) At the time of the December 3, 2016 visit Dr. Baxter wrote, "She [Petitioner] states she did not have headaches or pain at work before the accident." (PX 1B, p. 3/78) Dr. Baxter further noted, "The complicating factors for this patient include the following: previous disc herniation, work requirements, driving for work and previous AA." (PX 1B, p. 13/78) Setting aside the fact that, a "previous disc herniation" had never been noted or discussed in Dr. Baxter's records, Dr. Baxter appears to acknowledge causation issues posed by Petitioner's work and the November of 2016 accidents. Thereafter, Petitioner continued treating with Dr. Baxter, USAA continued to be billed for the treatment, and occasional

references to a "car accident" can be found. For example, on December 5th, 2016 Dr. Baxter notes Petitioner was having a tension headache but had gotten some sleep for the first time since "the accident." (PX 1B, p. 15/78) At the January 19, 2017 office visit, Dr. Baxter noted Petitioner was feeling better and trying to do things she had not been able to do around the house due to pain "after the accident" and had "reinjured her neck and back just trying to clean and move things. " (PX 1B, p. 36/78) As of March 4, 2017 Petitioner was telling Dr. Baxter that she was not having pain while driving before the "last accident" and was not having the frequency and intensity of headaches." She was reporting increased symptoms due to a "flare-up" from driving and traveling for work. (PX 1B, p. 54/78) On April 13, 2017 reference is made to "the accident" but not which one. (PX 1B, p. 69/78) Petitioner's last visit with Dr. Baxter that was billed to "USAA" was on April 19, 2017 at which time Petitioner reported she had been doing well until she had to do a long drive for work and it hurt her low back and hip and she described a sharp pain on the left and into her buttocks and leg and she could feel "the disc pain." Straight leg raising was positive on the left. (PX 1B, p. 75/78) Again, Petitioner had no left leg complaints prior to the accidents in November of 2016. As of June 28, 2017, the last office note of Dr. Baxter's contained in the record, Petitioner was reporting lower back pain rated a "4" with stiffness and decreased pain going down "leg." Her upper back and neck stiffness and aching was rated a "3." She mentioned no headaches. (PX 1B, p. 38/40).

After the November 28, 2016 accident, Petitioner went from attending appointments with Dr. Baxter approximately once a week to several times a week. Petitioner's complaints of soreness, vision loss, and headaches increased considerably. When Petitioner began treating for the car accidents of November 2016, no further specific mention was made of the alleged work accident of September 22, 2015 or the injuries sustained as a result thereof. The attention of Dr. Baxter and Petitioner appear to have shifted to the 2016 rear-end collision which is unrelated to the case herein. Dr. Baxter's references to "a accident" or "the accident" after Petitioner's three accidents is not altogether clear. Petitioner could have deposed Dr. Baxter to clearly establish causation but did not do so.

At the arbitration hearing Petitioner testified that, as a result of her accident on September 22, 2015, she has ongoing migraines and "awful, awful" sciatic pain because of "the lower disc issue." First, she didn't describe which leg has the sciatic pain and, second, no lower disc issue was ever noted in Dr. Baxter's records or causally connected to the 2015 work accident. Her lumbar spine MRI was essentially normal with no herniation being noted. (PX 4) While Petitioner testified as to how she could differentiate between whether her migraines and sciatica were due to her work accident or her pregnancy, she also acknowledged that her headaches increased after the "second" accident.

Based upon the foregoing, the Arbitrator finds that Petitioner's third accident occurring on November 28, 2016 was an intervening accident sufficient enough to break the chain of causation originally based upon a chain of events. After the accident of November 28, 2016, Petitioner failed to meet her burden of proving her condition of ill-being was causally related to the accident of September 22, 2015.

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 findings of the Arbitrator with regard to accident and causation, the Arbitrator finds Respondent is liable for certain medical services related to Petitioner's injuries. Respondent shall pay Petitioner's medical expenses set forth in Petitioner's Exhibits 1 through 7, as provided in Sections 8(a) and 8.2 of the Act, and as itemized as follows:

Memorial Hospital of Carbondale (PX 2); Service date of 9/22/15:	$7,129.29
Cape Radiology Group (PX 3); Service dates of 9/22/15 and 9/23/15:	$451.00
Cedar Court Imaging (PX 4); Service date of 3/30/16:	$1,691.00
Graham Family Medicine (PX 5); Service dates of 9/24/15 and 10/08/15:	$440.00
Jackson County Ambulance (PX 6): Service date of 9/22/15:	$615.40
Southern IL Med. Services (PX 7): Service date of 9/22/15:	$251.00

As to the medical bills of the chiropractor, Dr. Baxter, the Arbitrator relies upon her causation determination set forth above and awards Petitioner only those medical bills from Dr. Baxter for services prior to November 28, 2016:

Angela Baxter, LLC (PX 1A): Service dates of 10/14/15 – 11/28/16:	$11,749.60

Bills for services as of December 3, 2016 are denied.

As stipulated by the parties, Respondent shall pay these expenses directly to the providers pursuant to Sections 8(a) and 8.2 of the Act, and shall have credit pursuant to Section 8(j) for any medical bills paid by its group medical plan and shall hold Petitioner harmless from liability with regard to those bills.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8.1b of the Act is applicable to this claim as the accident occurred after September 1, 2011. The Arbitrator must rely on the following factors as contained in Subsection (b) to determine the level of permanent partial disability for Petitioner: (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. The analysis of the aforementioned factors is as follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an office manager, office accountant, event planner, and handled payroll at the time of her work accident. She began working for Respondent in 2014. Petitioner was able to return to work in her prior capacity as a result of her injury. She claimed no lost time on account of the accident. Petitioner appears to have voluntarily changed jobs in July of 2016; however, Petitioner provided no direct testimony regarding the circumstances of that change. Petitioner further provided no testimony as to when she quit working for Respondent altogether. Petitioner did testify to having headaches at the end of her work day; however, Petitioner was working for Respondent full-time and performing all aspects of her job before the two accidents in November of 2016. Petitioner's current employment status is not known. The Arbitrator, gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 26 years old at the time of the accident. While of relatively young age, no direct evidence was presented as to how Petitioner's age affects her disability and the Arbitrator cannot speculate as to same. The Arbitrator does give consideration to Petitioner's age in assessing permanency.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence was presented regarding Petitioner's expected future earnings. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability as corroborated by the treating medical records, the Arbitrator gives significant weight to Dr. Baxter's records, over that of Petitioner's testimony, given the vague nature of Petitioner's testimony and the causation problems caused by the accident of November 28, 2016. The diagnoses reached by Petitioner's medical doctors summarily included contusions and strains. Petitioner's headaches were sometimes described as migraines and, at other times, as tension-related. Petitioner was put through numerous CT scans, MRIs, and x-rays following her collision, all of which contained no acute findings. She was never referred to orthopedics at any time throughout her treatment and did not seek the treatment of other physicians outside of the emergency room doctor, her primary care physician, and a chiropractor. Petitioner was seemingly pleased with her treatment which was exclusively made up of chiropractic care. Petitioner never received injections or physical therapy. She was not taken off of work or given work restrictions. She requires no pain medication.

At trial, Petitioner complained of a headache that lasted two weeks immediately after her accident, followed by a difficult period of more headaches lasting about one month. In comparison, Petitioner's reports to Dr. Baxter in the months following her injury were that she was improving with treatment and, on a few occasions, was feeling the best she had since the accident. The primary focus of Dr. Baxter was treatment of her spinal discomfort. Petitioner complained of headaches only six times over forty appointments with Dr. Baxter spanning from October 2015 to June of 2016. Petitioner also testified she lost consciousness after the collision with the motor vehicle in the crosswalk. This was disproven by Dr. Graham's record from two days following the injury which states Petitioner had not experienced any loss of consciousness. Petitioner further claimed her treatment with Dr. Baxter ended in November of 2017 when she was too pregnant to receive it. Unfortunately, none of Dr. Baxter's records after June 29, 2017 were included in the record so corroboration is not possible. Petitioner was also unable to fully explain her termination of treatment at trial. The Arbitrator is aware that Petitioner was,

admittedly, "sleep deprived" at the time of the hearing due to having only recently given birth; however, the burden was on her to establish all the elements of her claim. After the accident of September 22, 2015 Petitioner had symptoms and complaints consistent with the nature of the accident she sustained. Slowly and surely, she improved with occasional waxing and waning of symptoms, also consistent with the nature of her injury. Petitioner asserted she currently suffers from weekly migraines lasting days, monthly loss of vision, and daily sciatic pain. In comparison, as of November 28, 2016, (presumably before her unrelated motor vehicle accident of the same day) Petitioner was reporting that, overall, she was feeling better since her last treatment (11/19/16) and had not had any headaches. Her pain was rated a "2/10" in her upper back and neck and she denied any hip pain or sciatica whatsoever. She was then involved in two more car accidents and she appears to have stopped treatment in July of 2017 as no further records were tendered. The Arbitrator reasonably infers that had these additional records from Dr. Baxter been beneficial to her case, they would have been included in the record. No reason for their absence was given.

Petitioner takes no over-the-counter or prescription medication. She is no longer treating for her complaints and symptoms. No future appointments have been scheduled. Petitioner offered no testimony as to the impact of her alleged injury on her daily life or that of her family. The Arbitrator places significant weight on this factor.

While Petitioner originally sustained a left thigh contusion at the time of the accident, Petitioner did not testify to any ongoing issues with her left thigh and the Arbitrator reasonably infers that it resolved over time.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to §8(d)(2) of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY BULLARD,
Petitioner,

vs.

NO: 14 WC 20102

MT. VERNON POLICE DEPARTMENT,
Respondent,

19IWCC0367

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, temporary total disability, and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 5, 2017, 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: JUL 19 2019

María Elena Portela
María Portela

Thomas J. Tyrrell

Deborah L. Simpson
Deborah L. Simpson

MEP/dmm
O: 070919
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BULLARD, JEFFREY
Employee/Petitioner

Case# **14WC020102**

MT VERNON POLICE DEPARTMENT
Employer/Respondent

19IWCC0367

On 9/5/2017, 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 1.11% 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:

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0299 KEEFE & DePAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

19IWCC0367

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

JEFFREY BULLARD
Employee/Petitioner

v.

MT. VERNON POLICE DEPARTMENT
Employer/Respondent

Case # **14** WC **20102**

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 **Herrin**, on **October 14, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [ ] 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. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **March 5, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**73,566.06**; the average weekly wage was $**1,373.61**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **2** dependent children.

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

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

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

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

ORDER

As explained in the Arbitration Decision, Petitioner sustained an accident which arose out of and in the course of his employment with Respondent on March 5, 2014. Petitioner failed to prove that his current condition of ill-being is causally related to the accident. Petitioner reached maximum medical improvement on June 6, 2014.

Respondent shall pay reasonable and necessary medical services totaling $679.01, as reflected in Petitioner's Exhibit 13 that remain unpaid. Specifically, Respondent shall pay medical bills to Express Care of Mt. Vernon for dates of service March 31, April 28, and June 6, 2014, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts previously paid, including those paid through its group medical plan, for which a credit is allowed under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers for which Respondent is receiving credit under Section 8(j) of the Act.

Petitioner is not entitled to and Respondent is not liable for temporary total disability benefits or permanent partial disability benefits.

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

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

Signature of Arbitrator

August 30, 2017
Date

SEP - 5 2017

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

19IWCC0367

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEFFREY BULLARD
Employee/Petitioner

v. Case #: **14 WC 20102**

MT. VERNON POLICE DEPARTMENT
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging he fell on ice on March 5, 2014, injuring his left arm/shoulder, left hand, and body as a whole. The parties agree that an event occurred in Respondent's parking lot on March 5, 2014, but it is disputed whether Petitioner's current condition of ill-being is related to that event.. The parties stipulated, and Petitioner testified, that Petitioner submitted all of his related medical bills through Respondent's sponsored group health plan and that Respondent is entitled to a credit pursuant to Section 8(j) for all bills paid.

Petitioner testified he had been injured throughout his career. He credibly testified that in the "mid 2000's" while attempting to arrest a suspect he injured his left shoulder, which was symptomatic for a few days. He was cross-examined regarding an alleged prior injury to his left wrist. He did recall the injury, for which a claim was filed and a settlement received, but elaborated that the injury was actually to his left forearm and not his wrist. He indicated he was not having any symptoms in either his left shoulder or wrist at the time of the accident on March 5, 2014, and that he was working full duty without restrictions at the time of the accident. He did testify, however, that he was "being guarded" at that time, as he was recovering from ***right*** shoulder surgery unrelated to the March 5, 2014 accident.

It was discussed during the hearing whether Respondent would be entitled to credit for previous settlements or awards. By agreement of the parties, the Arbitrator takes judicial notice of the settlement of case 00 WC 13733. The settlement represented 22% loss of use of the left arm referable to the forearm fracture, which Petitioner testified to. It appears Respondent would not be entitled to a credit on the current left wrist and hand injury, as his earlier fracture was located on his forearm, and the settlement was on the arm rather than the hand. At issue, however, is whether Respondent would be entitled to a credit on the current shoulder injury, based on the prior settlement of 22% loss of use of the left arm.

The parties dispute whether the incident of March 5, 2014, caused an injury to Petitioner's left shoulder and left wrist. The event at issue was captured on a parking lot security camera, and the video of same was admitted as Respondent's Exhibit 1. The parties agree that medical treatment rendered to Petitioner's left shoulder and left wrist were medically necessary, but Respondent disputes its relatedness to the parking lot event.

On March 5, 2014, Petitioner was 44 years old, single, and had two dependent children. He was employed by Respondent as a Detective Captain and had been with Respondent for 19 years. He testified he had had received numerous commendations for his actions and abilities, with near perfect ratings on his annual performances. Petitioner tendered several evaluations, which included notations that he was committed to providing a safe and productive work place, that he "possesses a very strong set of ethical and moral values", and that he had "become the primary reliable detective on major case instances". PX11.

Petitioner testified that he was in charge of the Mt. Vernon Police Department High Risk Team (HRT) and that on March 5, 2014, the team was preparing for a training day. He testified he had carried items from his car to the HRT truck and then returned to his personal vehicle to retrieve some additional items. There had been a recent snow storm and the parking lot had been cleared, but there were patches of snow and ice. As he approached the HRT truck he slipped on a patch of black ice and lost his balance. He testified that he slammed into the side of the truck and grabbed the handrail with his left hand, causing a twisting and jerking motion of his left arm as he changed directions.

The incident in question was captured on the security camera covering the rear parking lot of the Mt. Vernon Police Department, and Respondent offered the security video into evidence as Respondent's Exhibit 1. Petitioner testified that he had seen the video and in fact obtained a copy of it not long after the event. The video is just under two and a half minutes (2:18) long. As the video begins, Petitioner is seen carrying items from his personal vehicle to the HRT truck. It appears there are rifles in cases in his right hand and a bag in his left hand. These items are placed inside the truck. Petitioner then returns to his car and retrieves items from his trunk and front seat. He is seen carrying his coat as he approaches the truck. At the point of 1:20 on the video Petitioner loses his balance and slips, grabbing the handle on the left side of the door. Although the video is shot from a vantage point which is a considerable distance from the accident and is shot from an angle, the video does capture a slip on the icy parking lot and Petitioner grabbing the handrail on the truck and sort of falling against the truck. As the door is opened by a co-worker, Petitioner is seen still holding onto the bar and gives no indication of discomfort at that time. Later in the video at 1:57 Petitioner uses his left hand and arm again freely to hang onto the handrail bar and close the door with his right hand. At approximately 2:13 Petitioner is speaking with another officer and moves his left arm up and down freely, without any indication of discomfort. RX1.

Petitioner testified that as he approached the vehicle door he felt his feet start to go out from underneath him and he reached out quickly with his left hand, pulled himself toward the truck, and then impacted the vehicle. He testified that he felt immediate pain in his left shoulder and left wrist.

Petitioner testified that he completed an accident report the following day. On the Employee's Accident Report he indicated he slipped on a sheet of ice on the parking lot and to keep from falling he grabbed a handrail near the door, held himself up, and bounced off the truck. He further noted that his body violently jerked around and hit the HRT truck, and he had pain in his left wrist and left shoulder. PX1. A Supervisor's accident report was also completed the following day. It indicated that Petitioner reported he had slipped on the icy parking lot, grabbed the handrail to prevent falling, and the jerking/twisting caused by grabbing the rail caused pain and discomfort in his left wrist and left shoulder. PX1, RX2.

Both accident reports list Matt Gordon as the only witness to the events. Officer Gordon is no longer with Respondent and now works for the Illinois State Police. He was called as a witness by Petitioner and testified that he could not see Petitioner slide into the truck or grab the handrail with his left hand. He testified that he heard Petitioner hit the side of the truck and thought possibly he had hit his head. He further testified that when he opened the door to the truck his impression was that Petitioner "had a look of discomfort on his face". Officer Gordon testified that he watched the parking lot video about a week after the event but was not certain if he viewed it with Petitioner.

Both Petitioner and Officer Gordon testified that Petitioner participated in the training exercises on the day of this event. Petitioner testified that he is a hands-on leader and performs everything the other officers are expected to perform. Neither witness could recall the specific training events of that day, but both testified that training typically involves firearms training, scaling walls, breaking down doors, simulated pursuits, and arrests. Both agreed that the description of these typical activities was that they were physical in nature.

Petitioner testified that he delayed seeking medical treatment because he was hopeful the symptoms would improve. He did not seek any medical care until 16 days later, on March 21, 2014, and he testified that he worked regular duty throughout this period of time. He ultimately underwent surgery to both his left shoulder and his left wrist. Petitioner testified that currently his shoulder and wrist definitely feel better. After work, if he has been doing physical activities, he does experience some soreness over the surgical sites. He is able to carry out all of his regular duties as a police officer and he is not planning on any additional medical treatment.

The Arbitrator notes that on March 18, 2014, Petitioner presented to Dr. James Emanuel of Parkcrest Orthopedics for an Independent Medical Evaluation for his ***right*** shoulder, which he had injured at work on July 12, 2013. Although this evaluation was with regard to the right shoulder, Dr. Emanuel did perform an examination of ***both*** shoulders. He noted, "The opposite shoulder demonstrated full rotator cuff strength, normal stability, no significant tenderness, no bursitis impingement." There is no mention in the report of the more recent accident or an injury to the ***left*** shoulder and wrist. RX3.

Following the accident, Petitioner presented to Express Care of Mt. Vernon on March 21, 2014. He reported that he "went to grab handle to prevent fall and pulled shoulder and wrist", and continued to have pain in both areas with use. He described the pain as "mild" in nature, with no accompanying weakness. On examination, there was mild tenderness over the volar

aspect on the radial side of the left wrist and range of motion was normal. With regard to the left shoulder, there was mild tenderness in the area of the rhomboid muscles, normal range of motion in all directions, no weakness, and normal reflexes. Left wrist and shoulder x-rays were performed, which showed mild degenerative joint disease in both areas, but no evidence of fractures. Petitioner was diagnosed with sprains of his left wrist and left shoulder and was given pain medication. He was allowed to return to regular work duties but was advised to rest his left arm when he was able to. PX2, PX3.

On April 28, 2014, Petitioner returned to Express Care of Mt. Vernon for follow up of his left shoulder and wrist injury. He reported he was still having pain in both areas, which increased with any movement. On examination, there was mild tenderness in the left wrist, with normal range of motion. There was mild tenderness in the left shoulder, no weakness, and normal range of motion with some increased pain with motion. Assessment continued to be sprain of the wrist and shoulder. He was instructed to take Motrin, continue to work full duty, and follow up with an orthopedist on April 30. The Arbitrator notes there is no record of such an evaluation on April 30. Petitioner next followed up with Express Care on June 6, 2014, for the purpose of a urine drug screen and follow up from accident. His complaints and examination were unchanged, and the examination note reads verbatim as the note from April 28. PX2.

The next medical record is September 4, 2014, when Petitioner returned to Dr. Emanuel. It was noted that Dr. Emanuel had been asked to take over management of Petitioner's ***right*** shoulder condition (related to his work accident of July 12, 2013). He performed a full physical examination of ***both*** shoulders, and noted that the left shoulder appeared normal, with no atrophy or scapular winging, range of motion and strength were normal, and there was no tenderness to palpation. Dr. Emanuel noted impingement sign, Neer test, instability test, apprehension test, and anterior and posterior tests were all negative. The Arbitrator notes there was no mention of Petitioner's more recent accident or injury to his ***left*** shoulder and wrist, and there was no examination of the left wrist. RX3.

On September 17, 2014, Petitioner underwent surgery by Dr. Emanuel on his right shoulder for rotator cuff repair, debridement, spur removal, and distal clavicle resection. He followed up with Dr. Emanuel on September 25 and noted continued pain. He was released to one-arm duty at that time. RX3.

On October 8, 2014, Petitioner presented to Express Care of Mt. Vernon. It was noted that the purpose for the examination was his annual police department physical. It was further noted that Petitioner "denies any medical complaints". There was no mention of the left shoulder or left wrist. PX2. Petitioner testified that he informed personnel at Express Care that he was still having problems and was trying to get an MRI approved through worker's compensation. He believed that since complaints had previously been recorded the personnel did not bother to write them down again. However, there are no complaints or examination findings noted as part of this evaluation.

On October 20, 2014, Petitioner followed up with Dr. Emanuel for his right shoulder. There was no mention of the left shoulder or wrist. RX3.

Records from Express Care of Mt. Vernon include a page of handwritten notes, which appears to reflect telephone calls. One note states, "Jeff Bullard would like to go ahead and see if we can get his MRI going on his left wrist and shoulder. He has had his surgery on his right shoulder done. His Lt shoulder is still hurting, but his wrist is feeling numb and tingling now." Another note states a message had been left to approve an orthopedic referral on October 30. There is no corresponding office note. PX2.

Petitioner followed up with Dr. Emanuel for his right shoulder on November 17, 2014, January 6, 2015, and January 20, 2015. It was noted at each examination that he was participating in physical therapy or work hardening. There was no mention in any of these records of problems with Petitoner's left shoulder or wrist. He was released to full duty at MMI for his right shoulder on January 20, 2015. This is the last record from Dr. Emanuel. RX3.

The next medical record is approximately three months later, March 25, 2015, at which time Petitioner presented to Dr. Nathan Mall of Regeneration Orthopedics. The Arbitrator notes this was more than five months after Petitioner's last visit at Express Care of Mt. Vernon for the police physical, and nearly a year after the date of the accident. He reported he had slipped on a patch of ice and grabbed onto the truck with his left arm and suffered a traction type of injury to the left shoulder. He further reported he was able to pull himself toward the truck to avoid falling and also developed some left wrist pain. Petitioner reported he had been working full duty except from September 2014 to January 2015, when he was on light duty due to the right shoulder surgery. He stated that during the work hardening for his right shoulder his left shoulder pain significantly worsened. The Arbitrator notes that the work hardening records were not proffered at the time of trial. PX4.

Dr. Mall noted that on physical examination Petitioner had decreased range of motion, full rotator cuff strength, positive O'Brien's test, and pain with dynamic labral compression testing. In addition, Petitioner was tender over the scapholunate joint and the TFCC area of the left wrist. Updated x-rays showed minimal arthritis in the left wrist and shoulder. Assessment was possible left SLAP tear and possible left scapholunate tear versus TFCC injury. Dr. Mall recommended an MRI arthrogram to both the shoulder and the wrist. He opined that the left shoulder "traction" injury described to him could be consistent with a SLAP tear or a rotator cuff tear. He further opined that the heavy gripping type maneuver described could put a lot of force to the wrist and could cause wrist injury. PX4.

On March 31, 2015, Petitioner underwent MRI arthrogram of the left wrist, which revealed a tear to the peripheral ligamentous portion of the TFCC and a full thickness tear in the proximal attachment of the ulnar collateral ligament. Petitioner also underwent MRI arthrogram of the left shoulder, which revealed a superior labral tear extending from the biceps labral anchor to the posterior aspect of the superior labrum (SLAP type II), tendinopathy in the distal supraspinatus, and fraying on the bursal side of the supraspinatus tendon. PX5.

Petitioner returned to Dr. Mall the same day and discussed the findings. Dr. Mall recommended a cortisone injection into the glenohumeral joint of the left shoulder, followed by anti-inflammatories and physical therapy for both the wrist and the shoulder. PX4.

On April 9, 2015, Petitioner presented to Mulvaney Rehab Services upon referral by Dr. Mall. He reported he had injured his left shoulder and wrist on March 5, 2014, when he slipped on ice and grabbed an object with his left arm to prevent a fall. Petitioner underwent 5 physical therapy sessions for his shoulder and wrist from April 9 through April 23, 2015. It was noted he had not seen much change in his symptoms over that period of time. PX6.

Petitioner returned to Dr. Mall on April 28, 2015, who noted he had made some improvements with physical therapy but continued to have a dull, aching pain in the left shoulder. Dr. Mall recommended a referral to Dr. Collard for the TFCC issue. With regard to the left shoulder, he believed conservative care had been exhausted and that Petitioner would benefit from surgery. He again opined that both conditions and the need for treatment were causally related to the work accident. Petitioner returned to Dr. Mall on May 29, 2015, at which time the doctor opined that he had plateaued with conservative care for the shoulder and needed surgery, and that he needed to see a hand surgeon for the TFCC injury. Petitioner was to return in two months for follow up. PX4.

On June 12, 2015, Petitioner was evaluated by Dr. Jason Browdy, Respondent's Section 12 examiner. He provided a history that he was loading gear into the truck and when he got close to the door he slipped on ice. He used his left arm to grab onto a handrail on the side of the truck to keep from falling. Petitioner reported that he grabbed onto the handrail, pulled forcefully, and that his body swung around and hit the opposite shoulder on the truck. He entered a written statement into the doctor's electronic medical record. He stated, "I hurt my left shoulder and wrist while falling on a patch of ice. I reach (sic) for a hand rail with my left hand and pulled myself hard to get from going down. While pulling my body weight caused me to swing to my right and slam into the HRT truck the hand rail was attached to. When I did this I felt pain in both the shoulder and wrist." RX4, Dep.RX2.

Petitioner reported grinding, weakness, and popping in the left shoulder as well as nighttime pain. He also reported significant pain in the left wrist, primarily over the TFCC, which he stated was progressively getting worse. RX4, Dep.RX2.

Dr. Browdy reviewed the MRI arthrograms. With regard to the left shoulder, he noted some degenerative changes as well as a possible linear signal within the superior labrum, consistent with a subtle tear to the biceps anchor and possibly to the labrum. As to the left wrist, he recommended more weight be given to the radiologist's reading than his own. On physical examination, Dr. Browdy noted some compromise in range of motion of the shoulder, but full strength with the rotator cuff, as well as some tenderness in the bicipital groove and at the supraspinatus insertion. His impression was left shoulder pain likely due to proximal biceps tendinopathy and acromioclavicular joint arthropathy. He also believed there was a probable TFCC tear at the wrist. RX4, Dep.RX2.

Dr. Browdy reviewed the parking lot security video. He noted Petitioner walked across a parking lot towards a truck when his feet slipped and he grabbed a railing with his left hand. He went on to state, "However, in my opinion, Mr. Bullard's personal description of the incident is not consistent with the video evidence I reviewed." He noted Petitioner slipped slightly and regained his balance, then used his left arm to grab onto a rail on the side of the truck. He stated,

"I did not see a violent or forceful tugging of the arm, nor did the body swing around and strike the truck as Mr. Bullard described." RX4, Dep.RX2.

In terms of diagnosis, Dr. Browdy opined that Petitioner had left shoulder pain, left proximal biceps tendinopathy, and left AC joint arthropathy, as well as left TFCC tear. He did not believe that the incident of March 5, 2014, as depicted in the security video, would have played any role in the cause or aggravation of those conditions. RX4, Dep.RX2.

On September 30, 2015, Petitioner returned to Dr. Mall. The examination and complaints remained the same. Dr. Mall administered a cortisone injection and continued to recommend left shoulder surgery. PX4.

On November 5, 2015, Petitioner presented to Dr. Matthew Collard regarding his TFCC tear. He reported that in March 2014 he was carrying out his regular duties on a tactical training day when he grabbed the handle of the HRT truck as he slipped on some ice. This jerked his arm and caused left shoulder and left wrist pain. On examination, Dr. Collard noted full range of motion of the left wrist, tenderness over the radial styloid and mildly positive Finkelstein's test, indicating tenosynovitis or DeQuervain's, and positive TFCC grind test. Dr. Collard reviewed the MRI arthrogram and found it was consistent with peripheral TFCC tear at the level of the ulnar collateral ligament with mild sub-sheath injury of the extensor carpi ulnaris. He recommended surgery and Petitioner indicated he was preparing to undergo shoulder surgery and would not be able to have wrist surgery until after that time. As such, Dr. Collard administered a second injection into the wrist and continued Petitioner on anti-inflammatories. PX7.

Petitioner followed up with Dr. Collard on December 9, 2015. He reported that the injection provided relief for about one week, but that the pain had otherwise returned. The examination, diagnosis, and recommendation remained unchanged. PX7.

On December 14, 2015, Petitioner underwent left shoulder surgery by Dr. Mall, consisting of a rotator cuff repair, partial synovectomy, open AC joint resection, and open subpectoral biceps tenodesis for superior labral tear. PX9. Petitioner followed up with Dr. Mall on December 30, 2015, and reported he was doing well. Physical therapy was ordered at that time. PX4. He followed up with Dr. Mall on January 27, February 17, and March 23, 2016, at which time improvement was noted. It was further noted that Petitioner was complaining of pain in the lateral aspect of the elbow, which Dr. Mall diagnosed as elbow tendonitis. PX4. Petitioner underwent physical therapy at Mulvaney Rehab Services from January 4, 2016, through June 3, 2016. PX6.

On April 4, 2016, Petitioner underwent left wrist surgery by Dr. Collard, consisting of TFCC repair. PX7, PX9. He followed up with Dr. Collard on April 13 and May 11, 2016, and reported he was doing well. PX7.

On May 4, 2016, Petitioner followed up with Dr. Mall and reported he was doing well and had minimal complaints. He was progressing with physical therapy but still felt somewhat stiff and weak. It was noted that he had recently had left wrist surgery. Dr. Mall recommended work hardening but noted it was not possible due to the recent left wrist surgery. He therefore

recommended an additional three weeks of regular physical therapy, followed by two weeks of work conditioning when Petitioner was released for the wrist. PX4. Petitioner underwent additional therapy at Mulvaney Rehab Services from May 5, 2016, through June 3, 2016. PX6.

Petitioner returned to Dr. Mall on June 8, 2016, and reported he was doing well with minimal complaints. He had some mild pain in the front of the shoulder but otherwise felt he could return to his normal job duties. On examination, Petitioner had full strength and good range of motion both actively and passively. Dr. Mall placed him at maximum medical improvement with no restrictions and released him from care at that time. PX4.

Petitioner also returned to Dr. Collard on June 8, 2016, and reported he was doing very well, with only occasional pain with certain activities. He had returned to all of his normal activities and had no complaints. On examination, Petitioner had full active and passive range of motion of the wrist, no tenderness, no signs of instability, and negative TFCC grind test. He was released from Dr. Collard's care at that time with no restrictions noted. PX7.

Dr. Browdy testified by way of deposition on October 14, 2015. He is a Board Certified Orthopedic Surgeon with a Sub-Specialty Board Certification in Sports Medicine. Dr. Browdy testified consistent with his IME report. He testified that Petitioner stated, both orally and in the statement he put in the electronic medical record, that he grabbed the handrail on the left side of the truck to keep from falling and as he grabbed the handrail he pulled very forcefully, his body swung around, and he hit his opposite shoulder on the truck. Dr. Browdy testified that he viewed the parking lot security video and that what he saw on the video was a very subtle jerk on the arm, and "not even close" to what Petitioner described. He opined that the event shown in the video did not cause or aggravate Petitioner's left shoulder or left wrist. RX4.

On cross-examination, the following exchange took place:
Q: Now, with your physical exam and the studies you had available to you, this case adds up, right? I mean, he presents to you in a way that's consistent with the diagnosis and the need for surgery, right?
A: It does. I mean, you know, and I'll be perfectly honest. If I didn't have that surveillance video, I would probably have completely agreed with everything up to that point. In fact, I was ready to make my report with that in mind until I looked at the video....What I saw is highly unlikely to have caused an acute labral tear, an acute biceps injury, or an AC injury. RX4.

At hearing, Petitioner testified he had reviewed Dr. Browdy's deposition transcript and report and disagreed with his interpretation of the video. He stated, "One specific indication was, is that Dr. Browdy said that he believed from watching the video, that I had already re-obtained my balance prior to even grabbing the handrail. When I went back and broke the video into still images to sow that, it was clear that when I first grabbed the handrail I still had my left foot approximately a foot and a half up in the air and had not regained balance. Dr. Browdy also said in his reviewing of the video, that he couldn't even tell if I had struck the HRT truck while I was trying to maintain my balance."

The Arbitrator hereby incorporates by reference the above Findings of Fact, and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After review of the evidence and due deliberations, the Arbitrator finds on the issues presented at trial as follows.

In support of the Arbitrator's decision relating to issue (C), whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

To obtain compensation under the Illinois Worker's Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Worker's Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

The Arbitrator finds that Petitioner met his burden of proof in establishing that an accident occurred which arose out of and in the course of his employment. In so concluding, the Arbitrator notes that it is undisputed that Petitioner slipped on the ice on March 5, 2014. It is further undisputed by both the security video and the testimony that Petitioner reached out with his left hand and arm onto the handle of the truck in an attempt to keep from completely falling onto the ice. Although the severity of the incident as described by Petitioner is disputed, he gave a consistent history of the incident itself throughout his treatment and testimony.

In support of the Arbitrator's decision relating to issue (F), whether Petitioner's current condition is causally related to the injury, the Arbitrator finds the following:

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that his left shoulder and left wrist conditions are causally related to his work accident of March 5, 2014. In so concluding, the Arbitrator finds there are a number of questionable factors, none of which involve the veracity of the witnesses, in that the Arbitrator found both Petitioner and Officer Gordon to be credible in their testimony. However, the Arbitrator finds significant the delay in treatment with respect to these conditions, the long periods of no treatment, the security video, and the type of injuries diagnosed when compared to the video and the testimony of Dr. Browdy. The Arbitrator further finds the testimony of Dr. Browdy to be more credible than the remarks made by Dr. Mall, who did not testify and apparently did not review the security video of the incident. In addition, although Dr. Collard noted that Petitioner's "claim was denied in regards to these injuries", he did not offer a causal connection opinion with regard to the wrist/TFCC injury.

It is undisputed that Petitioner slid into the HRT truck on March 5, 2014. The degree of the impact is fairly clear on the video. The history recorded by Dr. Mall and Dr. Collard

included descriptions of torqueing, twisting, pulling, and violent. The video shows that Petitioner did nearly fall, but the description on which Dr. Mall relies appears to be overstated based on what is in the video. Again, Dr. Mall's records do not mention that he reviewed and analyzed the video and he did not testify.

Dr. Browdy's interpretation of the slide into the HRT truck is not the same as Petitioner's, but he is able to explain his rationale during his deposition. He was cross-examined fro some time about his review of the video and he provided a reasonable basis for his opinions. He answered questions regarding not only the potential cause of these injuries, but also regarding aggravation.

The security video is not convincing for causing a rotator cuff tear, a SLAP, and a TFCC tear. This is especially true considering the type and extent of injuries these are and the fact that Petitioner did not seek medical attention for his left shoulder from June 6, 2014, until March 25, 2015, some nine and a half months later. This is despite the f

act that he was treating with Dr. Emanuel, an orthopedic surgeon, for his ***right*** shoulder during this same period of time. He originally saw Dr. Emanuel for a Section 12 exam pertaining to his right shoulder on March 18, 2014, approximately two weeks after the accident at issue to the ***left*** shoulder. There was no mention of left shoulder complaints at that time, nor did Petitioner relate a history of the more recent work accident. Interestingly, Petitioner ultimately chose to have Dr. Emanuel take over treatment of his right shoulder and he followed up on September 4, 2014. At that time a thorough examination of ***both*** shoulders was performed, and the ***left*** shoulder was found to be normal, with no tenderness, normal range of motion, normal strength, and negative testing of multiple orthopedic and neurologic tests. Again, there was no mention of left shoulder complaints nor did Petitioner relate a history of the more recent work accident at that time, or when he followed up with Dr. Emanuel on September 25, October 20, November 17, 2014, and January 6 and January 20, 2015. The Arbitrator finds this to be significant and persuasive.

In addition, the Arbitrator finds significant that Petitioner continued to work doing physical activity not only on the day of the accident in the parking lot, but for the entire period outlined in his testimony and in the record. By Petitioner's and Officer Gordon's admission, this was oftentimes physical work.

The Arbitrator finds Dr. Browdy's testimony to be compelling and more persuasive than the treating notes of Dr. Mall, that the incident of March 5, 2014, neither caused nor aggravated Petitioner's left shoulder or wrist conditions. In addition, Dr. Collard did not offer a causation opinion with regard to Petitioner's left wrist condition.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being is causally related to his accident of March 5, 2014. The Arbitrator further finds that Petitioner reached maximum medical improvement on June 6, 2014. Although the Arbitrator has found that Petitioner sustained a compensable accident, and has further found that Petitioner was credible, the medical records simply do not support a finding of causation with regard to his left shoulder and left wrist conditions past June 6, 2014.

In support of the Arbitrator's decision relating to issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

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

In light of the Arbitrator's findings above with respect to issues (C) and (F), the Arbitrator finds that any medical treatment after June 6, 2014, is unrelated to his compensable injuries and is thereby denied.

The Arbitrator finds Respondent is liable for outstanding medical bills through June 6, 2014, as set forth in Petitioner's Exhibit 13, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts previously paid, including those paid through its group medical plan, for which credit is allowed under Section 8(j) of the Act. Specifically, Respondent is liable for the medical bills from Express Care of Mt. Vernon for dates of service March 31, April 28, and June 6, 2014, totaling **$679.01**.

In support of the Arbitrator's decision relating to issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized. *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 886 (2nd Dist. 1990).

Petitioner alleged he was entitled to temporary total disability benefits for the period of December 14, 2015, through December 30, 2015, a period of 2 2/7 weeks. In light of the Arbitrator's findings above with respect to issue (F), that Petitioner reached maximum medical improvement on June 4, 2014, the Arbitrator finds Respondent is not liable for temporary total disability benefits.

In support of the Arbitrator's decision relating to issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

In light of the Arbitrator's findings above, the Arbitrator finds that Petitioner sustained minor and temporary strains to the left shoulder and left wrist, for which he received minimal medical treatment on three occasions. Said medical treatment consisted of x-rays and medication. As such, the Arbitrator finds that Petitioner did not sustain any permanent partial disability as a result of his accident of March 5, 2014. The issue of credits for prior settlements is moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NOLINDA K. STRAND,

Petitioner,

vs.

NO: 16 WC 23848

19IWCC0368

ENTERPRISE,

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 prospective medical and "surgery authorization," 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 February 20, 2019, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 19 2019

María Elena Portela
María E. Portela

Thomas J. Tyrrell

Deborah L. Simpson
Deborah L. Simpson

SE/
O: 7/9/19
49

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

STRAND, NOLINDA K
Employee/Petitioner

Case# **16WC023848**

ENTERPRISE
Employer/Respondent

19IWCC0368

On 12/22/2017, 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 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

2337 INMAN & FITZGIBBONS LTD
FRANK JOHNSTON
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

19IWCC0368

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Nolinda K. Strand
Employee/Petitioner

v.

Enterprise
Employer/Respondent

Case # 16 WC 23848

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Urbana, IL**, on **November 17, 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 prospective medical care

FINDINGS

On **August 6, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $12,184.64; the average weekly wage was $234.32.

On the date of accident, Petitioner was **35** years of age, ***single*** with 3 dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services, but stipulated it will do so.

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

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

ORDER

- Respondent shall authorize and pay the surgery Dr. Garras has recommended in the nature of a left ankle arthroscopy and debridement with a low chance of microfracture, a lateral ligament stabilization, and possible syndesmotic stabilization, as well as follow up care with Dr. Garras, pursuant to the medical fee schedule, as provided in 8(a) and 8.2 of the Act.
- Respondent shall pay the further sum of **$6,738.51** and the bills of Drs. Eickmeier and Garras, for necessary medical services, pursuant to the medical fee schedule, as provided in Section 8(a) and 8.2 of the Act, and shall be given a credit for payments made by the group medical plan, and shall hold Petitioner harmless from any and all claims by any provider of the services for which Respondent is receiving this credit, as provided in 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.

D. Dyas McCarty

Signature of Arbitrator

12/19/17
Date

DEC 22 2017

The Arbitrator hereby makes the following Findings of Facts on all issues:

Petitioner has been employed by Respondent since November of 2007, and on 8/6/15, held the position of service agent where her duties included greeting customers, cleaning vehicles, and driving vehicles, and required Petitioner to bend to get in and out of vehicles as well as walk and stand 6 hours per day. Petitioner's work week is 4 days per week for 6 hours each day and her hours are 9-3.

On 8/6/15, Petitioner had been vacuuming the third row of a Chevy Tahoe SUV, when her left foot slipped off the running board and her left ankle rolled as she was exiting the vehicle. Petitioner noticed her left foot/ankle was very painful and caused her shoe to become tighter but did not seek immediate medical care because she thought it would be okay if she iced and elevated her left foot/ankle.

Petitioner noticed the swelling in her left foot/ankle went down slightly with elevating and icing it, but the pain eventually caused her to go to the emergency room of Presence Covenant Medical Center (Presence). The records of Presence reported Petitioner was seen on 8/17/15 with complaints of left ankle pain, Petitioner had slipped and fell off a pickup truck during work 11 days ago, increased pain since then, no relief with Ibuprofen, ice, and elevation, and pain with weight bearing and movement (PX 1, p. 1). On examination, there was joint pain in the left ankle, decreased range of motion, tenderness, but no edema or swelling (PX 1, p. 1-2). X-rays of the left ankle were interpreted by the radiologist as showing no acute fracture or dislocation, no large ankle effusion, and no radiopaque foreign body (PX 1, p. 4). These X-rays were performed with Petitioner lying on a table. Petitioner was diagnosed with an ankle sprain and an Ace wrap was applied to the left ankle and Petitioner was instructed to see her primary care physician (PX 1, p. 3).

Petitioner's primary care physician was at Frances Nelson Health Center, k/n/a Community Resource Center (CRC). The records of CRC reported Petitioner was seen on 8/27/15, as an ER follow-up for the left ankle, Petitioner was using a brace at work and the Ibuprofen was helping some (PX 2, p. 2). Petitioner was instructed to continue to wear the brace, elevate the foot when possible, and use heat (PX 2, p. 7). Petitioner reported the Ace wrap helped with the swelling but she continued to have pain on the outside of her left foot/ankle.

Petitioner returned to CRC on 10/1/15, and it was reported Petitioner still had a lot of pain in her left ankle and lower foot described as 7/10 (PX 2, p. 11). Petitioner was instructed to walk very slowly, limit standing, take hot baths, be off her feet as much as possible, and an MRI was discussed (PX 2, p. 17, 20). Petitioner telephoned CRC on 10/13/15 inquiring about the MRI and it was noted one was mentioned but had not been ordered (PX 2, p. 21). Petitioner returned to CRC on 10/15/15, and it was reported Naproxen helped the pain mildly, Petitioner was elevating the ankle every night, and using a heating pad and ankle brace (PX 2, p. 22). Petitioner was instructed to use ice at night, pain creams, and to stay off her feet as much as possible, and an MRI was ordered (PX 2, p. 29, 32).

Petitioner became frustrated with the medical care she received at CRC and sought a physician who accepted workers' compensation insurance and found Safeworks. The records of Safeworks reported Petitioner was initially seen on 10/29/15 by PA Cornett, with complaints of constant pain in her left ankle, described as sharp, burning, ache, considered to be severe, moderate, variable depending on activity level, accompanied by tingling, numbness, swelling, and weakness, with most of the pain located around the lateral malleolus and right above it (PX 3, p. 1, 2). A pain diagram completed by Petitioner showed the location of her pain to be anterior and lateral, and her level of pain was rated as 5/10 (PX 3,

p. 8). On examination, there was swelling present at the lateral distal aspect 3 inches above the ankle with pain at site, pain at anterior aspect of ankle, pain with weight bearing, and ankle stable in all planes (PX 3, p. 4). X-rays of the ankle were performed at Christie Clinic and interpreted by the radiologist as showing no acute osseous abnormality (PX 4, p. 2). These X-rays were also performed with Petitioner lying on a table. Petitioner was diagnosed with left ankle and lower leg pain since injury 8/6/15, prescribed medications and an MRI, given work restrictions of sit down work only and to wear brace PRN, and referred to Dr. Keller, an orthopedic surgeon (PX 3, p. 4-5).

The MRI of the left ankle was performed on 11/18/15 at Christie Clinic and interpreted by the radiologist as showing a partial thickness tear of the anterior talofibular ligament at its talar attachment (PX 4, p. 3).

The records of Dr. Keller reported Petitioner was seen on 11/25/15, with left ankle pain (PX 5, p. 1). On examination, Dr. Keller found mild tenderness in the region of ATF, mild tenderness in the calcaneal fibular region, minimal swelling laterally, and range of motion was -5 to 35 of flexion (PX 5, p. 2). Dr. Keller diagnosed left ankle ATF tear on MRI scan consistent with severe anterior lateral ankle sprain and fitted Petitioner with a walking boot, instructed Petitioner to bear weight as tolerated in the boot and remove the boot at night, ice the ankle 3-4 times per day, and prescribed physical therapy (PX 5, p. 2).

Petitioner was also seen by PA Blatzer of Safeworks on 11/25/15, who reported Petitioner was unable to put any weight on the foot when she tried to get up to turn off her alarm and had a burning feeling up the lateral side of her left leg (PX 3, p. 9). It was also reported Petitioner had seen Dr. Keller that morning, and he had given Petitioner a CAM walking boot and prescribed physical therapy, and Petitioner felt the boot was helping with some stability (PX 3, p. 9). Findings on examination of Petitioner remained the same, as did the location of Petitioner's pain on the pain diagram and Petitioner's level of pain was rated as 4/10 (PX 3, p. 9-12, 16). Petitioner was given work restrictions of sit down work only and to wear CAM boot (PX 3, p. 13).

The records of 217 Rehab & Performance Center (217) reported Petitioner was seen on 11/30/15, and complained of constant pain, swelling, decreased ROM, decreased strength, difficulty walking, pain was aggravated with standing, walking, and having the left leg in a certain position (PX 6, p. 6). On examination, the therapist found slightly reduced ROM, mostly with dorsiflexion, reduced strength in the peroneals, the posterior tibialis, and the anterior tibialis, and pain to palpation at the ATFL site and the peroneal tendons (PX 6, p. 3). On 12/3/15, Petitioner reported increased pain and soreness from her therapy session and on 12/16/15, reported some days she felt like the ankle was improving and then the next day she had increased pain (PX 6, p. 7, 22).

Petitioner continued to be seen at Safeworks while receiving physical therapy, and on 12/9/15, it was reported Petitioner had no change in symptoms since the last visit, noticed an increase in pain after physical therapy, and was given a roll of coban to wrap her ankle at home (PX 3, p. 17). Petitioner's complaints and findings on examination remained the same, as did the location of Petitioner's pain on the pain diagram and Petitioner's level of pain was rated as 4/10 (PX 3, p. 17-20, 24). Petitioner's visits with Safeworks on 12/23/15 and 1/13/16 reported the same complaints and had similar findings on physical examination, and the location of Petitioner's pain was again noted on pain diagrams, but Petitioner's level of pain was rated as 4-6/10 on 12/23/15, and 3/10 on 1/13/16 (PX 3, p. 25-28, 33-36, 32, 40). Petitioner was again given work restrictions of sit down work only and to wear the CAM boot.
Petitioner returned to Dr. Keller on 1/13/16, who reported Petitioner was improving slightly, was able to bear 55% of her weight capacity and was wearing the boot all of the time except the shower and therapy (PX 5, p. 4). On examination, Dr. Keller found tenderness to palpation along the ATF ligament and range of motion of the left ankle was decreased secondary to pain (PX 5, p. 5). Dr. Keller instructed Petitioner to continue with physical therapy, take over the counter NSAIDs, and stay in the boot.

Petitioner was also seen at 217 on 1/13/16, and it was reported Petitioner felt like someone was dragging a razor blade from her lateral malleolus across her anterior ankle to her medial malleolus (PX 6, p. 52). On 1/14/16, the therapist reported Petitioner's pain had started to slowly move up into her shin (PX 6, p. 55). On 1/27/16, the therapist reported Petitioner's left ankle had popped when she had taken her boot off to take a shower and the increased pain had brought tears to Petitioner's eyes (PX 6, p. 64). On 2/3/16, the therapist reported Petitioner's pain was annoying (PX 6, p. 73). On 2/4/16, the therapist reported Petitioner's pain level was getting worse instead of better (PX 6, p. 76).

Petitioner continued to be seen at Safeworks and on 1/27/16, saw Dr. Fletcher, who reported Petitioner continued to have complaints in her left ankle, occasionally feels like a razor blade is being dragged across the left ankle, Petitioner had been showering with her boot off, put some weight on the left foot and felt a pop, and Petitioner's pain was rated at 10 (PX 3, p. 41). On examination, Dr. Fletcher found swelling, reduced range of motion in eversion/dorsiflexion, pain in anterior aspect of ankle, ankle stable in all planes, mild tenderness in the region of ATF, and mild tenderness in the calcaneal figure (sp) region (PX 3, p. 45). The pain diagram completed by Petitioner showed the location of Petitioner's pain to be in the same area as before, and Petitioner's level of pain was rated as 4/10 (PX 3, p. 51). On a Pain Disability Questionnaire, Petitioner reported high numbers on how the pain affected her ability to walk or run, and the need to take pain medication every day to control her pain (PX 3, p. 49). Dr. Fletcher instructed Petitioner to continue with the CAM boot, continue physical therapy Dr. Keller prescribed, continue use of NSAIDS, and continue sit down work only (PX 3, p. 45-46). Dr. Fletcher further noted the MRI findings and opined an ankle arthroscopy may be needed for case closure, or Petitioner needed to be completely immobilized (PX 3, p. 45).

Petitioner returned to Safeworks on 2/10/16 and 3/9/16, and it was reported there was no change in Petitioner's symptoms and the pain diagrams showed the location of Petitioner's pain to be in the same area as before, and Petitioner's level of pain was rated as 3/10 on 2/10/16, and 4/10 on 3/9/16 (PX 3, p. 52-55, 63-66, 62, 71). At the visit of 3/9/16, Dr. Fletcher had the same findings he had on prior examinations of Petitioner's left foot/ankle, and now a finding of instability in the ankle (PX 3, p. 66). Dr. Fletcher put a hold on physical therapy as it had been recommended Petitioner get electrical studies, again opined a diagnostic arthroscopy was needed, and again instructed Petitioner to continue with sit down work only and wear the CAM boot (PX 3, p. 67, 69).

Petitioner was also seen by Dr. Keller on 2/10/16 and 3/9/16, who reported Petitioner had continued left lateral ankle pain, improving slowly, the boot was helping significantly, and physical therapy provided some relief (PX 5, p. 7-9, 10-12). At the visit of 3/9/16, Petitioner was instructed to continue weight bearing as tolerated, progress out of the boot as tolerated, continue with physical therapy, and do a home exercise program (PX 5, p. 11). The records of 217 reported Petitioner was seen on 3/7/16, and had been trying to walk less at work in order to help with her pain level (PX 6, p. 112).

Petitioner stated the physical therapy increased the intensity of pain she had in her left ankle. Petitioner also stated the boot/CAM walker did not alleviate the pain in her left ankle but allowed her to walk a little better, and she wore the boot daily from the time she got up in the morning until she was ready to shower.

On 2/26/16, Petitioner was seen by Dr. Pinzur for an examination pursuant to Section 12 of the Act (RX 1). This examination lasted 2-5 minutes and Dr. Pinzur did not order any additional testing of Petitioner at the time of the examination. On examination, Dr. Pinzur found an obvious color differential between the left and right foot, the left foot was red, the left foot was moderately swollen compared to the right, the left foot was somewhat sweaty, there was diffuse tenderness to touch of the left foot, there was a reasonable range of motion, and no evidence of instability (RX 1, p. 1). Dr. Pinzur noted in his review of the MRI, there were very few cuts on the anterior talofibular ligament and diagnosed Petitioner with

chronic regional pain syndrome secondary to her ankle injury, and opined Petitioner should see a pain specialist for a sympathetic nerve block and Petitioner was capable of working sedentary work. Petitioner acknowledged Dr. Pinzur did not recommend a surgery.

Petitioner returned to Dr. Keller on 4/6/16, who reported Petitioner had continued left ankle pain, slightly improved, and Petitioner had tried to get out of her boot, but had increasing pain (PX 5, p. 13). On examination, Dr. Keller found ankle tenderness to palpation over the ATF ligament, mild swelling over the ATF ligament, and range of motion was 0-40 (PX 5, p. 14). Dr. Keller instructed Petitioner to continue with a home exercise program, bear weight as tolerated, and progress out of the boot as tolerated.

At Petitioner's visit of 5/2/16, Dr. Fletcher again reported Petitioner had no change in symptoms but also had some dyesthesias, the foot/ankle complex was cold compared to the right, there was a trace of allyodynia, and there was no obvious pain behavior (PX 3, p. 74, 78). The location of Petitioner's pain was in the same area as noted on prior pain diagrams and Petitioner's level of pain was rated as 3-4/10 (PX 2, p. 81). Dr. Fletcher noted an IME physician had recommended a diagnostic nerve block and therefore, referred Petitioner to Millenium Pain Clinic. Dr. Fletcher also recommended electrodiagnostic studies due to the prolonged nature of the case, and instructed Petitioner continue with sit down work only and wear the CAM boot (PX 3, p. 78, 82).

The EMG/NCV study was performed on 5/4/16, showed no evidence of an L/S radiculopathy, no evidence of a peripheral polyneuropathy, and was interpreted as a normal study (PX 7). The records of Millenium Pain Center reported Petitioner was seen on 5/11/16, and Petitioner's pain had stayed constant since the injury and not gotten any better, physical therapy had been tried but made the pain worse, Petitioner was unable to not use the boot due to increased pain, and the pain was a stabbing, shooting type of pain (PX 11, p. 12). On examination, there was allodynia and hyperaglesia below the external malleolus and the sternal proximal aspect of the left foot, and decrease in circumference in the left leg (PX 11, p. 14). Petitioner was diagnosed with a neuropathic pain in the left ankle, prescribed Lyrica for the pain, and a series of lumbar sympathetic blocks with simultaneous physical therapy was also discussed. Petitioner stated the Lyrica did not alleviate the pain in her left foot/ankle.

Petitioner was also seen by Dr. Keller on 5/11/16, who reported Petitioner had continued left ankle pain and was very tearful, as Petitioner voiced concern and frustration over her injury (PX 5, p. 16). Petitioner further reported her pain was not better and she was still in the boot (PX 5, p. 16). On examination, Dr. Keller found tenderness to palpation over the ATFL region, instructed Petitioner to follow-up with the pain management physician, and opined at this time, Petitioner was not a surgical candidate and released Petitioner from his care (PX5, p.18). Petitioner tried get out of the boot as much as she was able to, but not wearing the boot increased the pain in Petitioner's left foot/ankle.

Petitioner returned to Dr. Fletcher on 5/25/16, who reported Petitioner had no change in her symptoms and opined he did not believe Petitioner had any evidence of RSD on examination, there was no gross instability, but there was antalgic weakness of left lower extremity with ankle inversion/eversion, observed Petitioner limping, and again opined Petitioner needed a diagnostic left ankle arthroscopy and referred Petitioner to Dr. Eickmeier, a podiatrist (PX 3, p. 86-91). The location of Petitioner's pain was in the same area as noted on prior pain diagrams and Petitioner's level of pain was rated as 2-3/10 (PX 3, p. 95). Dr. Fletcher also continued to restrict Petitioner to sit down work only.

Petitioner saw Dr. Eickmeier on two occasions, and received two injections to her left foot/ankle. The first injection from Dr. Eickmeier was administered to the inside of Petitioner's left foot/ankle and the second injection was administered to the outside of Petitioner's left foot/ankle. Petitioner reported these injections provided her a few days of some relief of her pain. The records of Dr. Eickmeier were not located by either Petitioner or Respondent, as Dr. Eickmeier had left Christie Clinic.

Petitioner returned to Dr. Fletcher on 6/9/16 and 7/7/16, who again reported there had been no change in Petitioner's symptoms other than Petitioner's ankle felt unstable, there had been no change in findings on physical examinations, and Petitioner's pain diagrams continued to note pain in the same area as noted on prior diagrams with the level of pain rated as 5/10 on 6/9/16, and 3-4/10 on 7/7/16 (PX 3, p. 110, 102, 105). Dr. Fletcher confirmed Petitioner received only temporary benefit from the injections given by Dr. Eickmeier and again opined the standard of care required a diagnostic arthroscopy and referred Petitioner to Dr. Paul as Dr. Eickmeier had not obtained privileges at Presence, and continued to restrict Petitioner to sit down work only (PX 3, p. 120, 113). Petitioner was also seen on 7/22/16 by Dr. Fletcher, and rated her level of pain as 2-3/10 (PX 3, p. 123).

The records of McClean County Orthopedics reported Petitioner was seen by Dr. Paul on 8/17/16, for left ankle pain, the physical therapy Petitioner received made her pain worse, the steroid injection helped a little, Petitioner was only able to be out of the boot for 2-3 hours per day and then has to put the boot on because of extreme pain, and all of Petitioner's pain was on the lateral side of the ankle (PX 8, p. 1). On examination, Dr. Paul found tenderness of the lateral ankle and gutter ankle, tenderness of the sinus tarsi, the lateral anterior talofibular ligament, the anterior talofibular ligament, and the posterior talofibular ligament, and varied pigmentation over the sinus tarsi (PX 8, p. 2). Dr. Paul ordered another MRI and indicated he may refer Petitioner to Dr. Kelikian (PX 8, p. 2). The MRI was performed on 9/27/16 and interpreted by the radiologist as showing tibiotalar joint effusion, talonavicular joint effusion, a small calcaneocuboid joint effusion, but no demonstrated tendon or ligament tear (PX 8, p. 4).

Petitioner returned to Dr. Fletcher on 10/25/16, who reported Petitioner had no change in her symptoms and noted Dr. Paul was referring Petitioner to Dr. Kelikian (PX 3, p. 130). Dr. Fletcher diagnosed Petitioner with chronic unstable lateral ankle pain for more than one year that had failed conservative treatment, and opined Petitioner was in need of a diagnostic left ankle arthroscopy and restricted Petitioner to sit down work only (PX 3, p. 132). The pain diagram showed Petitioner's pain to be in the same area as noted on prior diagrams and Petitioner's level of pain was rated as 3-4/10 (PX 3, p. 135).

The records of Dr. Kelikian reported Petitioner was seen on 11/11/16, for left ankle pain (PX 9). On examination, Dr. Kelikian found point tenderness of the left ankle peroneals and ordered stress X-rays which were interpreted as showing no instability (PX 9, p. 3). These X-rays were performed with Petitioner standing but were different from the X-rays Petitioner had subsequently performed by Dr. Garras. Dr. Kelikian also ordered an ultrasound of the left ankle that was performed on 12/13/16 and interpreted by the radiologist as showing no significant peroneal tendinopathy, tear, tenosynovitis, but mild intrasheath peroneal tendon subluxation with dynamic maneuvering which appears as pain on exam, intact ATFL, and mild extensor musculature edema (PX 9, p. 4). The examination by Dr. Kelikian lasted about 10 minutes and Dr. Kelikian did not recommend surgery as he explained to Petitioner there was a modest success rate with such a surgery. Petitioner did not remember if Dr. Kelikian told her to follow up as needed.

Sometime in early 2017, Petitioner noticed on occasion her left foot/ankle started giving out on her when she was not wearing the boot and when she put any weight on her left foot. Petitioner also noticed she was limping more and her left foot/ankle gave out on her when she climbed or descended stairs.

Petitioner returned to Dr. Fletcher on 2/10/17, who reported there was no change in Petitioner's symptoms and the severity of the pain was unchanged (PX 3, p. 138-139). The location of Petitioner's pain on the pain diagram remained the same as on prior diagrams, and Petitioner's level of pain was rated as 4-5/10 (PX 3, p. 146). Dr. Fletcher reviewed the treatment Petitioner had received to date, and again opined Petitioner needed a diagnostic left ankle arthroscopy, as Petitioner was limping and having issues descending stairs as seen on a video, and diagnosed Petitioner had chronic unstable lateral ankle

pain for more than 18 months as well as some chronic peroneal tendon issues (PX 3, p. 143). Dr. Fletcher then referred Petitioner to Dr. Garras (PX 3, p. 143). Petitioner was also seen on 3/13/17 by Dr. Fletcher, and rated her level of pain to be 4/10 on the pain diagram (PX 3, p. 157).

The records of Dr. Garras reported Petitioner was seen on 4/5/17, for left foot and ankle pain (PX 10, p. 1). Dr. Garras reviewed the treatment Petitioner had received to date, including visits with multiple orthopedic surgeons, foot and ankle orthopedic specialists, the diagnostic tests Petitioner had underwent, and the results from the conservative treatment Petitioner had received. Dr. Garras reported Petitioner complained of severe pain which was localized to the anterolateral aspect of the ankle, instability symptoms and feels like the ankle is going to give out on her, pain was moderate to severe with a rating of 7/10, the symptoms were constant and made worse with squatting, kneeling, stairs, moving, running, walking, engaging in athletics, and standing, and the symptoms often caused Petitioner to wake from sleep. On examination of the left ankle, Dr. Garras found mild swelling of the lateral aspect of the ankle, tenderness to palpation of the lateral and anterolateral ligaments over the peroneals, very tender to palpation along the anterolateral aspect of the ankle joint as well as the syndesmosis distally, ROM decreased at the ankle with pain reproduced with active and passive ROM, when Petitioner moved her ankle there was palpable burst clicking and sometimes audible with her peroneal sheath, 4/5 strength in dorsiflexion, inversion, and eversion, 2+ anterior drawer test, and positive talar tilt test (PX 10, p. 3). Petitioner estimated the examination by Dr. Garras lasted about 20-30 minutes.

Dr. Garras also ordered X-rays of the left ankle that included weight bearing and manual stress. Petitioner explained with the manual stress X-rays, Dr. Garras physically placed her foot into position as it was X-rayed. Dr. Garras interpreted the weight bearing X-rays as not showing any overt instability, but interpreted the manual stress X-rays as showing a significantly more displaced and unstable left ankle than the right (PX 10, p. 3). Dr. Garras discussed he thought Petitioner had a chronically unstable ankle as well as peroneal tendinitis as a result of her intrasheath peroneal subluxation, and may also have some subtle syndesmotic instability, which Dr. Garras opined was directly related to Petitioner's work injury. Dr. Garras recommended an ankle arthroscopy and debridement, with a small chance of microfracture if needed, a lateral ligament reconstruction with augmentation with an internal brace, possible syndesmotic fixation, peroneal debridement and reconstruction of the peroneal retinaculum with fibular groove (PX 10, p. 3).

Dr. Garras further noted there were no Waddell signs or symptom magnification during his examination of Petitioner, and Petitioner cooperated and tolerated the stress X-rays, although obviously distressed due to pain. Petitioner confirmed the stress X-rays were very painful. Dr. Garras proceeded to inject Petitioner's lateral ankle and sinus tarsi, which Petitioner reported did not alleviate any of her symptoms (PX 10, p. 5). Petitioner also reported the surgery Dr. Garras recommended was not authorized.

Petitioner returned to Dr. Fletcher on 5/10/17, for left ankle pain and reported Dr. Garras had recommended a diagnostic left ankle arthroscopy and Petitioner was scheduled for an IME next week with Dr. Holmes (PX 3, p. 163). Petitioner's rated level of pain on the pain diagram was 4-5/10 (PX 3, p. 166).

On 5/17/17, Petitioner was seen by Dr. Holmes for an examination pursuant to Section 12 of the Act (RX 8). This examination lasted about 5 minutes and X-rays ordered by Dr. Holmes were performed with Petitioner standing. Dr. Holmes reviewed the treatment Petitioner had received, noted Dr. Kelikian had explained to Petitioner surgery would only have about 60% success rate but Petitioner was unsure of the procedure recommended, and discussed the nature of the surgery Dr. Garras had recommended for Petitioner. Dr. Holmes reported Petitioner's pain was continuous over the lateral aspect of the ankle, worse with weight bearing activities and better with ice and elevation, Petitioner used a CAM walker, and Petitioner was working in a sedentary position. Dr. Holmes noted records he reviewed, which included

records from CRC, Dr. Keller, the MRI of 11/8/15, the EMG/NCV of 5/4/16, the ultrasound of 12/13/16, and a letter from the defense attorney summarizing the records of Safeworks. On examination, Dr. Holmes found gross stability to anterior drawer testing with a 1+ drawer test and some slight atrophy of the left calf.

Dr. Holmes diagnosed Petitioner with some pain in the anterolateral aspect of the ankle, which he opined could be related to some impingement but noted the objective findings from the physical examination and review of the MRI scan were relatively pauce. Dr. Holmes opined in light of Petitioner's ongoing complaints, it would be reasonable to continue treatment, but did not agree with the surgery that had been recommended, expressed Petitioner may benefit from a local Marcaine injection for diagnostic purposes or from a relatively minor short peek into the joint on that side arthroscopically, and it may be helpful to get an FCE to determine the exact current level of functioning (RX 8, p. 4). Dr. Holmes further opined Petitioner can easily work in a semi-sedentary or light duty job, and some of Petitioner's work activities could be improved with the use of a Lidoderm patch over the area of her pain (RX 8, p. 4). Petitioner confirmed Dr. Holmes recommended a scope.

Petitioner returned to Safeworks on 6/21/17, and Dr. Fletcher noted he reviewed the repot of Dr. Holmes and the employer was willing to authorize the Marcaine injection, the Lidoderm patches, and a Functional Capacity Evaluation (PX 3, p. 173). Dr. Fletcher proceeded to administer a Marcaine injection into Petitioner's left foot/ankle complex, gave Petitioner a prescription for Lidoderm patches, and noted he would seek authorization for the arthroscopy Dr. Holmes said was reasonable (PX 3, p. 173). Petitioner's rated level of pain on the pain diagram was 4-5/10 (PX 3, p. 176). An addendum to the note of 6/21/17, reported Petitioner was contacted on 6/22/17 by Nurse Hall, and reported her left ankle hurt so bad she can barely walk on it, Petitioner has had injections done in the past and has the same reaction each time, Petitioner's pain was 7/10, and there was no improvement (PX 3, p. 175). Petitioner confirmed the injection she received from Dr. Fletcher was very painful and had no effect on her ankle pain and the Lidoderm patches did not provide any relief of her pain but provided some padding from the boot.

Petitioner again returned to Safeworks on 7/5/17, where it was reported Petitioner had noticed slight improvement and the Lidocaine patches had been extremely helpful (PX 3, p. 178). The welfare check by Nurse Hall was also referenced and it was further reported there was only modest benefit with the injection and Petitioner was wearing the Lidoderm patches and the findings on examination were unchanged (PX 3, p. 181). Petitioner's rated level of pain on the pain diagram was 3/10 (PX 3, p. 186). Petitioner was not sure she had seen Dr. Fletcher's note of 7/5/17 but stated it was inaccurate if Dr. Fletcher wrote the Lidoderm patches were extremely helpful.

On 7/6/17, Dr. Garras reported he had reviewed the report of Dr. Holmes and expressed Petitioner had been consistent with her complaints including location and characteristics of pain since treatment was started, and had consistently complained of instability symptoms and anterolateral ankle pain. Dr. Garras also reported Dr. Holmes had found ankle instability and laxity as there was 1+ on anterior drawer testing and also calf atrophy, noted Dr. Holmes had not performed a detailed strength exam to show Petitioner's deficits, and Dr. Holmes had agreed with the possibility of needing an arthroscopy but disputed the need for lateral ligament reconstruction. Dr. Garras opined the treatment of a Marcaine injection, Lidoderm patches, and an FCE will not address Petitioner's problems with her ankle, and will only mask the pain rather than treat the underlying problem, and again opined Petitioner would benefit greatly from the surgical procedure he recommended, and the longer surgery was delayed, the more likely Petitioner will have increased atrophy and weakness and a more difficult recovery.

On 7/24/17, Dr. Holmes authored an addendum report and noted the additional record he reviewed was the record of Safeworks dated 7/5/17 (RX 9, p. 1). Dr. Holmes opined this record did not provide any additional information that would result in a change in his diagnosis as this record reported Petitioner

had an excellent response to the use of the Lidoderm patch, and opined a patient who had internal derangement of the ankle would not be expected to have an excellent response to a Lidoderm patch and expressed such a response was more consistent with a superficial problem of the ankle rather than a deep internal problem of the ankle that would require surgery (RX 9, p. 2). Dr. Holmes also opined the lack of response to the injection in the ankle would also be an indication of the absence of any significant internal derangement that would be responsive to surgical intervention, and specifically referred to the MRI performed in November of 2015, and the ultrasound performed in December of 2016, that demonstrated the ATF ligament was healed. Dr. Holmes further noted he did not agree with Dr. Fletcher's recommendations but acknowledged doctors can disagree and while he had previously mentioned a small peak into the joint arthroscopically, he did not personally recommend it as one of the most common complications of arthroscopic surgery is injury to the superficial peroneal nerve and his recommendation was continued use of the Lidoderm patches and opined Petitioner would be a good candidate for an FCE.

Petitioner returned to see Dr. Fletcher on 8/1/17, who reported there was no change in Petitioner's symptoms since the last visit and Petitioner was using her Lidocaine patches for which she does not need refills (PX 3, p. 193). It was again reported Petitioner indicated only modest benefit with the injection, was wearing Lidoderm patches, Petitioner's examination was unchanged, and Petitioner wanted to proceed with surgery by Dr. Garras (PX 3, p. 195). Petitioner's rated level of pain on the pain diagram was 4-5/10 (PX 3, p. 198). Petitioner thought the appointment she had with Dr. Fletcher on 8/1/17 was an early morning appointment but did not tell Dr. Fletcher the Lidoderm patches provided great relief or were extremely helpful and could not remember the appointment occurred in the afternoon.

Petitioner was seen by Dr. Garras again on 8/9/17, and it was reported there was no changes in Petitioner's symptoms, Petitioner's pain was moderate with a rating of 5/10, Petitioner denied any improvement since her last visit, there was no change in the character or location of the problem, and there was mild swelling in the right (sp) ankle (PX 10, p. 8). On examination, Dr. Garras found no significant change in the nature of the exam as compared to Petitioner's last visit, noted Petitioner was minimally tender over the peroneals today, had minimal pain with resisted eversion, the ankle was still chronically unstable with 1-2+ anterior drawer and a positive talar tilt test, there was tenderness to palpation along the anterior joint line and specifically the anterolateral gutter, and pain with squeeze test as well as external rotation stress test of the ankle (PX 10, p. 9). The diagnosis by Dr. Garras remained the same and Dr. Garras again recommended an ankle arthroscopy and debridement with a low chance of microfracture, a lateral ligament stabilization, and possible syndesmotic stabilization, but opined Petitioner no longer needed any peroneal debridement or fibular groove deepening since Petitioner was asymptomatic on 8/9/17 (PX 10, p. 10).

Dr. Fletcher referred Petitioner back to Dr. Keller who saw Petitioner on 8/30/17 and the examination lasted approximately 10 minutes. Dr. Keller reported Petitioner had severe aching and occasional sharp pain in the anterior lateral aspect of the left ankle, Petitioner had been wearing the boot and the boot helped her get around a bit, but had not resolved the issue, the pain was rated as 5/10, and worse with ambulation or walking on the toes (PX 5, p. 22). On examination, Dr. Keller found mild tenderness at the anterior lateral region over the ATF, ankle dorsiflexion -5 and plantar flexion was 40, there was +1 to +2 anterior drawer test, and tenderness along the anterior joint line (PX 5, p 23). Dr. Keller diagnosed chronic left ankle pain with anterolateral instability and mild left peroneal tendinitis and history of left grade 2 ankle sprain, and opined at this time, Petitioner had failed all conservative care and agreed with Dr. Garras Petitioner could benefit from left ankle arthroscopy and anterolateral reconstruction (PX 5, p. 24).

Petitioner was last seen at Safeworks on 10/6/17, and it was reported there was no change since Petitioner's last visit, Petitioner was using the Lidocaine patch but has pain when standing or walking for

long periods, and pain with flexion and extension of her foot (PX 3, p. 204). The physical examination of Petitioner remained unchanged and it was noted Petitioner wanted to proceed with surgery by Dr. Garras (PX 3, p. 206). Petitioner's rated level of pain on the pain diagram was 4-5/10 (PX 3, p. 209). Petitioner was continued on work restrictions of sit down work only and given a refill of the Lidoderm patches and pain medication (PX 3, p. 208).

Petitioner still has tenderness to touch of her left foot/ankle and reported it is very painful to walk and there is bruising and swelling on the outside of her left ankle. Petitioner rated the level of pain in her ankle when walking with the boot on as 4/10, and the level of pain in her ankle when walking without the boot on as 6/10. Petitioner confirmed she experiences instability in her left foot/ankle when she is not wearing the boot and limps when she is not in the boot. Petitioner further acknowledged she wears the boot from the time she gets up in the morning until she takes a shower.

Petitioner has difficulty with stairs when she is not in the boot and difficulty sleeping. Petitioner reported she does not stay as long as she would like at school activities and Cub scouts with her youngest son, and she no longer completes household chores like she used to. Petitioner normally elevates and ices her foot when she returns home from work for an hour and sleeps on her back and right side because of her left foot. Petitioner continues to take Ibuprofen throughout the day for her pain, and Petitioner thought this helped with the swelling and pain. Petitioner expressed she wants to proceed with the surgery recommended by Dr. Garras.

Petitioner confirmed she has been working with the restriction of sit down work only since the accident occurred and she drives customers to and from places but does not use her left foot/ankle when she drives. Petitioner wears the boot when she drives. While Petitioner sits at a desk for work, she does have to walk to get a car or to greet a customer. When Petitioner walks while wearing the boot, her pain increases.

Petitioner confirmed no FCE had ever been ordered by a physician. Petitioner completed pain diagrams for Dr. Fletcher following the Marcaine injection recommended by Dr. Holmes and noted the appointments she had with Dr. Fletcher occurred at various times and on days when she was not working and this influenced the amount of pain reported on the pain diagrams.

Therefore, the Arbitrator concludes as follows:

> The undisputed evidence showed the nature and location of complaints and symptoms Petitioner has experienced in her left foot/ankle since the work accident of 8/6/15 have been consistent and have included constant pain in the left lateral ankle that averaged 4-5/10 (PX 3, PX 5), increased pain with weight bearing and movement of the left ankle (PX 1, PX 3, PX 5, PX 6), decreased range of motion of the left ankle, tenderness of the left ankle, swelling (PX 3), weakness (PX 3), inability to bear weight on the left foot when not wearing the CAM boot, giving way of the ankle, and pain that has brought tears to Petitioner's eyes. The physical examinations of Petitioner's left lower extremity since the work accident of 8/6/15 have repeatedly found objective findings of an injury including decreased range of motion (PX 1, PX 6, PX 10), decreased range of motion with dorsiflexion (PX 6), decreased range of motion with inversion and eversion (PX 3), swelling (PX 3, PX 5, PX 10), tenderness to palpation in the region of the anterior talofibular ligament (PX 3, PX 5, PX 10), tenderness to palpation in the region of the calcaneal fibular region (PX 3, PX 5), reduced strength in the peroneals, posterior tibialis, and anterior tibialis (PX 6), pain to palpation at the ATFL site and the peroneal tendons (PX 6), instability (PX 3, PX 10), allodynia and hyperglasia below the external malleolus and the sternal proximal aspect of the left foot (PX 11), decreased circumference in the left leg (PX 11), limping, antalgic weakness of left lower extremity with ankle inversion/eversion (PX 3), tenderness of the lateral ankle and gutter ankle (PX 8), tenderness of

the sinus tarsi (PX 8), varied pigmentation over the sinus tarsi (PX 8), tenderness of the peroneals (PX 9, PX 10), tenderness at the syndesmosis distally (PX 10), palpable burst clicking and sometimes audible with the peroneal sheath (PX 10), a positive anterior drawer test (PX 10), and a positive talar tilt test (PX 10). In addition, various diagnostic tests of the left foot/ankle have been interpreted as showing pathology in the left ankle, including initial non-stress X-rays of the left ankle showing no large effusion (PX 1); an MRI of 11/18/15 showing a partial thickness tear of the anterior talofibular ligament at its talar attachment (PX 4, p. 3); an MRI of 9/27/16 showing no tendon or ligament tear, but tibiotalar joint effusion, talonavicular joint effusion, and a smallcalcaneocuboid joint effusion (PX 8, p. 4); an ultrasound of 12/13/16 showing no significant tear but mild intrasheath peroneal tendon subluxation with dynamic maneuvering and mild extensor musculature edema (PX 9, p. 4); and manual stress X-rays of the left ankle showing a significantly more displaced and unstable left ankle compared to the right (PX 10, p. 3). The negative EMG/NCV test is insignificant as Petitioner was never diagnosed with a nerve injury to her left foot/ankle from the work accident.

The undisputed evidence showed Petitioner's complaints and symptoms have had no significant change in almost 2 ½ years, and have not improved with the conservative treatment Petitioner has received to date for her left foot/ankle. The undisputed evidence has also showed since the first of the year, Petitioner's symptoms and complaints have been increasing, especially with respect to limping and feeling the ankle was giving out on her.

In addition to this evidence, the credible medical evidence supports that a left ankle arthroscopy and debridement with a low chance of microfracture, a lateral ligament stabilization, and possible syndescmotic stabilization, is reasonable and necessary in treatment of Petitioner's condition of ill-being. Dr. Fletcher, who has examined Petitioner on multiple occasions, has repeatedly opined Petitioner was in need of a diagnostic arthroscopy for her condition of ill-being. While Dr. Keller, the orthopedic surgeon Dr. Fletcher initially referred Petitioner to, had opined Petitioner was not a surgical candidate for her left foot/ankle at the time of his examination of Petitioner on 5/11/16, he has subsequently opined he agrees with Dr. Garras that Petitioner could benefit from left ankle arthroscopy and anterolateral reconstruction based on his examination of Petitioner on 8/30/17. Dr. Paul, another orthopedic surgeon Dr. Fletcher referred Petitioner to, did not render an opinion on the necessity of surgery for Petitioner's left foot/ankle, but referred Petitioner to Dr. Kelikian, who discussed surgery for Petitioner's condition of ill-being, but did not recommend such a surgery because the success rate was modest. However, the nature of the surgery Dr. Kelikian discussed was not reported. The third orthopedic surgeon Dr. Fletcher referred Petitioner to, Dr. Garras, has recommended a surgery for Petitioner's left foot/ankle based on his knowledge of Petitioner's symptoms and treatment to date, two extensive physical examinations of Petitioner with similar findings, and his interpretation of manual stress X-rays of Petitioner's left foot/ankle that confirmed displacement and instability.

The two physicians who examined Petitioner pursuant to Section 12 of the Act, Drs. Pinzur and Holmes, have rendered divergent and inconsistent opinions. In addition, the opinions of Dr. Holmes were based on incomplete and inaccurate information. Dr. Pinzur diagnosed Petitioner with chronic regional pain syndrome (CRPS) secondary to her ankle injury, based on his findings on examination of Petitioner, but this diagnosis was not made by any other medical provider, and was essentially dismissed by the pain management physician Petitioner saw. In reaching this diagnosis, Dr. Pinzur commented that in his review of the anterior talofibular ligament on the MRI of 11/18/15, there were very few cuts to confirm the tear. Given the diagnosis made by Dr. Pinzur, no surgery was recommended nor is warranted for CRPS. Dr. Holmes examined Petitioner on 5/17/17, but was provided with limited medical records and not all the diagnostic tests that had been performed on Petitioner at that time, including the MRI performed on 9/27/16 and the

manual stress X-rays performed on 4/5/17 (RX 8). While Dr. Holmes initially opined Petitioner may benefit from a peek into the ankle joint arthroscopy, he also opined a Marcaine injection and Lidoderm patches may help Petitioner's pain in the meantime. The credible evidence showed this treatment did not provide Petitioner with any long standing relief of her symptoms as reported in the pain diagrams completed by Petitioner at visits with Safeworks thereafter, including 7/5/17, 8/1/17, and 10/6/17, as well as the nurse's note of 6/22/17 (PX 3). Thus, the opinions of Dr. Holmes contained in his addendum dated 7/24/17, based solely on his review of the medical record of Dr. Fletcher for 7/5/17, which record contained conflicting information, were incomplete and inaccurate. However, even Dr. Holmes acknowledged physicians can disagree on treatment recommendations and expressed his reluctance to recommend arthroscopic surgery for Petitioner was a concern for injury to the superficial peroneal nerve, not that the surgery recommended was unnecessary and unreasonable. For these reasons, the opinions of Drs. Pinzur and Holmes are entitled to little weight.

Petitioner credibly testified how her left foot/ankle injury has affected her daily activities at work and at home, and how the conservative treatment she has received to date, including pain medications, wearing the boot, elevating and icing her left foot/ankle, applying heat to her left foot/ankle, physical therapy, and various injections, have done little to improve the pain and symptoms she has in her left foot/ankle and allow her to engage in everyday activities of walking and standing on her own.

The surgery recommended by Dr. Garras, and also Drs. Keller and Fletcher, is reasonable and necessary in the care and treatment of Petitioner's condition of ill-being in her left foot/ankle, and Respondent shall authorize this surgery and pay the reasonable and customary charges for said surgery, pursuant to the fee schedule, as provided in Section 8(a) and 8.2 of the Act.

STATE OF ILLINOIS

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)
☒ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Jensen,
Petitioner,

vs. NO: 12 WC 15953

19IWCC0369

UPS,
Respondent.

DECISION AND OPINION ON REVIEW

The parties cross-appeal the decision of the Arbitrator, filed on January 10, 2018 following §19(b) hearing held on December 19, 2017. Notice has been given to all parties. The Commission, after considering issues including causal connection, temporary total disability (TTD), and medical expenses, and being advised of the facts and law, hereby modifies the Arbitrator's decision. The Commission concurs with the Arbitrator's determination that Petitioner's condition of work-related ill-being ceased by October 21, 2014. However, the Arbitrator awarded compensation for TTD and medical expenses only up through February 14, 2014. The Commission modifies the award to reflect that Petitioner is entitled to TTD and medical expenses through October 21, 2014, consistent with the afore mentioned cessation date. The Arbitrator's decision, which is otherwise affirmed and adopted, is attached hereto.

The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Comm'n, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

19IWCC0369

Introduction and Summary

Petitioner, a 25-year-old supervisor at UPS, suffered an undisputed work-related injury on September 27, 2011. Petitioner was injured when she was using both hands to dislodge a 76-pound package that had jammed a chute. She was diagnosed with bilateral wrist sprains and tendonitis. About 3 months post-accident, she was diagnosed with thoracic outlet syndrome (TOS). By then, her complaints included bilateral arm, shoulder, and neck pain. In summer 2012, she underwent surgical treatment to address TOS, which operations consisted of resection of the first rib on the left side, followed by resection on the right side.

Petitioner responded well to the surgery, at least on the left side. However, she still complained of right arm symptoms. Not long after the surgeries, she came under the care of a pain specialist, Dr. Sandeep Amin, who would diagnose her with complex regional pain syndrome (CRPS) in the right arm by late 2012. In the meantime, her thoracic surgeon, Dr. William Warren, discharged her with permanent restrictions of no lifting over 20 pounds in November 2013. For the subsequent years thereafter, Petitioner continued seeing the pain specialist. Her pain treatment has consisted largely of pain medications, stellate ganglion nerve blocks, and physical therapy.

The Arbitrator found that Petitioner's TOS was causally connected to her work accident, but that her present condition of ill-being -- including the asserted CRPS -- was not. (Arbitrator's decision at 19). The Arbitrator fixed her date of maximum medical improvement (MMI) at ***October 21, 2014,*** the date of the Section 12 report generated by Dr. Kenneth Candido. Regarding CRPS, the Arbitrator found that there was insufficient objective evidence of this condition.

On review, as it did at arbitration, Respondent contends that Petitioner's work-related ill-being ceased by ***March 1, 2012***, the date of the Section 12 report generated by Respondent's other -- and first -- Section 12 examiner, orthopedic surgeon Dr. Kern Singh. For her part, Petitioner testified that she currently experiences soreness and fatigue in both arms and in her neck. Her issues on appeal include temporary total disability, medical expenses, and prospective medical treatment including a spinal cord stimulator trial.

As detailed below, the Commission finds that Petitioner reached MMI as it related to her work-related injury by October 21, 2014, and accordingly, awards TTD and medical expenses up through that date.

I. BACKGROUND

A. Petitioner Sustains September 27, 2011 Accident and is Diagnosed with Wrist Sprains and Tendonitis.

On September 27, 2011, Petitioner suffered an undisputed accident when she was handling a 76-pound package that had jammed a chute. In freeing the package with both hands, a number of packages that had been backed-up behind this package came sliding down upon her, causing immediate pain in both wrists. She notified her supervisor and self-treated for a few days.

19IWCC0369

On October 6, 2011, due to persistent pain and swelling in her wrists and hands, she presented to Clearing Clinic (Respondent's occupational clinic). There, Dr. Anita Carini diagnosed bilateral wrist sprains. Petitioner was provided with braces. The Clearing Clinic notes do not describe any subjective complaints of arm, shoulder or neck pain. She began occupational therapy sessions at Clearing Clinic.

Due to her ongoing symptoms (pain, swelling, paresthesias in the hands), she presented to hand surgeon Dr. Nicholas Speziale of Midwest Hand Surgery on November 4, 2011, upon referral by Dr. Carini. Dr. Speziale rendered diagnoses of wrist sprains and DeQuervain's Tenosynovitis (a condition affecting the tendons of the thumb). Dr. Speziale administered cortisone injections in her wrists, which provided some relief. In the meantime, on November 22, 2011, Petitioner sought a second opinion from Dr. Jerry Chow. (RX 5). Dr. Chow's diagnosis was bilateral wrist tendinitis. He believed that her treatment to date was appropriate but there was a chance of recurrence with the tendinitis. He recommended conservative treatment and to follow up with him on an as-needed basis. This was Petitioner's only visit to Dr. Chow. (RX 3).

Petitioner returned to Dr. Speziale. On December 29, 2011, it is documented for the first time that Petitioner was also having symptoms in her arms, specifically, of intermittent heaviness in the arms and associated numbness. She described fatigue in both arms while performing simple tasks at home and indicated that the onset of these arm symptoms was mid-November 2011. At that point, Dr. Speziale considered the possibility of thoracic outlet syndrome and described that Petitioner had experienced a "whiplash-type" mechanism of injury that could support TOS. Dr. Speziale looked up thoracic outlet syndrome on the internet and suggested to Petitioner that she see a thoracic outlet specialist.

B. Thoracic Outlet Syndrome Diagnosis of January 2012 and Rib Resection Surgeries in Summer 2012.

On January 25, 2012, she presented to thoracic surgeon Dr. William Warren at Rush University Medical Center. Dr. Warren diagnosed thoracic outlet syndrome and discussed surgery that day. Eventually, Dr. Warren performed first rib resection surgery on the left side (on June 5, 2012), followed by the right side (on September 6, 2012). The surgeries were "noticeably" beneficial. (Tr. 36). "There was relief of the swelling and the pins and needles and the tingling to a point" in the right arm; the left arm symptoms were much improved. (Tr. 88-90). She continued follow-up with Dr. Warren afterwards for post-op treatment.

Petitioner continued seeing Dr. Warren through late 2013. On November 18, 2013, Dr. Warren released her to home exercises and a permanent 20-pound lifting restriction. This release followed a functional capacity examination (FCE) done at ATI Physical Therapy on October 9, 2013. (PX 7). The FCE determined that she was capable of working an 8-hour workday, at the light physical demand level. All of her FCE restrictions pertained to lifting. Most pertinently, she was capable of occasionally lifting 25.8 pounds with both arms above the shoulders and frequent lifting of 17 pounds with both arms above her shoulders. There were no limitations on sitting, standing, or walking. In his discharge report of November 18, 2013, Dr. Warren wrote that she could return to work with permanent restrictions of lifting no more than 20 pounds for no more than one hour per day. There were no restrictions regarding standing, walking, climbing, sitting, or fine motor skills. (PX 7).

C. CRPS Diagnosis in Right Arm

While continuing post-operative treatment with Dr. Warren, Petitioner concurrently began treating for pain in her right upper extremity with Dr. Sandeep Amin of Rush Pain Center. On September 25, 2012, Petitioner presented to him with a chief complaint of right upper extremity pain rated at 7/10. (PX 5). She gave a history of injury including the bilateral rib resection surgeries. Apparently, the surgery on the right side did not provide positive results. That day, Dr. Amin noted that results of his physical examination included allodynia (experience of pain from a non-painful stimulation of the skin, such as light touch) and muscle weakness in the right upper extremity. There was no edema, discoloration, hair changes, temperature change, sweating, or shiny skin.

Dr. Amin's primary diagnosis was right upper extremity neuropathic pain, for which he prescribed Lyrica. Her medications were noted to be Norco 10/325 (the maximum strength), Flexeril (a muscle relaxant) and ibuprofen. He also maintained her prescription for Norco (hydrocodone), which she was to take every 4 hours for pain control. On October 2, 2012, he administered a stellate ganglion nerve block for the first time for Petitioner. Another stellate ganglion block was done on October 16, 2012; Dr. Amin's handwritten notes documenting the procedure made reference to "CRPS in RUE" (Complex Regional Pain Syndrome in right upper extremity). (RX 5). Petitioner has never been diagnosed with CRPS in the left arm.

Opioid prescriptions: Petitioner would proceed to visit Dr. Amin on a monthly basis up through May 2017. Her treatment under Dr. Amin is notable for the volume of medications prescribed. Regarding Norco, for example, between that first visit of September 25, 2012 and December 18, 2012, Dr. Amin refilled prescriptions of Norco 10/325 on four occasions, providing a total of 570 Norco tablets. (Petitioner was also prescribed Tramadol.) The Norco prescription remained in effect throughout treatment from 2013 through June 2016 (and was even increased in April 2016 because she had reported that her right upper extremity pain was exacerbated). Petitioner's only break from Dr. Amin's care was for 10 months beginning in June 2016 because she was pregnant.[1] In April 2017, she resumed her monthly visits with Dr. Amin, who placed her back on the opioids. At certain points during treatment, Dr. Amin had reached a point where he was prescribing 120 tablets multiple times per month.

Stellate ganglion nerve blocks: ~~Her~~ Petitioner's treatment also consisted of a number of right-sided stellate ganglion nerve block injections. Her first stellate ganglion nerve block was administered a week after she first presented to Dr. Amin. She reported relief from these nerve blocks in the beginning.

By May 2, 2016, Petitioner had undergone at least 18 stellate ganglion nerve blocks. (Tr. 105). By then, she was reporting that the nerve block injections were not as effective as before and that they made her neck even more sore. At that point, Dr. Amin recommended a cervical spine MRI. On May 6, 2017, she underwent the MRI[2], which results were essentially normal (revealing mild broad-based disc bulge at C4-5 level without extruded disc herniation, spinal cord compression, or neuroforaminal

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[1] While pregnant, she could not take the medications that Dr. Amin was prescribing. Petitioner testified that all her symptoms were made worse during this time and she felt "horrible." Upon resuming her monthly visits with Dr. Amin in April 2017, she was placed back on prescriptions for opioids.

[2] The cervical spine MRI was postponed for a year due to her pregnancy.

19IWCC0369

stenosis).

The last office visit record of Dr. Amin in evidence is from May 23, 2017, where Petitioner was presenting for follow-up with Dr. Amin after the cervical spine MRI. (PX 5c). Dr. Amin wrote "Pt. developed RUE CRPS due to work-related injury which caused thoracic outlet syndrome at UPS. Currently awaiting trial for final diagnosis and insurance plans." Physical examination findings included "allodynia and hyperalgesia over the right forearm, no edema or erythema in R hand today." Dr. Amin wrote that she could benefit from another repeat stellate ganglion block or a spinal cord stimulator trial, once her insurance issues were sorted out.

Spinal cord stimulator recommendation: Dr. Amin first suggested a spinal cord stimulator on July 15, 2014, which Petitioner declined. Dr. Amin continued to bring up the topic of a spinal stimulator at various intervals over the years. As mentioned above, Petitioner's last visit with Dr. Amin occurred on May 23, 2017, at which time Dr. Amin continued to recommend the spinal cord stimulator. By then, Petitioner was seeking to undergo this treatment and requests that the Commission award this treatment prospectively.

Extensive physical therapy: In addition to the rib resections and the pain treatment with Dr. Amin, Petitioner's treatment since the accident included extensive physical therapy, beginning with occupational therapy at Clearing Clinic. Dr. Carini, Dr. Speziale, Dr. Warren, and Dr. Amin all at sent her through courses of physical therapy. She underwent PT at Clearing Clinic, Thera Core, ATI Physical Therapy, and Advocate Christ Medical Center. At hearing, she acknowledged that she attended overall at least 130 sessions of physical therapy. (Tr. 95-97).

Petitioner also testified about her holding three short-lived jobs (at a hotel's front desk, as a restaurant server, and at a chiropractor's office) after she was released by Dr. Warren with permanent restrictions. (Tr. 100-103). She is currently unemployed. Regarding her present complaints, Petitioner testified she has soreness, fatigue and numbness in both arms below the elbow. (Tr. 90). In her right arm, she has tingling in the first two fingers of her right hand. Although she can do all the activities of taking care of her baby, those activities and other activities of daily life cause her arms to hurt and feel heavy. "It just feels like you had a really long workout and your body is tired." Her neck is swollen and sore to the touch. She experiences pain daily, which she rates at 8/10 at worst. (Tr. 64-67).

II. EXPERT MEDICAL OPINIONS

Petitioner underwent two independent medical examinations (IMEs) at the request of Respondent, pursuant to Section 12. To address the issue of thoracic outlet syndrome, Respondent retained orthopedic surgeon Dr. Kern Singh. To address the issue of CRPS, Respondent retained pain specialist Dr. Kenneth Candido. These examiners generated written reports. (RX 7; RX 9). There were no evidence depositions taken. No expert was retained by Petitioner.

A. Dr. Kern Singh IME - March 1, 2012

Orthopedic surgeon Dr. Singh examined Petitioner on March 1, 2012, about 5 months post-accident. Her complaint was neck pain rated at 7/10 and bilateral hand tingling and numbness in the entire hand and all her fingers, which symptoms had been worsening. Dr. Singh generated a written

19IWCC0369

report, wherein he opined that Petitioner suffered a soft-tissue strain in the neck (cervical muscular strain) and did not have thoracic outlet syndrome.

Dr. Singh opined that the muscular strain had resolved and she was capable of full-duty work with no restrictions. He did not believe that she was suffering from thoracic outlet syndrome. He noted that her complaints of tingling, numbness, and burning in her entire hand do not correlate with thoracic outlet syndrome. He also noted that an EMG study of February 2012 did not support thoracic outlet syndrome.[3] Dr. Singh also noted five positive Waddell findings (suggesting exaggeration of symptoms). (RX 7).

Upon receipt of Dr. Singh's IME report, Respondent discontinued light duty accommodation and medical treatment for Petitioner. She then went on short-term disability. Ultimately, Petitioner was administratively terminated on April 25, 2013, as by then she had been off-work for 12 months. (PX 9).

B. Dr. Kenneth Candido IME - October 21, 2014

Three years post-accident (and 2 years after her rib resection surgeries and CRPS diagnosis), Petitioner was examined by Respondent's second Section 12 examiner, Dr. Kenneth Candido, on October 21, 2014. Dr. Candido is a pain specialist at Advocate Masonic Medical Center Department of Anesthesiology. (RX 9). Petitioner stated to him that she was "80% improved when compared to the peak of her injury." She continued to have wrist pain but had full range of motion. Her limitations were related more to fine motor coordination and activities that required hand strength. (PX 9 at 6, 12-13).

Dr. Candido opined that: (i) she did not have CRPS; (ii) her history was consistent with someone who has sustained a "reversible, stretch type of neuropraxia type of insult to a nerve or plexus," since resolved; (ii) her pain management treatments to date were reasonable and necessary, in light of the "outstanding overall improvement" that was made; and (iii) she was at MMI and could work at the Medium Duty capacity. (PX 9 at 13-14).

Regarding diagnoses, Dr. Candido's report reads in pertinent part:

1) What is your diagnosis and prognosis of her current condition? Do you agree that she has CRPS?

The diagnoses include the following:

a) Status post-bilateral first rib resection for bilateral thoracic outlet syndrome.

b) Neuropathic pain, right arm (80% improved since inception)

c) Status post right brachial plexopathy (resolved)

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[3] Interestingly, a second EMG, taken on April 16, 2013, was abnormal, rendering a positive finding. (PX 5a). There was marked atrophy of right hand muscles on examination and decreased sensation in fingers four and five. The EMG study was consistent with right sided brachial plexus nerve injury. Respondent argues that, given that the prior EMG of February 2012 was normal, any thoracic outlet syndrome arose after February 2012 and was not caused by her September 2011 accident.

d) No criteria met to conclude that Ms. Jensen has CRPS type I or type II.

> The prognosis is excellent. Ms. Jensen is "80% better" since being injured. She has intact strength and there are no overt sensory deficits. An 80% improvement is likely "as good as it gets" in my experience of dealing with chronic pain patients who have neuropathic type pain.

(RX 9 at 12).

Regarding her treatment from Rush Pain Center, Dr. Candido opined that the stellate ganglion blocks (she had undergone about 14 right-sided ganglion nerve blocks, which she reported "worked great"), "appear[ed] to have been reasonably and medically necessary to assist in her recovery and possibly to hasten that recovery." However, he opined that her pain management should now be considered "complete" and no further interventional treatment was indicated or necessary. (PX 9 at 13). He believed that she should be weaned off the Norco. (PX 9 at 14).

Regarding thoracic outlet syndrome, Dr. Candido refrained from giving an opinion, as he is not a thoracic surgeon. He did however comment that TOS is inconsistent with the described mechanism of the September 2011 injury, that TOS tends to be more idiopathic than traumatic, and the condition often has congenital causes. (PX 9 at 14).

III. DISCUSSION

It is undisputed that Petitioner suffered a work-related accident in September 2011 while using her upper extremities. Regarding whether she developed TOS and whether this TOS stemmed from that incident, the Commission agrees with the Arbitrator's reliance on the opinions contained in the records of Dr. Speziale and Dr. Warren (who diagnosed her relatively soon after the accident). (Arbitrator's decision at 19-20). Hand surgeon Dr. Speziale believed she experienced a "whiplash-type" trauma, which caused him to suspect TOS. Subsequently, thoracic surgeon Dr. Warren diagnosed TOS and performed surgery, apparently with good results.[4]

Regarding CPRS and/or other alleged current condition of ill-being, the Arbitrator wrote:

> "In the instant case, the Petitioner's FCE indicated she was capable of an eight-hour workday and was unrestricted regarding sitting, standing, or walking. In the case at bar, the Arbitrator finds the Petitioner failed to prove objective findings indicating complex regional pain syndrome. Dr. Candido noted no color changes in either arm, no edema, no temperature abnormalities, no atrophy, no hypersensitivity, and no abnormal growth

[4] On May 21, 2014, Dr. Warren wrote to internist Dr. William Revethis regarding an office visit of May 19, 2014. Dr. Warren wrote: "As you recall, she is right-handed and has undergone bilateral first rib resections for thoracic outlet syndrome. Although the patient has had a good response on the left side, she has burning pain and tingling down the right arm. However, the original tightness in the shoulder seems to be improved. She has been referred to the Rush Pain Center where she is being treated by Dr. Sandeep Amin and responding to Lyrica under the presumed diagnosis of chronic *[sic]* regional pain disorder. Her wounds are clean and dry, and her Adson's sign is no longer positive. Therefore, I believe that her thoracic outlet syndrome has been well treated." (PX 3 at 538).

patterns of hair or nails. The Arbitrator finds the reports and findings of Dr. Singh[5] and Dr. Candido more credible than the opinions of Dr. Amin."

(Arbitrator's decision at 18). The Commission notes that Dr. Amin's records likewise contained no findings of the above-mentioned objective signs of CRPS.[6] Petitioner's exception to the Arbitrator's decision boils down to the argument that there were at least *some* symptoms of CRPS in the medical records. (See Petitioner's review brief at 17-19). Petitioner points to Dr. Amin's records, which consistently mention her (subjective) complaints of allodynia and hyperalgesia at her dozens of monthly visits.

Petitioner's argument is not compelling. Dr. Amin does routinely reference CRPS in his records, but the diagnosis is not supported in any detail. His description of CRPS symptoms are almost exclusively allodynia and hyperalgesia. Her symptoms of nerve pain suggestive of CRPS were at their height when she first began seeing Dr. Amin in September 2012. At hearing, she testified that stellate injections in November 2012 had provided relief from extreme sensitivity to touch on her arm – "Now I could finally touch my forearm without me wanting to cry." (Tr. 42-44). However, it is clear that any such sensitivity has long since abated, as demonstrated by her testimony of undergoing extensive physical therapy, exercising at the gym, and receiving massages from her boyfriend. Furthermore, her testimony regarding her current discomfort and pain makes no mention to this hypersensitivity. It should also be remembered that she has worked three jobs after her release with permanent restrictions by Dr. Warren in November 2013. Dr. Amin's records do not mention that he placed her on any restrictions.

It has now been more than 6 years since Petitioner's accident. By all credible evidence, Petitioner recovered from her TOS surgery and has long since reached MMI as to her accidental work injury. She reached MMI no later than October 21, 2014. Her current pain complaints – whether they rise to the level of CRPS or not -- have not been proven to be related to her accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed January 10, 2018 is hereby modified as discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner total temporary disability benefits of **$ 263.21 per week** for the period commencing **April 21, 2012 through October 21, 2014**, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred for treatment through **October 21, 2014,** subject to the limits of Sections 8(a) and 8.2 of the Act.

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

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[5] Dr. Singh offered no opinion on CRPS, as no CRPS had yet been diagnosed.

[6] In fact, in a "To Whom It May Concern" letter of August 9, 2013, Dr. Amin noted that she "doesn't have any temperature change, allodynia, or any discoloration of her right upper extremity… She just has some wasting of her muscles of the affected hand." (PX 5).

19IWCC0369

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 is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later 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 $25,000.00 The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 22 2019

Marc Parker

Marc Parker

o-05/23/19
mp/ac
68

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

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

JENSEN, JENNIFER
Employee/Petitioner

Case# **12WC015953**

UPS
Employer/Respondent

19IWCC0369

On 1/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.57% 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:

0009 ANESI OZMON RODIN NOVAK KOHEN
HAYLEY GRAHAM SLEFO
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Jensen
Employee/Petitioner
v.
UPS
Employer/Respondent

19IWCC0369

Case # 12 WC 15953
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 Luedke**, Arbitrator of the Commission, in the city of **Chicago**, on **12/19/2017**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **9/27/2011**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$20,530.52**; the average weekly wage was **$394.82**.

On the date of accident, Petitioner was **25** years of age, **single** with **1** dependent child.

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

Respondent shall be given a credit of **$1,654.43** for TTD, **$0** for TPD, **$0** for maintenance, and **$9,092.14** for other benefits, for a total credit of **$10,746.57**.

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

ORDER

Respondent shall pay reasonable and necessary medical services incurred prior to October 21, 2014 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $263.21/week for 94 6/7 weeks, commencing April 21, 2012 through February 14, 2014, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $1,654.43 for temporary total disability benefits and $9,092.14 for nonoccupational indemnity disability benefits that have been paid if allowed under section 8(j).

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

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

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

Robert E. Luedke

Signature of Arbitrator

1/10/18

Date

ICArbDec19(b)

JAN 10 2018

F. Is the petitioner's condition of ill-being causally connected to the work accident?

The arbitrator finds the petitioner's present condition of ill being is not causally connected to the work accident of September 27, 2011. The arbitrator bases this decision on the testimony of the petitioner and the petitioner's treating medical records.

FINDINGS OF FACT

The Petitioner, Jennifer Jensen, worked as a supervisor at UPS when she suffered an undisputed accidental injury that arose out of and in the course of her employment on September 27, 2011. Ms. Jensen was 25 years old on the date of accident. She worked approximately 20 to 25 hours a week. She had worked there 5 to 6 years.

She testified some of her job duties included making sure packages went onto the correct truck, loading hazmat parcels, filling out paperwork, and making sure proper safety precautions were being taken. Ms. Jensen testified she lifted up to 70 pound parcels, pushed parcels and pulled parcels that could weigh up to 120 pounds.

Ms. Jensen testified that on September 27, 2011 she was working on a dock that had a jam in a chute. She testified she climbed a ladder and reached with both hands for the package that was blocking the chute, which was at the height of about her mid-abdomen. She testified that when she lifted the package, which weighed about 76 pounds, it was like lifting a dam and the other packages that were backed up flew down the chute and pushed the package right out of her arms and she jerked forward. She noted that when she lifted the box, she was not aware it weighed 76 pounds. She stated that her hands instantly felt numb and tingling and she felt a pull in her arms. She testified that she notified her supervisor, Mark, and later sought medical attention after her hands continued to swell and the numbness and tingling worsened.

The swelling had not gone down by October 6, 2011. The petitioner testified she couldn't see the bones in her wrists and hands. Respondent sent petitioner to Clearing Clinic where she was seen by Dr. Kahrani. On October 6, 2011, Ms. Jensen presented to the Clearing Clinic after she developed pain and swelling in both hands and wrists that had been present since she was injured when lifting a box that was struck by another box. (Px. 1). She rated her pain level at a 6-7/10. (Id.) Examination revealed swelling at the dorsum of the left hand. (Id.) X-rays of the hands and wrists came back negative. (Id.) Ms. Jensen was diagnosed with bilateral wrist sprains. (Id.) Dr. Carani noted that the condition was related to work activities. (Id.) Dr. Carani prescribed Naproxen and recommended icing after activities. (Id.) According to the petitioner Dr. Kahrani diagnosed bilateral wrist strains and prescribed wrist braces. She was told to follow up in one week.

On October 13, 2011, Ms. Jensen returned to Dr. Carani with continued pain and swelling in her bilateral hands and wrists. (Px. 1). She noted exacerbation with movements and rated her pain level at a 3/10. (Id.) Examination revealed swelling at the dorsum of the left hand. (Id.) Ms. Jensen was diagnosed with bilateral wrist sprains. (Id.) Dr. Carani noted that the condition was related to work activities. (Id.) Therapy was recommended. (Id.) On October 13, 2011 the petitioner was referred to occupational therapy at Clearing Clinic. The petitioner testified she was having problems with activities of daily living.

Ms. Jensen began occupational therapy at the Clearing Clinic on October 17, 2011. (Px. 1). Physical examination showed edema along the thumb extensor tendon. (Id.) Tenderness and discomfort at the first dorsal compartments of both hands was also present. (Id.) Finkelstein testing was positive bilaterally. (Id.)

On October 20, 2011, Ms. Jensen returned to Dr. Carani with continued pain and swelling in her bilateral hands and wrists. (Px. 1). She noted exacerbation with movements and rated her pain level at a 4/10. (Id.) Examination revealed swelling at the dorsum of the left hand, a positive Finkelstein test in the left wrist and tenderness to palpation in both wrists. (Id.) Ms. Jensen was diagnosed with bilateral wrist sprains. (Id.) Therapy was recommended. (Id.)

On October 27, 2011, Ms. Jensen returned to Dr. Carani with continued pain and swelling in her bilateral hands and wrists. (Px. 1). She noted exacerbation with movements and rated her pain level at a 4-5/10. (Id.) Examination revealed swelling at the dorsum of the left hand, a positive Finkelstein test in the left wrist and tenderness to palpation in both wrists. (Id.) Ms. Jensen was diagnosed with bilateral wrist sprains and deQuervian's Tenosynovitis bilaterally. (Id.) Therapy was recommended. (Id.)

Ms. Jensen testified she wrote out an injury report on November 1, 2011. She wrote that she had to break a jam on September 27th and the reason for the jam "was a 76 lb. bulk piece stuck" and "once I lifted the box all the packages behind it came down and jerked the box." (Rx. 2). Ms. Jensen testified she was holding onto the box with both hands when the box became unlogged and jerked her entire body. (Id.) In the written statement Ms. Jensen wrote, "Prior to this day I've never had any problems or discomfort in my hands and wrists. I experienced soreness for the first couple days and my manager was aware. I thought it was a minor sprain, but my hands began to swell as well as my wrists. At that point I couldn't date the pain and needed to seek medical attention. Ever since Sept. 27, I have had this pain and swelling and therefore believe it is the root cause." (Id.)

On November 2, 2011, Ms. Jensen again saw Dr. Carani at the Clearing Clinic. (Px. 1). By this time, she had undergone four therapy visits and continued to demonstrate significantly decreased grip strength, positive Finkelstein testing. (Id.) She also continued to complain of bilateral swelling and pain in her hands. (Id.) Examination revealed swelling at the dorsum of the left hand, a positive Finkelstein test in the left wrist and tenderness to palpation in the dorsum of the right wrist. (Id.) Ms. Jensen was diagnosed with bilateral wrist sprains and deQuervian's Tenosynovitis bilaterally. (Id.) She was referred to a specialist. (Id.) She was restricted to no lifting, pushing or pulling greater than five pounds bilaterally. (Id.)

The treating records of Dr. Speziale were entered as P2. Dr. Speziale saw the petitioner on November 4, 2011 and diagnosed bilateral DeQuervain's tenosynovitis. *P2*. Dr. Speziale

treated the petitioner with an injection in the first dorsal extensor compartments of both wrists. *Id.* Dr. Speziale sent a report to Dr. Carani dated November 4, 2011. *Id.* Dr. Speziale commented that the petitioner has hand swelling bilaterally. *Id.* The left is more swollen than the right. *Id.* She has good range of motion of the fingers and thumb although she has some discomfort with movement of the wrist. *Id.* Dr. Speziale diagnosed bilateral tendinitis. *Id.* Dr. Speziale also diagnosed DeQuervain's tenosynovitis bilaterally. *Id.* The arbitrator finds it significant that Dr. Speziale did not diagnose complex regional pain syndrome.

Ms. Jensen testified she gave a recorded statement to Respondent on November 8, 2011. In the statement, the audio recording of which was submitted by Respondent at trial, Ms. Jensen stated that she had worked at UPS as a part time supervisor, working about 27.5 hours per week. (Rx. 3). She stated she had no other health conditions, but suffered an injury while working on September 27. (Id.) She said there was a jam and when she broke it, all of the freed boxes came down the chute. (Id.) She said the box she lifted that caused the jam was a 76-pound bulk piece. (Id.) Ms. Jensen said that when everything came down the chute she felt a burn like pull in her wrists and hands that swelled to where she did not have as much motion in her hands. (Id.) She further stated that she lifted the box with both hands to unbreak the jam. (Id.) Ms. Jensen said she had been seeing a doctor at the Clearing Clinic, had received a Cortisone injection, and was to start going to therapy. (Id.) Ms. Jensen said she was also sent to a Midwest Hand Specialists. (Id.) She said she had been told she could have a sprain or De Quervain's. (Id.)

On November 9, 2011, Ms. Jensen again saw Dr. Carani and had continued pain and swelling in her bilateral hands and wrists. (Px. 1). Examination revealed swelling in the left hand and positive Finkelsteins testing bilaterally, as well as tenderness to palpation in both wrists. (Id.) Dr. Carani restricted her to lifting no greater than 1 pound bilaterally and no forceful grasping. (Id.) Dr. Carani also referred her to Dr. Speziale for continued care. (Id.)

The petitioner was seen by Dr. Kahrani on November 11, 2011. The petitioner testified she improved after the injections. The petitioner testified she still had pain and numbness.

Dr. Chow examined petitioner at the request the employer on November 22, 2011. *R5.* The petitioner gave Dr. Chow a history of lifting a 75 pound box stuck in the chute. *Id.* After she lifted the box the other boxes came tumbling down and she suffered a pulling injury of both arms. *Id.* The following week she had more swelling and pain in her hands and wrists. *Id.* On October 6, 2011 she was seen at Clearing Clinic. It. She was treated with splints, ibuprofen, and physical therapy. *Id.* The petitioner gave Dr. Chow a history of being seen by a hand surgeon and being diagnosed with bilateral DeQuervain's disease. *Id.* She received cortisone injections in both wrist. *Id.* Dr. Chow diagnosed bilateral tendinitis of her wrists in both the first and second dorsal compartments. *Id.* Dr. Chow recommended conservative treatment. *Id.* The petitioner gave Dr. Chow a history of feeling better. *Id.* The arbitrator notes that Dr. Chow received no complaints regarding the petitioner's arms, shoulders, or neck. Dr. Chow did not diagnose complex regional pain syndrome.

On November 23, 2011, Ms. Jensen again saw Dr. Carani and had continued pain, which she described as soreness, and swelling in her bilateral hands and wrists. (Px. 1). She noted improvement with therapy. (Id.) Examination revealed swelling in the left hand and positive Finkelsteins testing bilaterally, as well as tenderness to palpation in both wrists. (Id.) Dr. Carani

restricted her to lifting no greater than 1 pound bilaterally and no forceful grasping. (Id.) Dr. Carani also referred her to Dr. Speziale for continued care. (Id.)

On December 1, 2011, Ms. Jensen saw Dr. Speziale and reported improvement with the injection, but continued discomfort with wrist range of motion. (Px. 2). Examination revealed a negative Finkelstein test and tenderness over the radial aspect of the wrist. (Id.) Dr. Speziale released her to work with a 20 pound lifting restriction. (Id.) He recommended additional physical therapy. (Id.)

Dr. Speziale sent a report to Dr. Carani dated December 19, 2011. *Id.* The petitioner gave a history of not feeling she could perform her regular duties. *Id.* Dr. Speziale stated he did not know why the petitioner has fullness in the left palm. *Id.* Dr. Speziale stated the petitioner's left index finger ganglion was asymptomatic and may not be related to the injury. *Id.* The petitioner gave a history of being 70% improved since the injections for her DeQuervain's tenosynovitis. *Id.*

Dr. Speziale sent a report to Dr. Carani dated December 29, 2011. *Id.* Dr. Speziale noted that the petitioner gave a history of having intermittent heaviness in her arms for the past 4 to 6 weeks. *Id.* Dr. Speziale noted that the petitioner told Dr. Speziale about these problems 10 days before the December 29, 2011 visit. *Id.* She gave a history of fatigue in both her arms as a result of simple tasks like dusting at home. *Id.* Dr. Speziale noted that the petitioner had full range of motion in her fingers and wrist, no tenderness over the radial aspect of the wrist, no clicking or instability in the wrist, no tenderness over the TFCC, and no tenderness over the ulnar styloid of the wrist. *Id.* The petitioner complained of left mid palm fullness. *Id.* Dr. Speziale noted very slight fullness but mentioned that it was minor and does not appear to be much more present when compared to the right side. *Id.* The right side has no mid palm swelling. *Id.* The arbitrator finds it significant that Dr. Speziale mentioned he was concerned about the possibility of thoracic outlet syndrome and referred the petitioner to the thoracic outlet syndrome program at Rush. *Id.* The arbitrator notes that Dr. Speziale did not diagnose or mention complex regional pain syndrome in the petitioner's hands wrists or upper extremities.

The treating records of Dr. Warren were entered as *P3.* Dr. Warren saw the petitioner on January 25, 2012. *P3.* Dr. Warren sent a report to Dr. Speziale dated January 27, 2012. *Id.* Dr. Warren wrote that the petitioner was essentially a healthy young woman apart from findings consistent with bilateral thoracic outlet syndrome. *Id.* Dr. Warren opined that the petitioner had bilateral bruits with loss or diminution of pulse with reproduction of symptoms upon assuming Edson's position. *Id.* Dr. Warren prescribed a chest x-ray and EMG studies. *Id.* She testified that she was having difficulty with numbness, tingling and weakness in both arms and hands. Dr. Warren noted a history that she was lifting a heavy object off a conveyor belt that had a backlog of parcels, and she strained her shoulders in doing so. (Px. 3). Ms. Jensen reported she had an onset of progressive bilateral swelling in her hands along with numbness and tingling in her bilateral upper extremities. (Id.) She also noted pain at the base of her neck. (Id.) Dr. Warren noted she had weakness, especially in her right hand as measured by grip strength and pinch strength. (Id.) She reported aggravation of the pain, numbness and weakness by raising her hands over her head. (Id.) Dr. Warren diagnosed bilateral thoracic outlet syndrome. (Id.) The petitioner

testified that Dr. Warren told her she had thoracic outlet syndrome bilaterally. According to the petitioner Dr. Warren determine the petitioner needed a surgical rib resection at the first right rib and first left rib. Dr. Warren prescribed continued physical therapy. The arbitrator finds it significant that Dr. Warren did not diagnose complex regional pain syndrome.

On March 7, 2012, Ms. Jensen returned to Dr. Warren, who opined that the EMG she had undergone on February 20, 2012 showed findings of bilateral median mononeuropathy at carpal tunnel consistent with a clinical diagnosis of carpal tunnel. (Px. 3). Ms. Jensen reported improvement with bilateral hand, upper body strength and discomfort on the neck area from physical therapy. (Id.) Dr. Warren recommended an additional 12 weeks of physical therapy. (Id.)

The petitioner had continued to work at light duty which was supplied by the employer. The light duty stopped on April 20, 2012. The petitioner then commenced receiving short-term disability benefits through the respondent. She collected the benefits through October 22, 2012. (Px. 14).

On May 21, 2012, Ms. Jensen again saw Dr. Warren, who diagnosed her with left thoracic outlet syndrome with reproducible bruits over her subclavical arteries with reproduction of the pain in her left shoulder upon assuming Adson's position. (Px. 3). Ms. Jensen complained of increasing pain on her bilateral shoulders (left greater than right), edema, numbness and tingling. (Id.) She also noted difficulty sleeping due to pain. (Id.) Dr. Warren noted that she was no longer able to do her prior work duties due to the injury she sustained from work. (Id.) Dr. Warren opined that even if she underwent a left first rib resection, Ms. Jensen would likely not be able to return to her job. (Id.) He recommended surgery. (Id.)

The petitioner saw Dr. Warren on May 22, 2012. The petitioner testified that at that time her arms were numb. According to the petitioner Dr. Warren continue to prescribe a first rib resection on the left and right. The petitioner underwent a first rib resection on the left side on June 5, 2012. She was seen by Dr. Warren for follow-up on June 12, 2012. The petitioner was prescribed physical therapy and was given a restriction of no lifting over 10 pounds. The petitioner underwent a first rib resection on the right side on September 6, 2012.

On May 30, 2012, Ms. Jensen saw Dr. Warren for a pre-op exam. (Px. 3). She reported bilateral swelling of arms and insomnia due to the pain. (Id.) She continued to have numbness and tingling that worsened with activities, requiring her to lift objects and raise her arms. (Id.) Dr. Warren diagnosed bilateral subclavian artery compromise with left thoracic outlet syndrome. (Id.) He restricted her from lifting more than 10 pounds on a regular basis. (Id.)

On June 5, 2012, Ms. Jensen underwent her first surgery, which was transaxillary first rib resection on the left side performed by Dr. Warren. (Px. 3a). Her pre- and post-operative diagnosis was left thoracic outlet syndrome. (Id.)

On June 13, 2012 Dr. Warren sent a report to Dr. Speziale dated June 13, 2012. *Id.* The petitioner underwent a left first rib resection. *Id.* The petitioner was seen by Dr. Warren and follow up on June 12, 2012. *Id.* The petitioner gave a history of strength returning to her left hand and that her shoulder aching was relieved. *Id.*

On July 16, 2012, Ms. Jensen returned to Dr. Warren and noted some hand swelling bilaterally. (Px. 3). Ms. Jensen testified that she had improvements in her left upper extremity after surgery, including noticeable reduction in swelling as well as decreased tingling. (Id.) He also noted that the left arm was measurable stronger than the right arm. (Id.) Physical examination revealed positive Adson's testing on the right. (Id.) Dr. Warren recommended proceeding with a right first rib resection and restricted her from working. (Id.)

On August 29, 2012, Ms. Jensen had a pre-op visit with Dr. Warren. (Px. 3). She noted bilateral hand swelling and strength deficits, mainly on the right side. (Id.) She noted significant improvement with left upper extremity strength and improved paresthesias and pain. (Id.) Physical examination revealed decreased range of motion, joint stiffness and pain in the right arm. (Id.)

On September 6, 2012, Ms. Jensen underwent her second surgery, transaxillary resection of the right first rib performed by Dr. Warren. (Px. 3a).

Ms. Jensen returned to Dr. Warren on September 13, 2012. (Px. 3). She noted pain in her right forearm with weakness. (Id.) Dr. Warren opined that her pain was secondary to retraction of the brachial plexus. (Id.) Dr. Warren reviewed her chest x-ray and noted excellent decompression of the thoracic outlets with resection of the posterior elements bilaterally. (Id.) Dr. Warren recommended therapy and restricted her to no lifting more than 10 pounds repeatedly. (Id.) Dr. Warren also referred for post-operative pain management. (Px. 5a).

On September 25, 2012, Ms. Jensen presented to Dr. Sandeep Amin, of Rush Pain Center, and reported pain in her right upper extremity and hand at a level 7/10. (Px. 5a). Ms. Jensen testified she still had improved symptoms on the left side at this point, but she had tingling in her right arm and fingers as well as sensitivity to light touch. Ms. Jensen also reported paresthesias of the right shoulder. (Id.) Examination revealed muscle weakness of the right upper extremity as well as allodynia and decreased grip strength in the right hand. (Id.) Dr. Amin diagnosed right upper extremity neuropathic pain. (Id.) He recommended a possible stellate ganglion nerve block and prescribed Norco and Lyrica. (Id.)

The petitioner was seen by Dr. Amin who prescribed hydrocodone and Flexeril. Between October 2, 2012 and November 6, 2012, Ms. Jensen underwent six stellate ganglion blocks on the right side performed by Dr. Amin. (Px. 5a). At the October 16, 2012 procedure, Ms. Jensen noted improvement in the right arm since the start of the ganglions. (Id.) The petitioner testified that she received help from these injections but the symptoms did not go away.

On October 27, 2012, Ms. Jensen returned to Dr. Warren. (Px. 3). He recommended additional physical therapy as she has made progress with her right arm and hand functioning and strength. (Id.) He also recommended continued pain management. (Id.) Ms. Jensen still reported being unable to lift items or hold her daughter for more than moments at a time. (Id.)

On November 20, 2012, Ms. Jensen returned to Dr. Amin and reported pain in her right upper extremity. (Px. 5a). She also noted numbness and tingling. (Id.) There was sensitivity with touch of the right fifth finger. Dr. Amin prescribed Norco, Lyrica and Flexeril. (Id.)

On December 4, 2012, Ms. Jensen underwent an intravenous regional sympathetic block of the right upper extremity performed by Dr. Amin. (Px. 5a). Her pre- and post-operative diagnosis was complex regional pain syndrome of the right upper extremity. (Id.)

On December 5, 2012, Ms. Jensen returned to Dr. Warren and reported numbness and tingling in her right hand and fourth and fifth fingers. (Px. 3). Dr. Warren recommended continued pain management and physical therapy. (Id.)

On December 18, 2012, Ms. Jensen returned to Dr. Amin for another right ganglion block. (Px. 5a).

On January 15, 2013, Ms. Jensen returned to Dr. Amin and continued to have pain in her right upper extremity. (Px. 5a). Hypersensitivity, mild atrophy and mild edema were noted on examination. (Id.)Physical therapy was recommended. (Id.)

Ms. Jensen continued to attend physical therapy through January 15, 2013. (Px. 4). By that time, she still was unable to do daily activities, such as opening sandwich bags, scrubbing dishes or holding a cup. (Id.) She also struggled to get dressed and grip small objects. (Id.) Ms. Jenson had moderate muscle atrophy to right hand palmar and intrinsic musculature as well as hypersensitivity. (Id.) She demonstrated poor soft tissue mobility of her forearm and poor dexterity of her right hand. She still had significant weakness in her right hand. (Id.)

On January 22, 2013, Ms. Jensen returned to Dr. Warren and noted discomfort in the right upper extremity that radiates down her arm with tingling in the fourth and fifth digits. (Px. 3). She also noted continued weakness in the left arm. (Id.) Dr. Warren recommended continued physical therapy and restricted her to lifting no more than 15 pounds. (Id.)

On February 26, 2013, Ms. Jensen underwent another ganglion block on the right performed by Dr. Amin. (Px. 5a).

In February and April 2013 Dr. Amin treated the petitioner with additional ganglion blocks. According to the petitioner the petitioner had an EMG test which showed improvement.

On March 5, 2013, Ms. Jensen returned to Dr. Amin with continued pain in her right upper extremity. (Px. 5a). Right erythema was present on examination, as well as allodynia and atrophy. She underwent another ganglion block on the right. (Id.)

On March 13, 2013 and March 19, 2013, Ms. Jensen underwent another ganglion block on the right performed by Dr. Amin. (Px. 5a).

On April 2, 2013, Ms. Jensen returned to Dr. Amin for another ganglion block on the right. (Px. 5a). Decreased strength in the right thumb was present on examination. (Id.) Dr. Amin prescribed Norco, Lyrica, Flexeril and Ambien. (Id.)

On April 17, 2013, Ms. Jensen returned to Dr. Warren and continued to report aching in her right shoulder with numbness and tingling down her right arm. (Px. 3). Ms. Jensen testified that physical therapy was going slowly and that it was "hard to get everything back to how it was." Dr. Warren noted there had seen some improvement with physical therapy. (Id.) He recommended continued physical therapy and restricted her from working. (Id.)

On April 16, 2013, Ms. Jensen underwent an EMG of her right upper extremity. (Px. 5a). Marked atrophy of right hand muscles was present on examination and decreased sensation in fingers four and five. (Id.) The EMG study was abnormal and was consistent with right sided brachial plexopathy. (Id.) The findings of development of a predominantly axonal process affecting the lower trunk were consistent with a neurogenic thoracic outlet syndrome. (Id.)

By April 16, 2013, Ms. Jensen had undergone 71 physical therapy visits. (Px. 4). She continued to report radicular symptoms with weakness in the right hand and arm. (Id.) She reported difficulty gripping to write, carry or lift with her right hand. (Id.) She had decreased tissue mobility in the right cervical muscles and positive upper limb tension testing for the ulnar and median nerves in the right upper extremity. (Id.) She had 50 percent decreased right grip strength. (Id.)

Ms. Jensen testified that she was still employed by UPS at that point, but her employment eventually ended when she received a letter, dated April 24, 2013, from UPS terminating her employment as of that date. (Px. 9).

On June 14, 2013, Ms. Jensen began physical therapy at ATI Physical Therapy. (Px. 6). She noted consistent pain in her neck and right arm. (Id.) She described difficulty lifting objects and gripping with her left hand. (Id.) Her grip strength was 65 pounds on the left and only 40 pounds on the right. (Id.)

On July 15, 2013, she had completed nine visits of physical therapy (Px. 6). She noted continued pain and difficulties with activities of daily living, such as turning a key to start a car and grasping dishes. She also noted difficulty sleeping.

On July 17, 2013, Ms. Jensen returned to Dr. Warren and reported her symptoms were improving with physical therapy and noted she could start her car with her right hand and snap her fingers on her right hand. (Px. 3). She also reported an episode of severe stiffness in her neck but improvement in her symptoms. (Id.) Dr. Warren noted that "she had undergone bilateral first rib resection for thoracic outlet syndrome which she sustained after moving heavy boxes on a conveyer belt at UPS." (Id.) Dr. Warren recommended continued therapy, pain management and restricted her from working. (Id.)

Dr. Amin saw the petitioner again on August 9, 2013. The arbitrator is aware that Dr. Amin has diagnosed bilateral thoracic outlet syndrome and right upper extremity CRPS. *Id.* Dr. Amin noted 3 out of 10 pain in her right hand. *Id.* The arbitrator finds it significant that Dr. Amin found no temperature change, increase pain response, or discoloration in the petitioner's right upper extremity. *Id.* Dr. Amin noted normal strength and range of motion in the petitioner's upper extremities. *Id.*

On September 3, 2013, Ms. Jensen returned to Dr. Amin with right upper extremity pain with tightness, numbness and tingling. (Px. 5b). Ms. Jensen's right upper extremity strength was decreased. (Id.) Allodynia was present on physical examination. (Id.) Neurontin, Lyrica, Flexeril, Ambien and Norco were prescribed. (Id.) Ms. Jensen testified she had side effects from the medications of feeling nauseous and dizzy from the Norco and tired from the Flexeril.

The petitioner underwent a functional capacity exam at ATI physical therapy on October 9, 2013. *P7.* The arbitrator notes the FCE used the KEY evaluation system. The arbitrator notes the FCE was conducted by an athletic trainer and not a physical therapist. The FCE determined the petitioner was capable of an eight hour workday. *Id.* There were no limitations on sitting, standing, or walking. *Id.* The petitioner could occasionally lift 25.8 pounds with both arms above her shoulders and frequently lift 17 pounds with both arms above her shoulders. *Id.* She could occasionally lift 17.4 pounds the right arm above her shoulders and 15.2 pounds with the left arm above her shoulders. *Id.* She could frequently lift 8.6 pounds above her shoulder with the right arm at 8.6 pounds above her shoulder with the left arm. *Id.* She could occasionally lift 55.6

pounds from a desk to a chair with both arms. *Id.* She could frequently lift 14.8 pounds from a desk to a chair with both arms. *Id.* The athletic trainer conducting the functional capacity exam determined the petitioner could work at the light physical demand level. *Id.*

On November 18, 2013 Dr. Warren issued a report releasing the petitioner to return to work effective November 18, 2013. *Id.* The petitioner has no restrictions regarding standing, walking, climbing, sitting, or fine motor skills. *Id.* She is restricted from heavy lifting 20 pounds or greater for longer than one hour per day. *Id.* On November 21, 2013 Dr. Warren sent a report to Dr. Revethis. *Id.* Dr. Warren noted that the petitioner has relief of the aching in both shoulders extending down both arms into her hands. *Id.* Dr. Warren determined that her postoperative condition has left her weak and unable to lift heavy objects for at least the foreseeable future. *Id.* Dr. Warren released her to work with a 20 pound lifting restriction for no more than one hour a day. *Id.*

Ms. Jensen testified that she started searching for a job after her release with permanent restrictions by Dr. Warren. She testified that she was looking for jobs that were within her restrictions. She kept a job log to detail her search. (Px. 16).

On December 3, 2013, Ms. Jensen returned to Dr. Amin with continued right upper extremity pain. (Px. 5b). Mild allodynia was present in the right upper extremity. (Id.) Norco, Ambien, Flexeril and Lyrica were prescribed. (Id.)

On February 4, 2014, Ms. Jensen returned to Dr. Amin and reported a slight worsening of pain in her right fourth and fifth fingers. (Px. 5b). Mild thenar atrophy was present on examination. Physical therapy was recommended and she was prescribed refills of her prescriptions. (Id.)

Ms. Jensen testified she eventually received a job offer at Extended Stay hotel for a front desk job and started working February 16, 2014. Ms. Jensen testified that she applied for and was awarded Social Security Disability benefits for the period of April 20, 2012 through February 16, 2014.

Ms. Jensen testified she eventually left that job because she was unable to sit for an eight-hour shift without significant discomfort. Ms. Jensen testified that she also later worked at a restaurant as a manager, but had to leave the job because she was not physically capable of lifting and carrying trays. Ms. Jensen testified she also attempted to work at a chiropractic office two days a week, but still had difficulty sitting behind a desk for eight hours at a time.

On April 2, 2014, Dr. Amin noted that Ms. Jensen still had a moderate amount of pain in the right upper extremity, but was more manageable with the stellate ganglion block and medication of Flexeril, Topamax, Norco, Lyrica and Ambien. (Px. 5b). Dr. Amin noted Lyrica was an integral part of her pain management as it is known to decrease neuropathic pain symptoms like allodynia and hyperalgesia. (Id.)

On July 15, 2014 the petitioner testified she received a recommendation of a spinal cord stimulator. She did not pursue the spinal cord stimulator. She received another ganglion block on July 15, 2014. The petitioner testified that during this time she continued to have pain in her neck and numbness in her right arm. She was seen Dr. Amin monthly.

On May 21, 2014 Dr. Warren sent a report to Dr. Revethis. *Id.* Dr. Warren saw the petitioner on May 19, 2014. *Id.* Dr. Warren noted the petitioner had a good response on the left side but has burning pain and tingling down the right arm. *Id.* The original tightness in the right shoulder seems to be improved. *Id.* Dr. Warren commented that the petitioner has been referred to the Rush Pain Center where she is being treated by Dr. Sandeep Amin under the presumed diagnosis of chronic regional pain disorder. *Id.* Apparently Dr. Warren did not join in this diagnosis. Dr. Warren noted that the petitioner's Adson's signs are no longer positive. *Id.* Dr. Warren opined that the petitioner's thoracic outlet syndrome has been treated and no further follow-up appointments rescheduled. *Id.*

On July 15, 2014, Dr. Amin wrote a letter detailing Ms. Jensen's condition and outlined his treatment recommendations. (Px. 5b). Dr. Amin wrote that Ms. Jensen had "a history of complex regional pain syndrome with neuropathic right upper extremity pain secondary to an injury she suffered while working for UPS. [She] developed thoracic outlet syndrome with bilateral upper extremity pain. She underwent resection of the first rib bilaterally with relief of her left-sided upper extremity pain. However, her right upper extremity continued to progress and deteriorate." (Id.) Dr. Amin noted that Lyrica was the best medication for her neuropathic pain and she received temporal relief from the stellate ganglion nerve blocks. (Id.) He noted the relief has been transient. (Id.) As such, Dr. Amin recommended she undergo a trial spinal cord stimulation given her partial response to stellate ganglion blocks as well as her partial response to medication management. Dr. Amin opined that it is medically necessary to proceed with the spinal cord stimulator trial given the treatment she has undergone and her disease process. (Id.) He also noted that "spinal cord stimulation has been proven to be an effective modality for the treatment of complex regional pain syndrome." (Id.)

On August 12, 2014, Ms. Jensen returned to Dr. Amin with continued complaints of sensitivity and pain on the ulnar side of the right hand with associated numbness and tingling. (Px. 5b). Her allodynia level was rated at a level 8/10 and she noted pain relief for one week following the last ganglion block. (Id.) Norco, Flexeril, Lyrica and Zolpidem were prescribed. (Id.)

Ms. Jensen continued to follow up with Dr. Amin on a monthly basis and had persistent symptoms of allodynia in the right hand. (Px. 5b). Ms. Jensen testified she continued to have pain and tingling on her right side. She then began seeing Dr. Amin every three months for continued pain management. (Id.) At her visit on April 4, 2015, she continued to have right upper extremity pain that she managed with Norco and Tramadol intermittently. (Id.) Dr. Amin refilled her prescriptions. (Id.) In April of 2015 the petitioner testified she returned to physical therapy.

She saw Dr. Amin on September 1, 2015. Dr. Amin stopped physical therapy. She went to a gym on her own. She put her physical therapy bills through group carrier. The petitioner testified that her symptoms would get worse if there was no physical therapy.

On September 1, 2015, Ms. Jensen returned to Dr. Amin and reported pain in her right upper extremity at a level of 6/10, which was consistent with the previous exam. (Px. 5b). She noted her strength and range of motion in her right hand had been declining since stopping physical therapy. (Id.) Ms. Jensen testified that after stopping physical therapy her symptoms would come back or get worse and she would have soreness and weakness. Dr. Amin recommended additional physical therapy and repeat stellate ganglion blocks and refilled her prescriptions. (Id.)

On September 15, 2015, Ms. Jensen underwent a right stellate ganglion block. (Px. 5b). She noted improved range of motion, strength and pain levels since restarting physical therapy. (Id.)

On September 29, 2015, Ms. Jensen returned to Dr. Amin for another right stellate ganglion block and noted improved vascularity in the right hand since the last block. (Px. 5b).

On October 13, 2015, Ms. Jensen returned to Dr. Amin and reported 30% improvement since the last block. (Px. 5b). However, she continued to have some pain, paresthesia and numbness in the right hand. (Id.) She underwent another right ganglion block at that visit and again on October 20, 2015. (Id.)

On October 27, 2015, Ms. Jensen returned to Dr. Amin and reported 35% improvement since her last block. (Px. 5b). She still noted paresthesia in the right hand with improvement in the right 5th digit since the last block. (Id.) Ganglion block #5 was administered. (Id.) She underwent a sixth block on November 3, 2015. (Id.)

On November 17, 2015, Ms. Jensen returned to Dr. Amin and reported greater than 50% improvement with pain since the final ganglion block and continued physical therapy. (Px. 5b). Dr. Amin recommended an additional two weeks of physical therapy. (Id.)

On February 23, 2016, Ms. Jensen returned to Dr. Amin and reported some sensitivity in her right arm and distal forearm. (Px. 5b). Dr. Amin recommended continued physical therapy and refilled her Norco and Tramadol prescriptions. (Id.)

On March 21, 2016, Ms. Jensen again saw Dr. Dalawari for her upper back and right arm pain. (Px. 15). She received a referral to again see Dr. Amin. (Id.)

On April 12, 2016, Ms. Jensen returned to Dr. Amin and he noted a recent exacerbation of her right upper extremity neuropathic pains secondary to brachial plexopathy with significant increase in allodynia and hyperalgesia. (Px. 5b). Dr. Amin recommended repeat stellate blocks and the trial spinal cord stimulator. (Id.) Ms. Jensen testified she wanted to proceed with the spinal cord stimulator trial at that time, but her health insurance would not cover the procedure.

On April 26, 2016, Ms. Jensen returned to Dr. Amin for a stellate ganglion block. (Px. 5b). She reported symptoms, especially sensitivity to heat and cold, in her right hand and pain that increased with activities. (Id.) The petitioner testified that in April and May 2016 the petitioner had additional ganglion blocks. The petitioner continued to see Dr. Amin monthly. The petitioner determined that her group coverage did not cover the spinal cord stimulator. When she was seen for treatment on May 10, 2016 she testified she still had pain.

On May 2, 2016, Ms. Jensen again saw Dr. Amin and reported improvement since the block with her right hand cramping, but continued to have paresthesias up to her mid forearm. (Px. 5b). Dr. Amin administered a second ganglion block. (Id.)

On May 10, 2016, Ms. Jensen returned to Dr. Amin and noted no improvement since the previous block. (Px. 5b). She reported paresthesias up to her right mid-forearm and left arm numbness. (Id.) Ms. Jensen also complained of persistent pain in her left and right shoulders. (Id.) Dr. Amin recommended an MRI of the cervical spine, right shoulder and left shoulder. (Id.) He also referred her for reevaluation by Dr. Warren "given the recurrence of symptoms of thoracic outlet syndrome in the left upper extremity." (Id.)

On June 14, 2016, Ms. Jensen again saw Dr. Amin. (Px. 5b). She reported parethesias up to her right mid-forearm and left arm numbness. (Id.) She noted that she was 11 weeks pregnant and had weaned herself off her narcotics. (Id.) She rated her pain at a level 8/10. (Id.) Examination revealed allodynia and hyperalgesia over the right hand. (Id.) Dr. Amin again recommended she follow up with Dr. Warren and gave her a referral for physical therapy. (Id.) Medications and MRI were put on hold until after the pregnancy. (Id.)

On July 28, 2016, Ms. Jensen saw her primary care physician, Dr. Satinder Dalawari, of Palos Internists, S.C., for a referral to physical therapy. (Px. 15). At the time, she was pregnant and unable to take pain medications. (Id.)

Ms. Jensen testified that during her pregnancy she tried to relieve her symptoms by doing a home exercise program, stretching, yoga, and using hot and cold packs. She said she had heaviness in her arms, tingling and weakness as well.

Ms. Jensen testified she returned to Dr. Amin on April 18, 2017 after giving birth. (Px. 5c). She was having bilateral arm pain, greater on the right, but noted the left arm pain had worsened since being off her medications during pregnancy. (Id.) She reported that since giving birth she had been taking Norco, provided from her OB and that she had left over from previous treatment with Dr. Amin. (Id.) Ms. Jensen also complained of worsened neck and shoulder pain, which she rated at a 9/10. (Id.) She noted burning, tingling and heavy sensation in both arms. (Id.) Physical examination revealed allodynia and hyperalgesia sensitivity to light touch over her right fingers and forearm to the elbow and wasting of thenar eminence. (Id.) Allodynia at the left triceps region was also present. (Id.) Dr. Amin noted decreased range of motion in the right upper extremity. (Id.) Dr. Amin recommended either repeat stellate blocks or proceeding with the spinal cord stimulator trial. (Id.) He recommended an MRI of the cervical spine due to the new onset of bilateral shoulder pain with difficulty extending and flexing the neck. (Id.)

On March 28, 2017, Ms. Jensen saw Dr. Dalawari for her upper back and bilateral arm pain. (Px. 15). Dr. Dalawari referred her to physical therapy. (Id.)

On May 6, 2017, Ms. Jensen underwent an MRI of her cervical spine at Advocate Christ Medical Center. (Px. 5c). The MRI revealed a mild broad-based disc bulge at C4-C5. (Id.) She underwent an MRI and was referred back to Dr. Warren. The petitioner saw Dr. Amin on May 18, 2017.

Ms. Jensen testified that she returned to Dr. Amin following the MRI on May 23, 2017. She reported ongoing right greater than left arm pain, but noted that the pain in her left arm had worsened since being off of the pain medications due to her pregnancy. (Px. 5c). She reported her neck and shoulder pain was even worse and rated the pain at a 9/10. (Id.) She also noted burning, tingling and heavy sensation in both arms. (Id.) Dr. Amin reviewed the MRI and concurred with the findings of a disc protrusion at C4-C5 with left-sided prominence. (Id.) Examination revealed significant allodynia and hyperalgesia over the right forearm and wasting of the thenar eminence. (Id.) Dr. Amin also noted decreased range of motion in the right upper extremity. (Id.) He opined that Ms. Jensen would benefit from repeat stellate blocks or proceed with the trial spinal cord stimulator. (Id.)

The petitioner had a gap in treatment because she had the birth of her child. She testified she couldn't be treated while she was pregnant. The petitioner testified she felt horrible when she

was off her prescription medication. On May 18, 2017 Dr. Amin prescribed a spinal cord stimulator or ganglion blocks. The petitioner underwent another cervical MRI on May 6, 2017. On May 23, 2017 the petitioner last saw Dr. Amin. On that date Dr. Amin reviewed the MRI and continued to prescribe the spinal cord stimulator.

Ms. Jensen testified that she wants to undergo the spinal cord stimulator trial, but is unable to because it is not covered by her group carrier insurance. She testified she scheduled a visit to the Thoracic Surgery Department at Rush for January 2018. The appointment is with another thoracic surgeon, because Dr. Warren has since passed away.

Ms. Jensen testified that she has had some relief from the stellate ganglion blocks, but the relief has been varied. She further testified that she has seen improvements from physical therapy over the years. Ms. Jensen was in visible discomfort during her testimony, and testified that as she sat on the stand she felt numbness from her elbow to her fingers, a heaviness and tingling. She also testified that she was in pain and noted the pain is daily but variable. She noted her symptoms interfere with her daily activities, for example just pulling apart a piece of cheese for her child can be difficult. She noted the outside cold aggravates her arm, and therefore she cannot take her children sledding because she would be crying from the pain. Ms. Jensen also testified that she has difficulty caring for her baby, who is 20 pounds because she is afraid she is going to drop him.

The petitioner has permanent restrictions. She has looked for work. Petitioner's Exhibit 16 are the petitioner's job logs. The petitioner testified she is looking for clerical employment that does not require lifting.

On February 14, 2014 the petitioner started employment at the front desk of an extended stay hotel. The petitioner applied for SSDI benefits. She was awarded SSDI benefits from April 20, 2012 to February 16, 2014.

The petitioner testified she is not currently working. The petitioner testified that at the current time she physically can't take care of her child and work in pain. The petitioner testified that she wants the spinal cord stimulator. She testified that Dr. Warren is deceased.

Petitioner testified that presently she is in pain. She has numbness from her elbows to her fingers. Her neck is sore. Her right hand is numb. She has the symptoms daily. Her pain level is 8/10. Activities of daily living exacerbate her pain. Cold-weather aggravates the pain in her arms. Her child weighs 20 pounds and is difficult to lift.

During cross-examination the petitioner testified she gave an accurate history to her doctors. She testified that the accident history she gave to UPS was truthful. She didn't complain of shoulder pain when she was first seen at Clearing Clinic on October 6, 2011. Dr. Kahrani diagnosed bilateral wrist sprains on October 6, 2011 when the petitioner was first seen for treatment. The petitioner gave no history of neck arm or shoulder pain when she was seen for treatment on October 20, 2011, October 27, 2011, November 2, 2011, November 9, 2011, or November 23, 2011.

Respondent's Exhibit 2 was written by the petitioner a month after the accident. The petitioner's signature is on Respondent's Exhibit 2. The petitioner gave a history that she was

lifting a box which had become stuck. She did not complain of any neck or shoulder problems in the statement.

On November 8, 2011 the petitioner gave a recorded statement to the respondent's workers compensation carrier. The petitioner gave a history of a burning sensation on her hand and wrist. She did not give a history of any problems in her arms, shoulders, or neck.

The petitioner was seen by Dr. Chow one time on November 22, 2011. She did not give a history of any arm, shoulder, or neck problems. She only complained of hand and wrist problems. Dr. Chow's diagnosis with tendinitis in both wrists.

The petitioner was seen by Dr. Speziali on December 1, 2011. She had no complaints of any arm shoulder or neck problems. The petitioner was seen by Dr. Speziale on December 19, 2011. She was given a 20 pound lifting restriction. She could not work regular duty with a 20 pound lifting restriction. She had a 70% improvement from the injection but the improvement didn't last. Her ganglion was not work related.

On December 29, 2011 she gave a history of having arm problems in mid-November. She saw Dr. Warren and gave a history of having arm problems two months after the accident. The petitioner testified that her surgeries didn't completely remove her symptoms.

The petitioner testified she has had approximately 130 sessions of physical therapy but still has pain complaints. Physical therapy has improved her symptoms according to the petitioner. The petitioner has had 16 injections. She did have temporary improvement in her symptoms from the injections.

The petitioner was employed at a restaurant. She quit this job when she became pregnant. She could not lift the trays at work.

In April of 2016 she was working two days a week at a chiropractor's office. After the 9/27/11 accident she has worked at an extended stay hotel, a restaurant, and at a chiropractor's office. She has permanent restrictions.

The petitioner agreed that on April 26, 2016 she had her 17th injection with Dr. Amin and received 100 Norco pills and 60 tramadol pills. On May 2, 2016 she had her 18th ganglion block and received another 100 Norco pills and 60 tramadol pills.

On May 18, 2017 she was off the pain medications during her pregnancy. Her son was born on December 29, 2016.

During redirect the petitioner testified she presently has trouble carrying her baby. She has a permanent restriction of no lifting over 20 pounds. She can lift for one hour per day. She has attempted to get back to work. She left her job at the restaurant because she couldn't carry heavy trays. She left the job at the chiropractor's office because she can't sit for eight hours. She would get some pain relief from the ganglion blocks but the level of relief varies.

Dr. Kenneth Candido IME

The arbitrator notes the report of Dr. Candido entered as R9. On October 11, 2014, Ms. Jensen underwent a Section 12 exam, at the request of Respondent, with Dr. Kenneth Candido, of Advocate Masonic Medical Center Department of Anesthesiology. (Id.) Ms. Jensen gave a history of being injured while unjamming a chute on September 27, 2011. (Id.) She noted that she lifted a package, weighing 78 pounds, with both hands and then all of the backed up packages came sliding down the chute, causing immediate pain in both wrists. (Id.) She rated her pain at a 3-4/10 in her bilateral wrists that increased to 8/10 with activity. (Id.) She noted continued strength deficits and fine motor coordination. (Id.) She reported that she felt 80% improved when compared to the peak of her injury. (Id.)

Dr. Candido diagnosed Ms. Jensen with status post bilateral first rib resection for bilateral thoracic outlet syndrome, right arm neuropathic pain, status post right brachial plexopathy since resolved. (Id.) He noted that she did not have CRPS as there were no overt sensory deficits and intact strength. (Id.)

Dr. Candido opined that the treatment Ms. Jensen had undergone to date had been reasonable and necessary. (Id.) He noted, "[S]tellate ganglion blocks appear to have been reasonable and medically necessary to assist her in her recovery and possibly to hasten that recovery and shorten the period of ill-being." (Id.)

Dr. Candido did not comment on the reasonableness of the first right rib resection surgery. "I am not a thoracic surgeon and did not have the privilege of assessing Ms. Jenson prior to the surgeries of Dr. Warren. He detected clinical signs (bruit; provocation maneuvers; diagnostic studies) that were consistent with a clinical diagnosis of right sided thoracic outlet syndrome," he noted. Dr. Candido noted that the IME physician, Dr. Singh, did not find thoracic outlet syndrome. He noted the two of them would be in a better position to opine whether she had suffered from right sided thoracic outlet syndrome "than would I some years after the fact and while she is almost completely healed from her injury and from her surgery." (Id.)

Despite this, he notes later that a diagnosis of thoracic outlet syndrome is typically idiopathic and inconsistent with the mechanism of injury. (Id.) Dr. Candido reviewed the EMG report from April 16, 2013 and opined that it was consistent with "a phenomenon that might be idiopathic; could be related to surgical positioning, or could have no relationship whatsoever to any of her alleged work related events and subsequent treatment." (Id.)

Dr. Candido reviewed her medications and opined that Flexeril was not necessary because there were no muscle spasms. (Id.) Dr. Candido opined that Ms. Jensen should use either Topamax or Lyrica because Topamax offers no statistical advantage over Lyrica for neuropathic pain. (Id.) Additionally, he noted she could be weaned off Norco because she had seen improvement in her pain. (Id.) Dr. Candido opined that Ms. Jensen had reached MMI and could return to work at the medium-duty level. (Id.)

Dr. Candido's report includes a list of the medical records he reviewed which included the petitioner's job description along with the records of Clearing Clinic, Dr. Speziali, Dr. Kahrani, Dr. Warren, Dr. Singh, and Dr. Amin. *Id.* The records included the operative reports of Dr. Warren. *Id.* The records reviewed by Dr. Candido included the stellate block procedure notes. *Id.* The petitioner was seen Clearing Clinic and by Dr. Speziale. *Id.* In 2012 the petitioner

was seen by Dr. Warren at Rush University. *Id.* The petitioner underwent a resection of the first rib on the left side on June 6, 2013. *Id.* The petitioner underwent a surgical removal of the first rib on the right side on September 6, 2013. *Id.* The petitioner was seen by Dr. Amin for pain. *Id.* The petitioner gave a history of receiving 14 or 15 right-sided stellate ganglion nerve blocks. *Id.* The petitioner gave a history that the nerve blocks worked great causing the sensitivity in the arms to go away. *Id.* The petitioner gave a history of being prescribed a spinal cord stimulator. *Id.* The petitioner stated she was not sure she wanted to go forward with it. *Id.* The petitioner gave Dr. Candido a history of having a resting pain level of 3–4 on a 10 point scale in the wrists. *Id.* The petitioner gave a history of having a pain level of 8 on a 10 point scale with activity. *Id.* The petitioner gave Dr. Candida a history of being 80% improvement when compared to the peak of her injury. *Id.* Dr. Candido noted hand grip strength of 51 pounds on the right and 56 pounds on the left. *Id.*

The arbitrator notes that only Dr. Candido commented on the objective findings typically found when diagnosing complex regional pain syndrome. The arbitrator finds it significant that Dr. Candido noted no color changes in either arm, no edema, no temperature abnormalities, no atrophy, no hypersensitivity, and no abnormal growth patterns of hair or nails. *Id.* Dr. Candido took temperature measurements using an industrial infrared measuring device. *Id.* The petitioner gave a history that no one has taken her extremity temperatures prior to Dr. Candido's examination. *Id.*

Dr. Candido diagnosed status post bilateral first rib resection. *Id.* Dr. Candido's diagnoses included no criteria to conclude that the petitioner had CRPS type I or type II. *Id.* Dr. Candido noted the petitioner is 80% better since being injured. *Id.* She has intact strength and there are no overt sensory deficits. *Id.* Dr. Candido commented that an 80% improvement is likely to be as good as it gets. *Id.* Dr. Candida commented that the petitioner likely suffered a stretch injury to the right brachial plexus. *Id.* Dr. Candido went on to comment that this stretch injury was from either positioning during surgery or an idiopathic process. *Id.* Stretch injuries generally result in resolution. *Id.*

The arbitrator finds it significant that Dr. Candido wrote that the stellate ganglion blocks appeared to have been reasonable and medically necessary to assist in the petitioner's recovery. *Id.* The arbitrator also finds it significant that Dr. Candido opined that the petitioner's pain management should be considered complete at the time of Dr. Candido's exam on October 21, 2014. *Id.*

Dr. Candido commented that there were no muscle spasms so the petitioner no longer needs Flexeril. *Id.* The petitioner could use Topamax or Lyrica but not both. *Id.* The petitioner gave Dr. Candido a history that she has cut back on the use of Norco and Dr. Candido commented that she could be weaned off this medication. *Id.* Dr. Candido commented that Ambien is a sleep aid which has no relationship to her accident or treatment. *Id.*

Dr. Candido commented that thoracic outlet syndrome is a diagnosis inconsistent with the described mechanism of injury at work. *Id.* Thoracic outlet syndrome tends to be more idiopathic than traumatic. *Id.* Congenital causes are more likely to blame for this condition. *Id.* The

arbitrator notes Dr. Candido's causal connection opinion regarding thoracic outlet syndrome but finds Dr. Warren's opinion more persuasive. Dr. Candido commented that the petitioner is at maximum medical improvement and capable of returning to work in a medium duty capacity. *Id.*

Dr. Kern Singh IME

In further support of the arbitrator's opinion regarding causal connection the arbitrator notes the report of Dr. Singh entered as R7. Dr. Singh examined the petitioner on March 1, 2012 at the request of the respondent. The petitioner gave Dr. Singh a history of handling a package weighing 77 pounds on September 27, 2011. *R7.* The petitioner gave a history of freeing the package when it jerked her arms and hands. *Id.* She gave a history of working regular duty and missing two or three days. *Id.* The petitioner gave a history of being seen by Dr. Kahrani on October 6, 2011 and was diagnosed with bilateral wrist's strains. *Id.* On October 27, 2011 Dr. Kahrani diagnosed the petitioner with bilateral DeQuervain's tendosynovitis. *Id.* On November 4, 2011 petitioner was seen by Dr. Speziale who performed a Kenalog injection. *Id.* The petitioner was seen by Dr. Chow on November 22, 2011 and received a diagnosis of bilateral tendinitis of the wrists. *Id.* On March 1, 2012 the petitioner gave Dr. Singh a history of having neck pain. *Id.* The petitioner gave Dr. Singh a history of bilateral hand tingling and numbness. *Id.* She gave a history of having pain in her neck at a level of 7 on a 10 point scale.

Dr. Singh found that the petitioner had normal strength and reflexes in her upper extremities. *Id.* Dr. Singh diagnosed a cervical muscle strain. *Id.* Dr. Singh commented that he did not believe the petitioner was suffering from thoracic outlet syndrome. *Id.* The arbitrator notes Dr. Singh's causal connection opinion regarding thoracic outlet syndrome but finds Dr. Warren's opinion more persuasive. Dr. Singh determine the petitioner was capable of full duty employment without restriction. *Id.* Dr. Singh went on to comment that the petitioner's complaints of hand burning tingling and numbness did not correlate with thoracic outlet syndrome pathology. *Id.* Her EMG test does not demonstrate any ulnar distribution of her symptomatology. *Id.* Dr. Singh's report contained his opinion that there was no work-related pathology involving the spine. *Id.* The petitioner's current complaints are not related to her September 27, 2011 work accident. *Id.* Dr. Singh commented that the petitioner had no pre-existing condition and did not suffer an aggravation. *Id.* Dr. Singh commented that the petitioner suffered a soft-tissue muscle strain to her neck which has resolved. *Id.* Dr. Singh determined that the petitioner has reached maximum medical improvement for her work-related injury. *Id.*

Dr. Singh noted five positive Waddell findings on examination. (Id.) Dr. Singh diagnosed Ms. Jensen with a cervical muscular strain, and stated he did "not believe that she is suffering from thoracic outlet syndrome." (Id.) Dr. Singh noted that her entire hand burning, tingling and numbness would not correlate with thoracic outlet syndrome. (Id.) He also noted that her EMG did not demonstrate any ulnar distribution. (Id.) He opined she was at MMI capable of full-duty work without restriction. (Id.)

The arbitrator finds the IWCC decision of *Ravji v United Airlines* 12 WC 94 (2012) instructive in the instant case. In *Ravji* the petitioner suffered a left foot injury and claimed complex regional pain syndrome. The treating physician in *Ravji* noted cooling of the skin along the lateral side of the left foot along with hypersensitivity. The treating physician diagnosed complex regional pain syndrome of the left foot. In *Ravji* the petitioner underwent a triple phase bone scan which was normal. The treating physician in *Ravji* documented discoloration and temperature change. No such finding has been made in the instant case.

In *Ravji* the IWCC found that despite the treating physician's diagnosis of regional pain syndrome the signs of CRPS were not described. The petitioner's complaints were inconsistent with CRPS. The petitioner in *Ravji* had no atrophy or abnormal hair growth. The petitioner in *Ravji* was examined by the respondent who did not find signs of CRPS. Surveillance video showed the petitioner was active and able to walk normally. In *Ravji* the arbitrator found the testimony of Dr. Blonsky and Dr. Charuk more credible than the testimony of the treating physician that had diagnosed complex regional pain syndrome.

In the instant case the petitioner's FCE indicated she was capable of an eight hour workday and was unrestricted regarding sitting, standing, or walking. In the case at bar the arbitrator finds the petitioner failed to prove objective findings indicating complex regional pain syndrome. Dr. Candido noted no color changes in either arm, no edema, no temperature abnormalities, no atrophy, no hypersensitivity, and no abnormal growth patterns of hair or nails. The arbitrator finds the reports and findings of Dr. Singh and Dr. Candido more credible than the opinions of Dr. Amin.

The arbitrator finds the decision of the IWCC in *Krumrey v Williamson County Special Education* 05 WC 10605 (2011) helpful in the instant case. In *Krumrey* the petitioner alleged complex regional pain syndrome in her upper right extremity. The petitioner complained to her treating physician of a burning or crawling sensation. In *Krumrey* a bone scan was ordered for the petitioner. In the instant case petitioner underwent no such bone scan. In *Krumrey* the petitioner had edema and hypersensitivity. The petitioner has no such finding in the instant case. In *Krumrey* the petitioner had shiny skin in the affected area. There is no such finding in the instant case. In *Krumrey* the respondent's examining physician was presented with a copy of Green's Operative Hand Surgery during cross-examination. The respondent's examining physician agreed that Green's is an authoritative text. Green's describes the symptoms of CRPS to include burning pain, hyperalgesia, allodynia, and trophic changes. Hyperalgesia is a heightened perception of pain. Allodynia is the perception of pain initiated by normally innocuous stimuli. Trophic changes include stiffness, edema, or changes in nails or skin. According to Green CRPS can be identified by vascular abnormalities or temperature. Significant differences in temperature occur between affected and unaffected extremities. In the instant case the petitioner does not have the objective findings indicating CRPS.

The arbitrator finds the decision of the IWCC in *Lacke v Illinois Department of Human Services* 06 WC 55428 (2008) to be instructive in the instant case. In *Lacke* the petitioner alleged complex regional pain syndrome. The petitioner was seen at Rush Hospital and treated by a specialist in anesthesiology and pain medication. Complex regional pain syndrome was

diagnosed. The petitioner underwent nine sympathetic blocks. This gave the petitioner temporary improvement. In *Lacke* the petitioner was examined on behalf of the respondent by Dr. Konowitz. Dr. Konowitz described 11 signs to evaluate complex regional pain syndrome. These 11 signs relate to pseudomotor changes, trophic changes, and radiologic changes. Because none of these signs were present Dr. Konowitz determined the petitioner did not have complex regional pain syndrome. Dr. Konowitz went on to opine that an individual developing complex regional pain syndrome would be complaining of pain with a few days rather than several weeks. In the instant case the petitioner did not allege CRPS until months after the work accident. In the case at bar the petitioner's treating medical records do not note the objective findings indicating CRPS.

The arbitrator finds the decision of the IWCC in *Treadway v Munch's Supply Company* 06 WC 37739 (2009) to be helpful in the instant case. In *Treadway* the petitioner alleged complex regional pain syndrome of the right foot and ankle. The petitioner had right ankle swelling and neurological findings regarding the right foot. The petitioner had loss of hair and trophic changes in the right foot. Toes were cool to the touch. The petitioner had excessive sweating on the underside of the foot. The petitioner complained of having a burning, throbbing, stabbing pain with tingling, numbness, and swelling. During physical therapy the therapist noted a healing rash on the top of the right foot with three small areas of scabbing. The therapist noted an increased sheen of the skin with increased swelling of the ankle, foot, and toes with brittle nails at all toes. The therapist noted mottled purple residual skin coloring in the area where the rash faded on the top of the foot as well as swelling of the right foot and ankle. The petitioner complained of increased pain when it is cold inside of his work area. The arbitrator and the IWCC found that the petitioner had CRPS which was causally connected to the work accident. The IWCC found that the petitioner had clinical signs to include swelling, color changes, temperature changes, hair loss, shining of the skin, hypersensitivity, and numbness.

The findings of the petitioner in *Treadway* are different from the findings of the petitioner in the instant case as indicated by the treating medical records entered into evidence. In the case at bar the petitioner has pain complaints but does not have the objective findings noted in prior IWCC decisions where CRPS is determined to be present.

The arbitrator notes the petitioner in the case at bar was seen by Dr. Kahrani, Dr. Speziale, Dr. Chow, Dr. Singh, and Dr. Candido. These physicians did not diagnose complex regional pain syndrome. The arbitrator has reviewed the opinions of Dr. Amin and Dr. Candido. Based on the petitioner's treating medical records, the objective findings, and the timeline of her medical treatment the arbitrator finds the opinions of Dr. Candido more reasonable than the opinions of Dr. Amin. The arbitrator finds the petitioner's CRPS and present condition of ill-being not causally connected to the work accident.

The arbitrator finds the petitioner's thoracic outlet syndrome to be causally connected to the work accident. The arbitrator notes the petitioner was treated by Dr. Speziale and Dr. Warren. Dr. Speziale was concerned about the possibility of thoracic outlet syndrome. Dr. Warren diagnosed the petitioner with thoracic outlet syndrome and treated her left and right side with two surgical procedures. The arbitrator is aware Dr. Singh offered an opinion that the

The petitioner agreed that on April 26, 2016 she had her 17th injection with Dr. Amin and received 100 Norco pills and 60 tramadol pills. On May 2, 2016 she had her 18th ganglion block and received another 100 Norco pills and 60 tramadol pills. Her son was born on December 29, 2016.

The medical bills from Advocate Christ Medical Center are found by the arbitrator not to be causally connected to the work accident of September 27, 2011 and are not awarded.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule to Rush University Thoracic Surgeons, University Pathologists PC, Affiliated Radiologists SC, Rush University Medical Group, Thera-Core Physical Therapy, and ATI physical therapy as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule to Dr. Amin for charges incurred prior to October 21, 2014 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

K. Is petitioner entitled to any prospective medical care?

Based on the arbitrator's previous finding regarding causal connection the arbitrator finds the petitioner's prescribed spinal cord stimulator not to be causally connected to the work accident and is not awarded. The petitioner's future proposed medical expenses and medical expenses after October 21, 2014 are not causally connected to the work accident and are not awarded.

petitioner did not have thoracic outlet syndrome. The arbitrator has considered the opinions of Dr. Warren and Dr. Singh and finds the opinions of Dr. Warren to be entitled to more weight.

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The arbitrator finds the petitioner's medical treatment incurred prior to October 21, 2014 to be causally connected to the work accident of September 27, 2011.

Petitioner has presented a medical bill exhibit marked "Medical Bills" as Petitioner's Exhibit 10. The arbitrator notes the report of Dr. Candido entered as R9. Dr. Candido examined the petitioner at the request of the respondent on October 21, 2014. *R9.* Dr. Candido wrote that the stellate ganglion blocks appeared to have been reasonable and medically necessary to assist in the petitioner's recovery. *Id.* Dr. Candido opined that the petitioner's pain management should be considered complete at the time of Dr. Candido's exam on October 21, 2014. *Id.* Dr. Candido commented that the petitioner is at maximum medical improvement and capable of returning to work in a medium duty capacity. *Id.*

Dr. Singh examined the petitioner on March 1, 2012 at the request of the respondent. R7. Dr. Singh determined that the petitioner had reached maximum medical improvement for her work-related injury. *Id.*

On May 21, 2014 Dr. Warren sent a report to Dr. Revethis. *P3.* Dr. Warren saw the petitioner on May 19, 2014. *Id.* Dr. Warren opined that the petitioner's thoracic outlet syndrome has been treated and no further follow-up appointments rescheduled. *Id.*

The treatment from Advocate Christ Medical Center is for physical medicine and rehabilitation. She saw Dr. Amin on September 1, 2015. Dr. Amin stopped physical therapy. Petitioner testified that after September 1, 2015 she went to a gym on her own. She put her physical therapy bills through group carrier. The petitioner testified she has had approximately 130 sessions of physical therapy but still has pain complaints.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margarita Melger,
Petitioner,

vs.

No. 13 WC 35616, consol. w/ 13 WC 35617

Head Manufacturing Inc.,
Respondent.

19IWCC0370

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of the dismissal for want of prosecution and being advised of the facts and law, reverses the Arbitrator's December 4, 2017 Order denying Petitioner's Motion to Reinstate these claims, as stated below. The Commission reinstates these claims and remands them to the Arbitrator for further proceedings consistent with this Order.

PROCEDURAL BACKGROUND

On October 25, 2013 Petitioner filed two claims, each alleging shoulder injuries incurred in accidents occurring on September 10, 2012 (13 WC 35616), and July 26, 2013 (13 WC 35617). These claims were consolidated for hearing on October 14, 2014. On December 9, 2016, after the claims were above the line, Respondent's counsel filed a Request for Hearing and a Motion to Dismiss based upon, "Petitioner's continued failure to advance the actions." These matters were set for hearing on March 14, 2017. When Petitioner's original counsel failed to appear on that date, the first Order of Dismissal for Want of Prosecution was entered by the Arbitrator.

19IWCC0370

Petitioner's current counsel, Jonathan Schlack, substituted into these cases on or about March 28, 2017. On June 6, 2017, his Motion to Reinstate these claims was granted by the Arbitrator.

On July 17, 2017, Petitioner filed an "off-cycle" motion seeking Respondent's authorization of certain medical treatment and payment of TTD benefits. The parties acknowledge that this motion appeared on the August 7, 2017 call, and was assigned a hearing date of August 15, 2017. The parties further acknowledge that on August 15, 2017, the Arbitrator specially set these cases for hearing on October 20, 2017.

On July 17, 2017 Respondent filed another Motion to Dismiss Petitioner's claims, noticing that motion for hearing on the Arbitrator's September 1, 2017 call. On September 1, 2017, the Arbitrator set that motion for arguments on September 5, 2017. Upon Petitioner's counsel learning that Respondent's counsel would be unable to appear on September 5, 2017, he emailed the Arbitrator to request the cases be returned to the call ("RTC-ed") on that date. The Arbitrator agreed to that request, and according to counsel, sent an email reply to both counsel on September 5, 2017, informing them that the claims would be, "RTC absent any objection." The next regularly scheduled call date after that would have been in December 2017.

Thereafter, Respondent's counsel emailed two letters, dated September 14, 2017 and October 9, 2017, to Petitioner's counsel. Petitioner's counsel acknowledged receiving both letters, and also, that each letter reported the claims were still specially set for hearing before the Arbitrator on October 20, 2017. No one appeared on behalf of Petitioner on October 20, 2017, and on that date, these claims were DWP-ed for the second time.

Petitioner filed a timely Motion for Reinstatement, which the Arbitrator, after hearing arguments of counsel on December 4, 2017, denied. This Review was filed 23 days later.

At the December 4, 2017 hearing on Petitioner's Motion to Reinstate, Petitioner's counsel reported that the reason he had not appeared on October 20, 2017 was because that date – which was set as a priority as a result of Petitioner's own motion pursuant to the Act and Commission's rules by an Arbitrator who carries a docket of thousands of cases– had not been put into his office's calendar. Petitioner's counsel claimed his client's cases were meritorious, and that from the time he began representing Petitioner, he had given these claims, "the attention they deserved." The Commission disagrees. Failing to calendar a hearing date which Petitioner's counsel acknowledged receiving on multiple occasions and claiming that omission to be a "clerical error" or "docketing error," is *not* giving these claims, "the attention they deserved."

In this case, however, the Commission finds the Arbitrator's September 5, 2017 email could be interpreted as indicated by both Petitioner and Respondent as it did not address whether his Order of that date also continued the October 20, 2017 hearing to the December 2017 call. The Arbitrator's email to the parties, though not in the record, apparently made no reference one way or the other to the scheduled October 20, 2017 hearing. Petitioner's counsel understood the September 5, 2017 email to mean that the Arbitrator RTC-ed all pending motions and hearings, including the hearing set for October 20, 2017, to the next calendar call in December.

19IWCC0370

Respondent's counsel understood the September 5, 2017 email to mean that the Arbitrator would continue only the motions scheduled for hearing on September 5, 2017 to the December call date.

The Commission also notes that before October 20, 2017, these claims had not been DWP-ed twice. While the Commission expressly finds Petitioners have *no right* to reinstatement of their claims following a dismissal for want of prosecution, the Commission acknowledges that reinstatement, in this case, may have been denied because of an erroneous understanding that these cases had been dismissed on two previous occasions, which was not clarified by Respondent's counsel.

The granting or denying of a petition to reinstate a dismissed claim rests in the sound discretion of the Commission. *Zimmerman v. Industrial Comm*; 50 Ill. 2d 346; 278 N.E.2d 784 (1972). Under the facts presented here, the Commission finds these claims should be reinstated, and that Petitioner's Motion to Vacate the October 20, 2017 Order of dismissal shall be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's December 4, 2017 Order, denying Petitioner's Motion to Vacate the October 20, 2017 dismissal of these claims, is reversed, and Petitioner's Motion to Vacate that Order is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED:

o-05/23/19
mp/mcp
68

Marc Parker

Barbara N. Flores

DISSENTING OPINION:

I respectfully dissent from the Decision of the majority. The majority reversed the Decision of the Arbitrator and reinstated Petitioner's claims. I would have affirmed the Decision of the Arbitrator to dismiss and deny reinstatement of the instant claims.

Petitioner filed the instant claims on October 25, 2013. On December 9, 2016. after the matter was above the line. Respondent filed a Request for Hearing and Motion to Dismiss. The matter was set for hearing on March 14, 2017. Neither Petitioner nor a lawyer representing her appeared at the hearing and the claims were dismissed. Two weeks later Petitioner's current lawyer substituted for Petitioner's previous lawyer. On June 6, 2017, his Motion to Reinstate was granted. In presenting the Motion to Reinstate Petitioner's lawyer assured the Arbitrator that he would diligently monitor the matter to ensure the matter would proceed expeditiously. After the matter was reinstated, Petitioner filed an "off-cycle" motion seeking authorization of medical treatment and TTD payments.

In August of 2017, both lawyers were present before the Arbitrator and the case was given a specially set hearing date of October 20, 2017. Then in September the case was on status call, above the line, so the matter was set for hearing on September 5, 2017. Upon learning that Respondent's lawyer could not attend a hearing on that date, the Arbitrator sent notice to the lawyers that the matter would be returned to the call. However, that did not affect the previously scheduled October 20, 2017 hearing date, which was still in effect. Once again, neither Petitioner nor a lawyer representing her appeared at the October 20th hearing and the matter was again dismissed. In the hearing on Petitioner's Motion to Reinstate, Petitioner's lawyer explained that his failure to appear at the October 20th hearing was caused by a "clerical error" or "docketing error" in his office. At the hearing, Petitioner's lawyer acknowledged that he received e-mail correspondences from Respondent's lawyer on September 14, 2017 and October 9, 2017 noting the October 20th special hearing and requesting updated information.

The majority reinstated the claim despite its admonishment concerning Petitioner's lawyer assertion that he gave the matters "the attention they deserved." In its decision, the majority notes that the Arbitrator was incorrect in stating that the matter had been dismissed twice previously, when it had only been dismissed once. It also asserts that Petitioner's lawyer may have been confused that the matter was being continued to the Arbitrator's next regular call in December of 2017.

I disagree with the majority. While the majority notes possible confusion based on the Arbitrator notation that the matter was returned to the call, Petitioner's lawyer did not argue confusion but relied on his assertion that there was a clerical error within his office. In addition, the Arbitrator's mistake that the matter had been dismissed twice previously does not excuse Petitioner's failure to appear or timely prosecute her claims. Petitioner has the burden of proving that a claim should be reinstated. I do not believe that Petitioner met her burden of proof that this matter should be reinstated.

For the reasons stated above, I would have affirmed the Decision of the Arbitrator to dismiss and deny reinstatement of the instant claims. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

STATE OF ILLINOIS

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)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Ligon,
Petitioner,

vs. NO: 16 WC 02910

19IWCC0371

Kitagawa Northtech,
Respondent.

DECISION AND OPINION ON REVIEW

Petitioner timely appeals the decision of the Arbitrator filed on December 29, 2017, following Section 19(b) hearing held on October 26, 2017. Notice has been given to all parties. The Commission, after considering issues including causal connection, temporary total disability, and penalties and fees, and being advised of the facts and law, hereby reverses the Arbitrator's decision as described below.

Petitioner, a 34-year-old repair technician, alleges that the current condition of his lumbar spine is causally connected to an undisputed work-related accident of April 28, 2014. The Arbitrator found that Petitioner sustained an intervening accident on or about December 1, 2015, which broke the chain of causation. Thus, the Arbitrator denied benefits to Petitioner for failure to prove that his ongoing complaints were related to the April 2014 accident.

19IWCC0371

Upon review, the Commission disagrees with the Arbitrator that there was an independent intervening accident that broke the causal chain. The Commission finds that Petitioner's condition of ill-being in his lumbar spine from December 15, 2015 up to the present is a continuation of that April 28, 2014 work-related injury. Accordingly, the Commission awards temporary total disability (TTD) from December 15, 2015 through October 26, 2017 (97 and 2/7 weeks); and reasonable and necessary medical expenses incurred since December 15, 2015. Regarding penalties and fees, the Commission denies these insofar as Respondent's refusal to pay benefits after December 15, 2015 was based on reasonable reliance on the opinions Dr. Andrew Zelby, Respondent's Section 12 examiner.

The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

I. BACKGROUND

A. First injury of April 2014 and Microdiscectomy at L4-5 in October 2014

Petitioner, 34, worked as a repair technician for Respondent, a manufacturer and servicer of industrial equipment. On April 28, 2014, he suffered an undisputed work-related accident to his low back while lifting a 90-pound box. He underwent treatment for low back pain and pain radiating into his right leg. Eventually, he was diagnosed with L4-5 herniation with right-sided L5 radiculopathy, for which he underwent L4-5 microdiscectomy on October 6, 2014. This surgery was performed by orthopedic surgeon Dr. Richard Rabinowitz of Barrington Orthopedics. (PX 1 at 87).

In December 2014, following post-operative physical therapy at Barrington Orthopedics, Dr. Rabinowitz felt that Petitioner was ready to return to light duty, effective December 14, 2014.[1] The light duty restrictions included no lifting more than 10 pounds and no bending/stooping and were accommodated by Respondent. At that time, Dr. Rabinowitz's record indicated that Petitioner's pre-operative right leg pain had resolved but he still had low back pain with bending. (PX 1 at 26-27, 31). Petitioner continued physical therapy and follow-up visits. Upon a January 13, 2015 follow-up visit, Dr. Rabinowitz modified the lifting restriction to 30 pounds and anticipated that Petitioner would reach maximum medical improvement (MMI) by the time of the next monthly visit. However, Dr. Rabinowitz's record indicated that Petitioner was (still) experiencing "intermittent low back pain and right buttock pain." (PX 1 at 10-13).

On February 10, 2015, Dr. Rabinowitz saw Petitioner for the last time. He deemed Petitioner to be at MMI and released him to his full job duties effective February 16, 2015. (PX 1 at 5-6). Dr. Rabinowitz observed, "Overall he reports 75% improvement in his pre-operative symptoms. He has mild complaints of low back pain especially with lifting items from the floor to waist level." (PX 1 at 5-6). Notwithstanding the residual low back pain, Petitioner resumed his regular job, full duty at

[1] Respondent paid TTD benefits from October 14, 2014 through December 14, 2014.

19IWCC0371

Respondent. He continued performing his duties without incident until he was laid off some four months later, on June 30, 2015 (for unrelated reasons). Petitioner has been unemployed since then.[2]

At the Arbitration hearing, Petitioner testified that, right after the L4-5 microdiscectomy, he had no more pain radiating down his right leg, but he still had occasional back soreness. (Tr. 20-21, 45). Other than this back soreness, there were no other symptoms – "all my symptoms went away." (Tr. 20-21, 45). After his last visit with Dr. Rabinowitz in February 2015, he saw no other doctors for his back until mid-December 2015. As described below, in early December 2015, Petitioner experienced a recurrence of symptoms, for which he resumed medical treatment on December 15, 2015. (Tr. 44-45).

B. Recurrence in December 2015 and Second Surgery at L4-5 in December 2016

In early December 2015, while at his father-in-law's residence, Petitioner's symptoms recurred. He testified that he bent over to pick something up, whereupon he felt his back "lock up" and "that's when [he] started to get symptoms again." (Tr. 25-26). On December 15, 2015, he sought medical attention from his new primary care physician, Dr. Antonios Papadopoulis, to whom he related his history. This time, the symptoms were more severe than those leading up to his October 2014 surgery. The pain in his right leg was worse this time and now he also had bladder control problems. (Tr. 25-26, 44-45). Dr. Papadopoulis referred Petitioner to Dr. Mark Lorenz of Hinsdale Orthopedics.

On February 11, 2016, Petitioner presented for evaluation at Hinsdale Orthopedics. The record of that date was generated by physician's assistant Jennifer Silvia, who wrote, "Patient is here today with a new complaint of lower back pain increased after bending.... Admits to history of L4-5 right sided disc herniation with discectomy in 2014. States symptoms improved up until 12/26/2015 when he bent down to pick up a small box off the floor. Since that time has been complaining of worsening lumbar back pain with radiation down right lower extremity with associated numbness and tingling [and] urinary hesitancy." (PX 4 at 5). A Medrol Dosepak prescribed for his pain provided relief for only a brief period.

On March 2, 2016, a lumbar MRI was done. The radiologist's impression as reflected in the MRI report was "probable residual or recurrent posterior right paracentral disc protrusion at L4-5 extending into the region of the right lateral recess and causing mild central canal narrowing and mild narrowing at the entrance of the right intervertebral neural foramen." (PX 4 at 14). As well, Dr. Lorenz on March 21, 2016 saw the MRI as revealing a "fairly large recurrent disk herniation at L4-5 on the right." Dr. Lorenz also observed that Petitioner was "really quite uncomfortable." Dr. Lorenz recommended an epidural steroid injection and indicated that, if the injection did not help, the recommendation would be "revision discectomy at L4-5." (PX 4 at 4-5).

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[2] With respect to about the first six months of unemployment after lay-off, Petitioner does not claim relatedness to the April 2014 accident. Petitioner claims a TTD period starting on December 15, 2015 and continuing up to the present.

19IWCC0371

After initially authorizing the epidural steroid injection, the insurance carrier then rescinded authorization. In August 2016, Petitioner received his injections from pain specialist Dr. Shana Margolis of Shirley Ryan Ability Lab. On December 17, 2016, orthopedic surgeon Dr. Alpesh Patel of Northwestern Medicine performed a second microdiscectomy at L4-5. (Tr. 33-34). Petitioner underwent physical therapy through mid-February 2017. The injections, second surgery, and post-operative physical therapy were paid for by Illinois Medicaid. The last progress note from Shirley Ryan Ability Lab in evidence is dated May 18, 2017 and indicates that, subsequent to the second L4-5 microdiscectomy by Dr. Patel, Petitioner's radicular symptoms resolved; however, two weeks prior to this last visit he began having severe back spasms. (PX 7 at 7). At the arbitration hearing in October 2017, Petitioner testified that he continues to have back pain for which he seeks authorization for further physical therapy. (Tr. 34-37).

II. EXPERT MEDICAL OPINIONS

A. Dr. Andrew Zelby, Section 12 Examiner

Neurosurgeon Dr. Andrew Zelby saw Petitioner for a Section 12 examination on August 15, 2016. Dr. Zelby felt that Petitioner's lumbar condition at that time was not causally related to the April 2014 injury. In his report of examination, Dr. Zelby wrote that, following Petitioner's October 2014 microdiscectomy, Petitioner had reported "75-80% improvement" and was released back to full duty work at MMI in February 2015. Dr. Zelby continued:

> "More than 10 months later [in December 2015], Mr. Ligon lifted another object in a garage and developed a recurrence of back and radiating right leg pain[.]... His back and right leg symptoms appear related to his recurrent L4-5 herniated disc. This condition is related to a new lifting incident in his father-in-law's garage and is not an ongoing manifestation of his April 28, 2014 work injury. Mr. Ligon has been at maximum medical improvement for his April 28, 2014 work injury since February 2015 and he remains at maximum medical improvement for that injury. Without the new lifting incident [of December 2015], his recurrent herniated disc would not be present. His current herniated L4-5 disc represents a new and discrete injury from December 2015 and not from his April 2014 injury."

(RX 1 exh. 1). Dr. Zelby sat for an evidence deposition on November 21, 2016. (RX 1). His testimony was consistent with the opinions expressed in his written report.

B. Dr. Mark Lorenz, Treating Physician

Dr. Lorenz testified via evidence deposition on August 15, 2016. (PX 16). Dr. Lorenz explained that, as a disc herniates, "there's an open tear in the annulus, which is the structure that contains the disc material, and that allows for disc material to extrude," and that re-herniation is a known risk thereafter. (PX 16 at 10-12). The recurrence can be caused by any everyday activity "or [even] no activity." (PX 16 at 29). In other words, the herniation can recur spontaneously, happening in the absence of any particular event that the patient can recall. (PX 16 at 26, 28).

19IWCC0371

This recurrence risk remains after a discectomy procedure, where the annulus tear does not completely heal up but remains open. (PX 16 at 10). Dr. Lorenz stated that any discectomy procedure "will render somebody more susceptible to recurrent herniation, particularly within a two-year frame period of the actual surgery." As revealed in the March 2016 MRI, Petitioner's second herniation was at "exactly at the same location" as the surgical site of the microdiscectomy done by Dr. Rabinowitz. (PX 16 at 9). This re-herniation sustained by Petitioner was a "predictable sequalae" for up to 33 percent of people who undergo such procedures, according to Dr. Lorenz. (PX 16 at 29-30.)

Ultimately, Dr. Lorenz opined, "It is more likely than not given the facts of this particular patient, that the disc herniation occurred as a complication secondary to his first disc herniation." (PX 16 at 13).

C. Dr. Richard Rabinowitz, Treating Physician

Dr. Rabinowitz was deposed on November 11, 2017. (PX 17). He had not seen Petitioner since February 10, 2015. He had no knowledge of Petitioner's condition since then and surmised during deposition questioning that Petitioner's herniation apparently had recurred. He testified regarding his diagnosis and treatment of Petitioner, including describing the microdiscectomy of October 2014 and Petitioner's recovery therefrom. He affirmed that he placed Petitioner at MMI and returned him to his regular duties in mid-February 2015. According to Dr. Rabinowitz, reaching MMI at four months signified that Petitioner had "an excellent response" to the surgery. (PX 17 at 16).

Regarding the subject of recurrence of herniation, Dr. Rabinowitz explained that a microdiscectomy at L4-5 leaves that segment more vulnerable to a re-tearing, likening the site of operation in the disc to a "soft spot in the apple:"

> "I went through the same rent in the back of the annulus. So that is not real healthy for the disc, I am sure you can imagine that. But at the end, it heals. It's always going to be, for instance, that soft spot in the apple. Thankfully, the majority of the time, people do okay. Sometimes, there is an incidence of having a recurrence."

(PX 17 at 25-26). Dr. Rabinowitz placed the risk of an incidence of having a recurrence at up to 10 percent. As to what would cause a recurrence, Dr. Rabinowitz echoed Dr. Lorenz's testimony that it is "sometimes nothing," i.e., the recurrence can be spontaneous. (PX 17 at 21-23). When asked whether Petitioner's recurrence was related to the original work injury, Dr. Rabinowitz replied that "it very well could be." (PX 17 at 24).

III. DISCUSSION

Whether a causal connection exists between an employee's condition of ill-being and a particular work-related accident presents a question of fact. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d at 786; see also *Bell & Gossett Co. v. Industrial Comm'n*, 53 Ill. 2d 144, 148, 290 N.E.2d 585 (1972) (whether an accident constitutes an independent, intervening cause is a question of fact for the Commission).

19IWCC0371

The Arbitrator agreed with Respondent's argument that it is not liable for any condition of ill-being that arose after Dr. Rabinowitz placed Petitioner at MMI and returned him to full duty in February 2015. Particularly, the Arbitrator was persuaded by Dr. Zelby, who opined that Petitioner's re-herniation in December 2015 arose from the "new lifting incident" at his father-in-law's residence and there was no "ongoing manifestation" of the original herniation of April 2014. The Arbitrator concluded that the December 2015 incident constituted an independent intervening accident that broke the chain of causation between Petitioner's April 2014 accident and his current condition of ill-being. (Arbitrator's decision at 5).

The Commission does not find that the "new lifting incident of December 2015" constituted an intervening cause. While the December 2015 lifting incident may have precipitated the recurrence, for purposes of causation analysis under the Act, this incident is not an independent intervening event. As the Appellate Court stated in *PAR Electric v. Illinois Workers' Compensation Comm'n*, 2018 IL App (3d) 170656WC; 118 N.E.3d 681; 2018 Ill. App. LEXIS 775; 427 Ill. Dec. 480:

> "Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred 'but for' the original injury. *International Harvester Co., 46 Ill. 2d at 245.* Thus, 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. See *Lee v. Industrial Comm'n, 167 Ill. 2d 77, 87, 656 N.E.2d 1084, 212 Ill. Dec. 250 (1995); Vogel, 354 Ill. App. 3d at 787; Lasley Construction Co. v. Industrial Comm'n, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5, 211 Ill. Dec. 345 (1995).* '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.' *Global Products, 392 Ill. App. 3d at 411.*"

PAR Electric, 2018 IL App (3d) 170656WC at P59.

In the case at bar, the Commission is unconvinced that but for the December 2015 lifting incident, Petitioner's L4-5 disc would not have herniated a second time. To the contrary, the Commission finds that the December 2015 herniation was causally connected to the original herniation from April 2014. The Commission finds persuasive the opinions of Dr. Lorenz, who stated that a discectomy surgery "will render somebody more susceptible to recurrent herniation, particularly within a two-year frame period of the actual surgery. The opinions of Dr. Lorenz are bolstered by Dr. Rabinowitz who as well plus the interpreting radiologist of the March 2, 2016 lumbar MRI who found a "probable residual or re-testified that a microdiscectomy leaves the patient at an increased risk of re-herniation as well as the interpreting radiologist of the March 2, 2016 lumbar MRI who found a "probable residual or recurrent" herniation. The instance of Petitioner's second herniation occurred around mid-December 2015, or about 14 months after the October 2014 microdiscectomy, which surgery was itself made necessary by the work-related April 2014 herniation. This recurred herniation happened well within Dr. Lorenz's 2-year-post-surgery timeframe.

Under the facts of this case, Petitioner has proven a causal relationship between his current condition of ill-being and the April 2014 injury.

19IWCC0371

Lastly, the Commission denies Petitioner's request for penalties and attorney fees. Respondent was not unreasonable in relying on the opinions of Section 12 examiner, Dr. Zelby, in refusing to pay benefits after being discharged by initial treating orthopedic surgeon.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed December 27, 2017, is hereby reversed as discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner total temporary disability benefits of **$ 638.70 per week for 97 and 2/7 weeks**, commencing December 15, 2015 through October 26, 2017, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical bills of **$ 82,481.38** as contained in PX 8 through PX15, or for the reasonable and necessary medical expenses incurred for treatment, subject to the limits of Sections 8(a) and 8.2 of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later 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 $ 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: JUL 22 2019

Marc Parker

Marc Parker

o-05/23/19
mp/ac
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Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

STATE OF ILLINOIS)
)
)
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

Mark Folsom,
Petitioner,

vs. No: 15 WC 37604

North Palos Fire Protection District,
Respondent.

19IWCC0372

DECISION AND OPINION ON REVIEW

Respondent, North Palos Fire Protection District ("North Palos FPD"), via Petition for Review timely filed on January 18, 2017, appeals the decision of the Arbitrator filed December 23, 2016, following Section 19(b) hearing held on October 13, 2016. Notice has been given to all parties. The Commission, after considering issues including, *inter alia*, the rebuttable presumption under Section 6(f), causal connection, notice, and admissibility of evidence, and being advised of the facts and law, hereby affirms the Arbitrator's award – but provides different analysis in light of the Appellate Court decision in Johnston v. Illinois Workers' Comp. Comm'n, 2017 IL App (2d) 160010WC, 2017 Ill. App. LEXIS 250, 414 Ill. Dec. 430, 80 N.E.3d 573.

The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Comm'n, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). The Arbitrator's decision is attached hereto.

Introduction

Petitioner, a 42-year-old firefighter, suffered an acute myocardial infarction, i.e., heart attack, while on vacation on September 26, 2015. On November 20, 2015, he filed an Application for Adjustment of Claim pursuant to the Illinois' Workers' Compensation Act ("Act"), seeking benefits in connection with his heart attack. The Arbitrator found that Petitioner's underlying coronary artery disease and resultant heart attack were injuries that arose out of and in the course of his employment with Respondent. Petitioner was awarded temporary total disability benefits from September 24, 2016 through October 13, 2016 (55-1/7 weeks) and medical expenses ($123,930.35).

19IWCC0372

In finding for Petitioner, the Arbitrator ruled that "the rebuttable presumption afforded firefighters in Section 6(f) effectively shifts the burden to Respondent to prove that Petitioner's 25 years' employment history of firefighting duties contributed in no way to his coronary artery disease" and heart attack. On appeal before the Commission, Respondent asserts several errors on the Arbitrator's part, including with respect to the application of the rebuttable presumption, the admission of certain items of evidence, and, ultimately, the Arbitrator's conclusion that Petitioner sustained an accident that arose out of and in the course of employment.

The Commission finds that the Arbitrator misapplied the Section 6(f) rebuttable presumption. On April 13, 2017, the Appellate Court issued its decision in Johnston v. Illinois Workers' Comp. Comm'n, 2017 IL App (2d) 160010WC, 2017 Ill. App. LEXIS 250, 414 Ill. Dec. 430, 80 N.E.3d 573. There, the Court set forth the proper application of the presumption. The Commission, upon undertaking the proper application of the firefighter's presumption, finds that Respondent has successfully rebutted the presumption. And upon weighing the evidence anew, the Commission further finds that Petitioner has carried his burden of showing that his coronary artery disease and resultant heart attack are compensable under the Act.

I. BACKGROUND

A. Petitioner's Firefighting Activities

Petitioner began working with the North Palos Fire Protection District ("North Palos FPD") in a part-time capacity in 1991. In January 1999 he was hired as a probationary firefighter and was appointed a regular firefighter a year later. He currently holds the rank of Lieutenant. (Tr. 7-10). At the hearing, Petitioner described his job activities. He worked shifts of 24 hours on and 48 hours off, with each shift beginning and ending at 7 a.m. His typical shift's activities began with roll call in the morning followed by briefing, equipment checks, lunch, mandatory physical exercise, dinner, housekeeping tasks, etc. Training sessions – whether physical activity drills or in a classroom setting – could be scheduled to take place in the morning or afternoon. (Tr. 10-18).

Of course, the firefighters are required to be prepared to respond to service calls at any time. Regarding fire suppression activities, the types of fires encountered include residential, industrial, school, garbage, and others. (Tr. 10-18). As for hazards and risks, he affirmed the contents of an employee manual distributed by Respondent which contained descriptions of job duties, demands, and working conditions of firefighters at North Palos FPD. (Tr. 19; PX 19). As a firefighter, Petitioner was required to perform hazardous tasks under emergency conditions, involving strenuous exertion under adverse conditions such as fire, heat, smoke, darkness, and cramped and confined surroundings. (PX 19 at §200.4)

As well, Petitioner's supervisor, Battalion Chief Christopher Perry, testified that the manual accurately reflected the exposures to which Petitioner was subjected. (Tr. 113-116). Chief Perry agreed that Petitioner was exposed to work conditions throughout his long career that required, for example: performing complex tasks during life-threatening emergencies; working for long periods of time while sustaining physical activity and intense concentration; facing life or death decisions during emergency conditions; making a rapid transition from rest to near maximal exertion without warm-up periods; facing exposure to grotesque sights and smells associated with illness, trauma and burns; and the like. (Tr. 116-119; PX 19 at §200.4).

Chief Perry also attested that Petitioner was required to tolerate emotional and psychological stress. (Tr. 119-120). Regarding the "emotional and psychological stability" demanded, Chief Perry affirmed that Petitioner was required to "deal effectively with the morbid, the macabre, the repugnant, the abnormal, the

19IWCC0372

morose, the psychotic, the neurotic, and the otherwise unpleasant or unusual facets or results of human behavior." (Tr. 119-122; PX 19 at §200.6).

During cross-examination, Petitioner testified about certain personal emotional stressors he experienced in the year and a half preceding his heart attack. In February 2014, his stepson died. (Tr. 80-82). Then, shortly before Petitioner's heart attack, a fellow fireman committed suicide. Both deaths were referenced in the record of treating cardiologist Dr. Daniel Rowan, dated October 5, 2015, wherein the cardiologist wrote:

> "I suspect [Petitioner's] myocardial infarction was a combination of plaque rupture and the stress relating to the death of the patient's son approximately one year ago. The patient readily admits that he's been delaying his grief, but mostly recently it had started to hit him significantly."

(PX 4; Tr. 82-83). At the hearing, Petitioner stated that the event that had most recently "started to hit him significantly" was the suicide of his younger, fellow fireman. This suicide occurred just two weeks prior to his heart attack. Combined with the death of his stepson, the emotional impact on Petitioner was significant. In Petitioner's words: "In 25 years it was the first time I ever had an incident at work that bothered me as much as that." (However, in opposition to the belief of his cardiologist, Petitioner stated that he "personally would not relate that [stress] to [his] heart attack.") (Tr. 82-83).

B. Petitioner Suffers Heart Attack; Dr. Moisan Withholds Clearance to Return to Work

Petitioner testified that he is 6'5" and weights around 260 pounds. (Tr. 18). He has never been a smoker. (Tr. 18-19). Prior to September 2015, he had not received any medical treatment for heart problems, nor did he have any heart issues. (Tr. 84). On the evening of September 23, 2015, during an after-dinner walk with his wife, he experienced what he believed to be acid reflux. The next day, September 24, 2015,[1] during his shift at the firehouse, he experienced two more episodes of "acid reflux:" once while exercising on the treadmill, and then, some hours later, during a service call. Petitioner and his team were assigned to check vents on the roof of a townhouse in connection with a dryer fire. He suffered this "acid reflux" attack when he squatted down to check a vent. The discomfort from these episodes was passing and he did not report them. (Tr. 19-24).

On September 26, 2015 -- while boating on Paw Paw Lake in southwestern Michigan with a friend, Petitioner experienced "esophageal burning" that worsened. He was taken to the emergency room of nearby Lakeland Hospital in St. Joseph, Michigan. By the time they arrived at the ER, Petitioner was experiencing severe chest pains; it was determined that he was having an acute anterior wall myocardial infarction, i.e., heart attack. He was hospitalized in Michigan for three days. His left anterior descending coronary artery was found to be 90% blocked. It was noted that his symptoms began several days earlier (in retrospect, his "acid reflux" were unstable anginal symptoms). (Tr. 64-68; PX 1; PX 5).

After returning home to Chicago, Petitioner was treated by cardiologist Dr. Daniel Rowan. During the year following his heart attack, Petitioner underwent successful treatment with angioplasty and completed a cardiac rehabilitation program. Petitioner's last documented visit with Dr. Rowan prior to the arbitration hearing was September 13, 2016. At that time, Dr. Rowan found Petitioner to be doing well and released him with no activity restrictions. Petitioner remains on medications including Lipitor, Lisinopril, baby aspirin, Toprol ER, fish oil and omega-3. (Tr. 35-37). At the arbitration hearing of October 13, 2016, Petitioner stated

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[1] Petitioner's Application for Adjustment of Claim asserted September 24, 2015 as the date of accident.

19IWCC0372

that he felt "great," was in "excellent shape, minus the heart attack," and felt "absolutely ready" to go back to work. (Tr. 37-38).

However, Petitioner to date has yet to return to regular firefighting duties, as Dr. Terrence Moisan had not granted him work clearance. Dr. Moisan acts as the North Palos FPD's medical director, which is "not a formal position," according to Dr. Moisan. (PX 13 at 6). In this capacity, he has administered fitness-for-duty examinations for Respondent's firefighters and paramedics since the early 1990s. On November 17, 2015, about two months post-heart attack, Dr. Moisan evaluated Petitioner. Notwithstanding Dr. Rowan's release, Dr. Moisan withheld clearance to return to work. As of the date of arbitration hearing, Dr. Moisan had yet to re-evaluate Petitioner, and so Petitioner remained off-work. In his evaluation record of November 17, 2015, regarding possible causes of Petitioner's heart attack, Dr. Moisan wrote:

> "I told him [Petitioner] that I could not find a specific reason for his isolated vasculitic proximal coronary lesion and that there are studies which would suggest perhaps an isolated vasculitic process when younger, followed by an isolated and ulcerating plaque, etc. ***I did tell him that stress in his occupation has been on occasion associated with the development of coronary disease***."

(***emphasis*** added) (PX 7). Dr. Moisan sat for deposition on July 20, 2016. (PX 13). His testimony is discussed in section II below, under "Medical Expert Opinion Evidence."

C. Pension Board Finds Occupational Causation

Concurrently with the prosecution of this instant workers' compensation claim, Petitioner sought a disability pension under the Illinois Pension Code, 40 ILCS §5/1-101 *et seq*. Petitioner attested that, on October 15, 2015, in the presence and with the assistance of Respondent's Chief Dan Russell, he filled out an Application for Disability Pension Benefits. (Tr. 30-31; PX 21). The application sought pension benefits for disability due to occupational disease (duty disability), or, in the alternative, for non-duty disability. (PX 21). Petitioner would file his workers' compensation claim about a month later, on November 20, 2015.

The Board of Trustees of the North Palos Fire Protection District Firefighter's Pension Fund ("Pension Board") hired three physicians to conduct independent medical examinations of Petitioner. These pension medical examiners were: Dr. Mark Lampert, Dr. Daniel Samo, and Dr. Timothy McDonough. Following their examinations, these physicians submitted written reports to the Pension Board in March and April 2016. All three generally concluded that, as of the time of examination (about 6 months post-event), Petitioner was disabled (that is, could not return to unrestricted firefighter duties) due to his heart attack, and that this disability was likely permanent.

Regarding causal connection between the disability and his "service as a firefighter,"[2] Dr. Samo and Dr. McDonough opined that there was none. Specifically, Dr. Samo wrote that Petitioner's "disability is unrelated

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[2] The Pension Code, while not controlling here, provides in relevant part that "An active firefighter… who is found, pursuant to Section 4-112, unable to perform his or her duties in the fire department by reason of heart disease, stroke, tuberculosis or any disease of the lungs or respiratory tract, resulting from service as a firefighter, is entitled to an occupational disease disability pension[.] (40 ILCS 5/4-110.1). Section 4-112, in turn, governs the determination of disability, and reads in relevant part, "A disability pension shall not be paid until disability has been established by the board by examinations of the firefighter at pension fund expense by 3 physicians selected by the board and such other

19IWCC0372

to his service as a firefighter." (RX 2 exhibit 2). Dr. McDonough wrote that Petitioner's "disability resulted from progression of an underlying, but not preexisting disease, which did not occur as a result of his service as a firefighter, and his service as a firefighter did not contribute clearly to this condition." (RX 3 exhibit 2). Dr. Lampert wrote that it was "possible" that Petitioner's service as a firefighter contributed to his disability, as Petitioner did not have the traditional risk factors and was in otherwise excellent health. (PX 14).

Several months later, Respondent would take the evidence depositions of Dr. Samo and Dr. McDonough in connection with its defense against Petitioner's workers' compensation claim. The opinions of the three pension medical examiners are discussed more fully in section II below, under "Medical Expert Opinion Evidence."

In any event, on April 20, 2017, the Pension Board found that Petitioner was disabled, and furthermore, that the disability was duty-related. The Pension Board stated in its decision that Petitioner was entitled to "an occupational disease disability pension under Section 4-110.1 of the Pension Code because he is currently disabled as a result of coronary artery disease, resulting from his service as a firefighter."

II. MEDICAL EXPERT OPINIONS

A. Medical Opinions Submitted by Petitioner

As medical opinion evidence in support of its causation argument, Petitioner submitted the evidence deposition testimony of Dr. Terrence Moisan and the pension medical examination report of Dr. Mark Lampert.

(1) Dr. Terrence Moisan's deposition testimony

Dr. Moisan is board-certified in internal medicine, pulmonology, and occupational disease medicine. Petitioner took Dr. Moisan's evidence deposition on July 20, 2016. (PX 13). Since the early 1990s, Dr. Moisan has performed fitness-for-duty and other examinations for North Palos FPD firefighters and has issued recommendations based thereon. Dr. Moisan first examined Petitioner's fitness for duty in January 1996 and continued to do so regularly up through May 12, 2015 (the last fitness-for-duty examination prior to Petitioner's heart attack). Dr. Moisan stated that over the years he had not noted any evidence of heart disease in Petitioner. (PX 13 at 12-13).

Regarding causation, Petitioner primarily relies on Dr. Moisan. Dr. Moisan acknowledged the medical literature supporting a link between firefighting and heart disease, and that he could not rule out as contributors Petitioner's activities at work over his 25 years of firefighting. (PX 13 at 31). Dr. Moisan noted that firefighting duties, such as the ones performed by Petitioner, increase the risk of developing coronary artery disease. (PX 13 at 40-41, 64-65). He also affirmed that it was more likely than not that Petitioner's firefighting activities contributed to his coronary artery disease. (PX 13 at 43). However, as to quantifying this work-related contribution in terms of percentage apportionment among other, non-work-related contributors, Dr. Moisan could not say. (PX 13 at 40, 41-43, 73).

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evidence as the board deems necessary. The 3 physicians selected by the board need not agree as to the existence of any disability or the nature and extent of a disability." (40 ILCS 5/4-112).

19IWCC0372

(2) Dr. Mark Lampert's pension medical examination report

In March 2016, Dr. Lampert reported to the Pension Board that Petitioner's myocardial infarction "resulted in a large scar in the myocardium and moderate reduction in his left ventricular systolic function," which rendered him disabled – that is, precluded him from returning to unrestricted firefighter duties – and that his disability was expected to be permanent. (PX 14 at 2). As to occupational causation, Dr. Lampert noted that "reports in the medical literature … have established a higher risk of cardiovascular events among firefighters in active duty" and as to Petitioner, Dr. Lampert wrote:

> "It is possible that Lt. Folsom's service as a firefighter contributed to the disability he suffered. He did not have traditional risk factors for the myocardial infarction that occurred in September 2015 and was in otherwise excellent health."

(PX 14 at 2). Dr. Lampert did note in his report Petitioner's past history of high values of triglycerides in the blood, which values normalized after he cut back on his habit of drinking "at least 1 gallon of milk every day." (PX 14). Dr. Lampert did not provide testimony in this workers' compensation proceeding through evidence deposition or otherwise.

B. Medical Opinions Submitted by Respondent

Respondent took the evidence depositions of Dr. Daniel Samo and Dr. Timothy McDonough – the two pension medical examiners who reported to the Pension Board that there was no occupational causation – in connection with its defense against Petitioner's workers' compensation claim. Dr. Samo was deposed in September 2016 and Dr. McDonough in October 2016. (RX 2; RX 3).

Respondent also retained, as its Section 12 examiner, Dr. Dan Fintel of the Cardiology Division of The Feinberg School of Medicine at Northwestern University. Dr. Fintel generated a written report and sat for an evidence deposition in September 2016. (RX 1).

(1) Dr. Dan Fintel's deposition testimony

Dr. Fintel is a board-certified cardiologist. He performed a Section 12 examination of Petitioner on April 6, 2016 and testified via evidence deposition on September 21, 2016. (RX 1). Dr. Fintel diagnosed Petitioner has having suffered a single vessel coronary artery occlusion that led to myocardial infarction that was successfully treated with an angioplasty. He determined that Petitioner's functional capacity had since returned to normal, with there being no indications that he could not return to work as a firefighter. (RX 1 at 11-12).

Regarding causation, Dr. Fintel testified that Petitioner's personal risk factors put him at "moderate risk, not high risk" for heart disease. (RX 1 at 43). The risk factors cited by Dr. Fintel included some family history, longtime use of chewing tobacco, and hyperlipidemia (high blood levels of fats). (RX 1 at 39-41). However, Dr. Fintel conceded that his knowledge of these personal risk factors was quite limited and cursory – for example, Dr. Fintel could not attribute Petitioner's high triglycerides to any self-reported drinking of excessive amounts of milk during childhood, and there was "no evidence" that Petitioner was continuing this habit into adulthood. (RX 1 at 41). Dr. Fintel opined that Petitioner's firefighter employment did not cause his ill-being: "There is no evidence, nor do I believe that his work activities as a fireman engaged in fire suppression activities in any way caused the myocardial infarction or accelerated the likelihood of that heart attack." (RX 1 at 13). Dr. Fintel believed that Petitioner's myocardial infarction "would have occurred whether or not he was

19IWCC0372

working as a firefighter," and that his heart condition was "an inevitable consequence of his underlying genetic make-up and lipid problems." (RX 1 at 49-50).

Notwithstanding, the Commission notes with interest that, after opining that there was no occupational link to his myocardial infarction, Dr. Fintel conceded upon cross examination – twice – that Petitioner's firefighting activities did contribute to his coronary artery disease, albeit to an unquantifiable extent:

> Q: …[W]ould you agree with me that his firefighting activities in some respect, and we don't know what level or what participation, but in some respect contributed to his coronary artery disease?
>
> A: As I've stated, of course, any job including that of fire suppression can contribute to coronary artery disease. As a generality in this particular individual, I think it had no meaningful contribution.
>
> Q: When you say "no meaningful contribution," what do you mean by that?
>
> A: I mean the contribution of his firefighting activities to his isolated LAD [left anterior descending] stenosis were slight at most.

(RX 1 at 53). Later, he again reluctantly acknowledged that Petitioner's firefighting activities had at least some contribution to his coronary artery disease:

> Q: …But just so we're clear on it, his firefighting activities had some contribution, small, albeit small, but you don't know what that is?
>
> A: I would say no, I don't know the exact number, but it's very small.

(RX 1 at 69).

(2) Dr. Daniel Samo's deposition testimony

Dr. Samo is a board-certified emergency medicine physician and occupational medicine specialist. As noted above, in his pension examination report, Dr. Samo opined that Petitioner's firefighting service was not related to his disability. Dr. Samo's report contained a summary of the body of medical literature regarding heart disease and firefighting (spanning the years from 1978 through 2011), noting that, "Currently, there is no conclusive evidence to support or refute any significant increase in CAD [coronary artery disease] in firefighters when compared with the general population." (RX 2 exhibit 2).

Dr. Samo sat for an evidence deposition in September 2019. (RX 2). Dr. Samo stated that firefighting "is not causally related to the development of coronary artery disease as far as science tells us." (RX 2 at 12). He also testified, "There's a few studies which show maybe a minor increase of the prevalence in firefighters, but the preponderance is – speaks against there being any increased coronary artery disease due to being a firefighter." (RX 2 at 29). As to Petitioner's September 26, 2016 heart attack, Dr. Samo stated, "His heart attack was not related. He wasn't at work. He wasn't doing anything firefighter-wise, so his event would not be related to his job." (RX 2 at 12). Dr. Samo did not agree with Dr. Lampert's statement from Dr. Lampert's report that "it is possible that [Petitioner's] service as a firefighter contributed to the disability he suffered," responding, "I don't see any scientific basis for that." (RX 2 at 32).

19IWCC0372

(3) Dr. Timothy McDonough's deposition testimony

Dr. McDonough is a board-certified cardiologist. He testified that he discerned Petitioner's only risk factors to be his age and male gender. (RX 3 at 11). Dr. McDonough did not consider Petitioner's firefighting activities to be causally connected to his coronary artery disease and heart attack. Dr. McDonough acknowledged the existence of medical literature suggesting a link between firefighting and heart disease, but averred that the literature did not bear upon his causation opinion in the case of Petitioner, stating, "I don't have any reason to believe that his activities as a firefighter are different from anyone else's activities as a firefighter. Given that, is it possible, it's still under the speculation that it is possible that those activities could possibly have contributed." (RX 3 at 33.) When asked whether he could "point to any evidence that would refute the opinion that Lieutenant Folsom's firefighting activities caused or contributed to cause to some percentage of his coronary artery disease," Dr. McDonough replied, "Right. I think that's an impossible thing to prove." (RX 3 at 74).

III. DISCUSSION

A. The rebuttable "firefighter's presumption" of Section 6(f).

Section 6(f) of the Act provides:

> 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 paramedical employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.

820 ILCS 305/6(f). A parallel provision is found in Section d (1) the Occupational Diseases Act. (ILCS 310/1 *et. seq).*

In finding Respondent liable, the Arbitrator wrote:

> "In the present case, the rebuttable presumption afforded firefighters in §6(f) effectively shifts the burden to Respondent to prove that Petitioner's 25 years employment history of firefighting duties contributed in no way to his coronary artery disease, which would be extremely difficult, given the Petitioner's long employment history."

(Arbitrator's decision at 22). Immediately after this statement, the Arbitrator stated, "Respondent's best evidence to rebut the statutory presumption is that the heart attack occurred when Petitioner was off work, while engaged in recreational activity that was remote in time and place to his employment." (Arbitrator's decision at 22). The Arbitrator went on to summarily find in favor of Petitioner and grant all benefits sought.

About four months after the Arbitrator filed his decision, the Appellate Court on April 13, 2017 handed down its decision in Johnston v. Illinois Workers' Comp. Comm'n, 2017 IL App (2d) 160010WC, 2017 Ill. App. LEXIS 250, 414 Ill. Dec. 430, 80 N.E.3d 573. In Johnston, the Appellate Court set forth in detail how the Section 6(f) presumption was to be applied and explained that this presumption was a "bursting-bubble"

19IWCC0372

presumption. Johnston, 2017 IL App (2d) 160010WC at ¶ 37, *citing* Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 462, 448 N.E.2d 872, 69 Ill. Dec. 960 (1983). Once the employer presents evidence to rebut the presumption, the metaphorical bubble bursts and the trier of fact must then consider the evidence presented in the case as if the presumption had never existed. Id. The burden of proof does not shift but remains with the claimant. Id. at ¶ 36.

Regarding the amount of evidence needed for successful rebuttal, the Johnston Court concluded that Section 6(f) provides for an "ordinary rebuttable presumption." Id. at 45. It is not a "strong presumption," and does not hold the employer to a heightened standard such as "clear and convincing." Id. The employer need not present evidence excluding or eliminating occupational exposure as a cause of a claimant's condition. Rather, successful rebuttal "simply require[es] the employer 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). Id. at 45.

A few days later, on April 18, 2017, the Appellate Court again illustrated the operation of the presumption in Simpson v. Illinois Workers' Comp. Comm'n, 2017 IL App (3d) 160024 WC, 2017 Ill. App. LEXIS 260, 79 N.E.3d 643,414 Ill. Dec. 8. The Appellate Court reiterated its holding in Johnston, stating that "once the employer introduces some evidence of another potential cause of the claimant's condition, the presumption ceases to exist and the Commission is free to determine the factual question of whether the occupational exposure was a cause of the claimant's condition based on the evidence before it but without the benefit of the presumption to the claimant." Simpson at 46.

In the case at bar, it was error to shift the burden of proof to require Respondent to show that Petitioner's employment did not contribute to his condition as was held in the arbitration decision. The misapplication of the Section 6(f) presumption renders any conclusion flowing therefrom untenable. The Commission, after applying the presumption pursuant to Johnston and Simpson, finds that Respondent has successfully rebutted the presumption. Further, after weighing the evidence as a whole, the Commission finds that Petitioner has carried his burden of proving a compensable claim. The Commission's analysis is discussed below.

B. Respondent has successfully rebutted the presumption.

The Commission finds that Respondent has sufficiently rebutted the firefighter's presumption of Section 6(f). This evidence consists of the medical expert opinions of Dr. Lampert, Dr. Samo, and Dr. Fintel, at least prior to cross examination. These opinions from three medical experts constitute a quantum of evidence sufficient to rebut the presumption.

As Respondent has successfully rebutted the "ordinary rebuttable presumption" of Section 6(f), the analysis now turns on whether Petitioner has carried his burden of proof "as if the presumption never existed" – that is, whether Petitioner has shown, more likely than not, that his firefighting duties contributed to his coronary artery disease and myocardial infarction.

C. Petitioner has carried his ultimate burden of proving his coronary artery disease and heart attack arose out of and in the course of employment.

"[R]ecovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 at 204 citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d at 36. The Commission finds that Petitioner has shown that his exposure to workplace stressors was "a causative factor" in the development of his coronary artery disease, which in turn led to his heart attack on September 26, 2015.

19IWCC0372

As the basis for this determination, the Commission gives weight to the opinion of Dr. Moisan, who testified that it is likely that Petitioner's firefighting activities contributed (to some unquantifiable degree) to his coronary artery disease. The Commission also notes that even Respondent's experts acknowledged that firefighting duties have been associated with a higher incidence of heart disease in firefighters, and that Respondent's experts could only discern "no evidence" in Petitioner's individual case to refute the opinion that his employment as a firefighter was among the causative factors of his condition.

Under the "a causative factor" standard of *Sisbro*, there is no requirement that, once Petitioner has demonstrated that his employment was a causative factor, he must provide quantification of that factor, much less demonstrate that this factor is the sole factor or even the primary factor among multiple factors. Also, Petitioner's occupational stressors were greater than the stressors experienced by the general public. See Baggett v. Industrial Comm'n, 201 Ill.2d 187, 203 (2002) ("We hold that in a "mental-physical" injury case, a claimant need not show stress exceeding the stress of co-workers. Rather, a claimant need only prove that the usual stress of the workplace is greater than the stress experienced by the general public."). It cannot reasonably be disputed that Petitioner experienced stress at the workplace greater than the stress experienced by the general public given the evidence relating to his work for Respondent.

In short, the Commission finds that Petitioner has shown that his coronary artery disease that became symptomatic on two occasions while at work and shortly thereafter gave rise to his heart attack were causally related to his employment exposures and activities as opined by Dr. Moisan, and that his claim is compensable.

IV. EVIDENTIARY ISSUES

Respondent asserts that the Arbitrator improperly admitted certain items of evidence. These items can be put in two broad categories: (1) written materials, specifically three articles of medical literature and the pension medical examination report of Dr. Mark Lampert; and (2) the evidence deposition testimony of Dr. Moisan. The Arbitrator overruled Respondent's objections.

Unfortunately, the Arbitrator's discussion regarding his evidentiary rulings is confusing and his line of reasoning unclear. For example, as to any individual article and/or to the articles collectively offered, it is unclear whether the Arbitrator admitted those for impeachment and/or for substantive purposes. (See Arbitrator's decision at 25-28). And as for Dr. Moisan's testimony, the Arbitrator does not address the objection lodged by Respondent – that Dr. Moisan's causation opinion was extracted improperly from him via leading questions from Petitioner's counsel. Instead, curiously, the Arbitrator invoked the party-admission exception to the hearsay rule – even though hearsay was not the objection made and would be inappropriate – and then conflated this party-admission-as-hearsay-exception allusion with caselaw regarding "binding" judicial admissions made in pleadings and other pre-trial filings of conventional litigation. (Arbitrator's decision at 21).[3]

[3] Respondent asserts that the Arbitrator erred in his (unsupported) characterization of Dr. Moisan as Respondent's agent (as opposed to independent contractor), insofar as it appears the Arbitrator draws from this characterization a conclusion that this agent status works some "binding admission" effect on Respondent. Respondent is correct that the Arbitrator is incorrect here. While Dr. Moisan's history of working with Respondent is certainly relevant and important in our analysis, we do not consider him an "agent" of Respondent or that his testimony is "binding" upon it. In the Commission's view, Dr. Moisan's testimony was not the product of leading questioning.

19IWCC0372

As described below, the Commission does not find that the admission of these items of evidence by the Arbitrator warrants any vacating of the award. Additionally, the Commission reiterates that its ultimate determination regarding causation here was based on competent, admissible, testimonial evidence – i.e., the testimony of Dr. Moisan in particular, as well as the concessions made by Respondent's experts in their own depositions. With regard to the written materials, the Commission does not receive and has not considered the statements contained in these materials as proof of the truth of the matters asserted therein; that is, the Commission assigns no substantive weight to this particular evidence.

A fuller discussion of the evidentiary disputes raised by Respondent follows.

A. "Leading Question" Objection to Testimony of Dr. Moisan

During Dr. Moisan's deposition of July 20, 2016, Respondent's counsel objected to a series of re-phrased questions posed by Petitioner's counsel regarding the doctor's ultimate causation opinion. Respondent requests that Dr. Moisan's responses be stricken (insofar as they can be characterized as favorable to Petitioner) on grounds that this testimony was extracted through repeated, improper, leading questions. Respondent's counsel made this objection at least four times over the course of the lengthy interrogation. (See PX 13 at 31-37).

"The test of a leading question is whether it suggests the words or thought of the answer." *People v. Schuldt*, 217 Ill. App. 3d 534, 542, 577 N.E.2d 870, 876, 160 Ill. Dec. 545 (1991). The Commission finds that, while the phrasing and re-phrasing of the questions of Petitioner's counsel was belabored, repetitive, and understandably exasperating, the questioning was an attempt to focus or clarify Dr. Moisan's opinion.

B. Written Materials

(1) Medical literature and report of Dr. Lampert

At the hearing, Petitioner offered into the evidentiary record three articles of medical literature, purportedly for purposes of impeachment of Respondent's expert witnesses. These articles are: (i) "Heart Disease in the Fire Service" published in 2013 by the International Association of Fire Fighters; (ii) "Preventing Fire Fighter Fatalities Due to Heart Attacks and Other Sudden Cardiovascular Events" published in June 2007 by the National Institute of Occupational Safety and Health (NIOSH), an agency within the U.S. Department of Health and Human Services; and (iii) "Cardiovascular Risks in Firefighters; Implications for Occupational Health Nurse Practice," published in March 2004 by the American Association of Occupational Health Nurses. (PX 16, 17 and 18). Petitioner also offered the pension examination report of Dr. Lampert. (PX 14).

The articles had been introduced by Petitioner as deposition exhibits during the cross-examinations of Drs. Fintel, Samo, and/or McDonough. These doctors acknowledged the existence of authoritative medical literature, which include the aforementioned articles, indicating an association between firefighters' line-of-duty exposures and an increased risk of adverse cardiovascular outcomes including heart disease. Dr. Lampert's report was introduced by Petitioner as a deposition exhibit during the cross-examinations of Drs. Fintel and Samo. Drs. Fintel and Samo were questioned regarding whether they agreed with Dr. Lampert's opinion that it was "possible" that Petitioner's employment was causally related to his disability – they did not. Petitioner's counsel moved to admit Dr. Lampert's report into evidence at the conclusion of Dr. Fintel's deposition. Respondent's counsel stated he had "no objection." Therefore, any objection to its admission is waived.

19IWCC0372

Respondent objects to the admission of the articles into evidence insofar as the Arbitrator may have, in effect, received them as substantive evidence, as opposed to limiting their purpose to the impeachment of witnesses. The law is clear that publications which do not constitute treatises are hearsay and cannot be substantive evidence. Weekley v. Industrial Comm'n, 245 Ill. App. 3d 863, 868-869, 615 N.E.2d 59, 63, 1993 Ill. App. LEXIS 866, *12-13, 185 Ill. Dec. 764, 768, citing Walski v. Tiesenga (1978), 72 Ill. 2d 249, 258, 381 N.E.2d 279, 283, 21 Ill. Dec. 201; Mielke v. Condell Memorial Hospital (1984), 124 Ill. App. 3d 42, 54, 463 N.E.2d 216, 226, 79 Ill. Dec. 78. See also Fornoff v. Parke Davis & Co. (1982), 105 Ill. App. 3d 681, 690-91, 434 N.E.2d 793, 801, 61 Ill. Dec. 438 (treatises in general also not admissible as substantive evidence). An expert witness, in testifying, may not summarize findings of studies in medical literature, nor may he read from such articles, although he may use them as a basis for his opinion. Schuchman v. Stackable (1990), 198 Ill. App. 3d 209, 230, 555 N.E.2d 1012, 1025-26, 144 Ill. Dec. 493; Mielke, 124 Ill. App. 3d at 54, 463 N.E.2d at 226.

In the case at bar, it was not improper for Petitioner to use the medical articles for impeachment during the cross-examinations of Respondent's experts. It would be error for the Arbitrator to have admitted them as substantive evidence. The uncertainty here is whether the Arbitrator's references to these exhibits in his causation determinations indicate that he, in practical effect, did treat this evidence as substantive.

In any event, the Commission finds that, for whatever purpose the Arbitrator intended, his admission of these written materials is immaterial to the Commission's ultimate determination that Petitioner has proven causation. The Commission made this determination after undertaking the proper analysis of the Section 6(f) rebuttable presumption and weighing the evidence anew, as a whole. Any error made by the Arbitrator regarding these evidentiary issues is moot or otherwise harmless.

V. REMAINING ISSUES

A. Notice

The Commission finds that Respondent received timely notice. As mentioned above, not long after his heart attack, Petitioner sought a disability pension. He testified that he began the process by filling out an Application for Disability Pension Benefits on or about October 15, 2015, in the presence and with the assistance of Respondent's Chief Russell. (PX 21). This document was notarized by Respondent's human resources director on October 29, 2015 – well within the 45 days required under Section 6(c) of the Illinois Workers' Compensation Act.

B. Section 8(j) credit

The Arbitrator determined that Respondent was not entitled to a credit under Section 8(j) for medical benefits paid through Respondent's group insurance carrier. The record indicates that Respondent provided a group health insurance plan for its employees, including Petitioner. Petitioner acknowledged that he had this employer-provided medical coverage, and that medical bills were submitted to and paid by this group insurance carrier. (Tr. 91-93, 103). However, Respondent's human resource director, Gina DegLeffetti, testified that the medical benefits paid on Petitioner's behalf could have been made irrespective of an accidental injury under the Act. Thus, Section 8(j) is not applicable. The arbitrator's determination that Respondent was not entitled to a credit under Section 8(j) was correct.

C. Penalties and fees

On January 18, 2017, Petitioner filed its own Petition for Review form, where the only disputed issue indicated was penalties and fees under Sections 16, 19(k) and Section 19(l); however, Petitioner does not

19IWCC0372

address this issue anywhere in his review brief (the brief submitted in response to Respondent's Statements of Exceptions). The Arbitrator had declined to award penalties and fees against Respondent, writing that the case "may be one of first impression regarding the impression of Section 6(f)… [I]t was reasonable [for Respondent] to deny the present claim in order to determine how the court would interpret the law." (Arbitrator's decision at 24). The Commission agrees that no penalties and fees are warranted.

D. Petitioner's motion(s) to dismiss

In June 2017, Petitioner moved to dismiss Respondent's (then-pending) Petition for Review. This original motion to dismiss was prompted by the Pension Board's decision of April 20, 2017, granting Mr. Folsom's application for duty disability pension. This motion was heard by Commissioner Luskin in September 2017. Petitioner argued that the Pension Board's finding of occupational causation acted as collateral estoppel or *res judicata* as to preclude Respondent from disputing causal connection in this workers' compensation case. Commissioner Luskin denied the motion. Petitioner filed for judicial appeal of this denial in Cook County Circuit Court on September 20, 2017 (Case No. 17 L 050871). On March 20, 2018, Judge Daniel Kubasiak dismissed Petitioner's judicial appeal for lack of subject matter jurisdiction due to the lack of a final order by the Commission and remanded the matter to the Commission. Petitioner then filed a "Motion to Reconsider Before Full Commission Petitioner's Motion to Dismiss" on December 7, 2018.

Given the Commission's instant Decision and Opinion on Review, Petitioner's reconsideration motion is now moot.

The Commission notes that the minimum requirements for the application of the doctrine of collateral estoppel are: (1) the issue decided in the prior adjudication is identical to the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party to the prior adjudication or in privity with such party. Demski v. Mundelein Police Pension Board, 294 Ill. Dec. 754, 757, 831 N.E. 2d 704, 707. *See also* Hannigan v. Hoffmeister, 240 Ill. App. 3d 1065, 1075-6, 608 N.E. 2d 396, 404 (1st Dist. 1992) (party arguing *res judicata* must show, *inter alia*, that the former adjudication involved the same cause of action and same subject matter).

Regardless of the finding that Petitioner's motion to reconsider is moot, Petitioner's argument is nonetheless unconvincing. The Pension Board's decision was pursuant to the Illinois Pension Code whereas the instant matter before the Commission was filed under the Workers' Compensation Act. Pension Code claims and Workers' Compensation Act claims are different and do not invoke the same causes of action. The Commission concludes here that the issues are not identical and the party against whom estoppel is asserted is not the same party. The lack of privity between the parties is supported by the distinct identity, constituency, and interest of the Pension Board. Rhoads v. Board of Trustees of the City of Calumet City Policemen's Pension Fund, 293 Ill. App. 3d 2070, 1075, 689 N.E.2d 266, 270 (1st Dist. 1997).

The Commission also points out that the firefighter claimant in Simpson v. Ill. Workers' Comp. Comm'n, 2017 IL App (3d) 160024WC – who suffered his heart attack while cleaning his garage at home – was granted his duty disability pension by the relevant pension board. Id. at ¶7. That prior adjudication did not prevent the Appellate Court from affirming the Commission's denial of benefits in Simpson for lack of causation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the December 23, 2016 decision of the Arbitrator is affirmed, subject to and in accordance with the above.

19IWCC0372

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

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

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

No bond for review is required pursuant to Section 19(f)(2). The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 2 2 2019

Marc Parker

Barbara N. Flores

o-05/23/19
mp/ac
68

CONCURRENCE IN PART AND DISSENT IN PART

I respectfully dissent from the Decision of the majority. The majority affirmed the Decision of the Arbitrator, and found that the Arbitrator arrived at the correct decision despite misapplying the presumption in Section 6(f) of the Act. The majority found that even though the Arbitrator erred in finding that Respondent failed to successfully rebut the statutory presumption of liability, Petitioner successfully sustained his burden of proving that his heart attack was caused by his work activities. I concur with the finding of the majority that Respondent successfully rebutted the presumption of liability in Section 6(f). However, I disagree with the majority that Petitioner sustained his burden of proving his heart attack was work-related in the absence of that presumption.

Petitioner has been a firefighter for Respondent since 1991 and suffered a heart attack on September 26, 2015 while on vacation. The majority relies on the opinion of Dr. Moisan, who performed fitness-for-duty examinations on Petitioner. Dr. Moisan opined that duties of firefighters generally increase the risk of developing cardiovascular disease and that more likely than not Petitioner's firefighting activities contributed to his coronary arterial disease. However, Dr. Moisan could not apportion a percentage of causation between his firefighting activities and other non-employment factors.

19IWCC0372

Respondent presented testimony of expert witnesses, Dr. Lambert, Dr. Samo, and Dr. Fintel all of whom opined that Petitioner's heart attack was caused by non-occupational factors such as age, gender, tobacco use, and high lipid count, and was not related to his duties as firefighter. The majority also noted that Petitioner's treating doctor, Dr. Rowan, indicated that he suspected that "the stress related to the deaths of his stepson and fellow firefighter, combined with a plaque rupture, caused Petitioner's myocardial infarction." Interestingly, Petitioner did not depose Dr. Rowan.

The majority concluded that even though the testimony of Respondent's experts, and the above-cited notation of Petitioner's treating doctor, successfully rebutted the statutory presumption, Petitioner's burden of proving causation was successfully sustained through the testimony of Dr. Moisan. However, Dr. Moisan and Petitioner only related the general duties of firefighter, and Dr. Moisan simply stated that those duties can contribute to a cardiac condition. Basically, that testimony simply outlines the basis for establishing the statutory presumption. Once that presumption has been successfully rebutted, as is the case here, Petitioner had the burden of proving that his particular duties particularly affected him in causing his cardiac condition. In my opinion, Petitioner did not sustain that burden of proof.

For the reasons stated above, I concur with the finding of the majority that Respondent successfully rebutted the statutory presumption of liability, but dissent from the finding of the majority that Petitioner successfully proved that his work activities as firefighter caused his myocardial infarction absent that presumption. I would have reversed Decision of the Arbitrator and denied compensation. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FOLSOM, MARK
Employee/Petitioner

Case# **15WC037604**

NORTH PALOS FIRE PROTECTION DISTRICT
Employer/Respondent

19IWCC0372

On 12/23/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.64% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 HEALY SCANLON LAW FIRM
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
MICHAEL E RUSIN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mark Folsom
Employee/Petitioner
v.
North Palos Fire Protection District
Employer/Respondent

Case # 15 WC 37604

19IWCC0372

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 **October 13, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 24, 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 **$109,200.00**; the average weekly wage was **$2,100.00**.

On the date of accident, Petitioner was **42** years of age, married, with **two** dependent children.

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

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

Respondent shall be given a credit of $ 75,490.92 for TTD for a total credit of $ 75,490.92.
Respondent is not entitled to a credit under Section 8(j) of the Act.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of **$1,379.73**/week for **55 1/7** weeks commencing **09-24-15** through **10-13-16**, as provided in Section 8(b) of the Act.

Medical benefits
Respondent shall pay reasonable and necessary medical services of **$123,930.35**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Penaltis
No penalties are awarded in this case.

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

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

Signature of Arbitrator 12.22.16
Date

DEC 23 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

19IWCC0372

Mark Folsom,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**NO. 14 WC 19896**
	)	
North Palos Fire Protection District,	)	**Arbitrator Kurt Carlson**
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact

The Petitioner testified his twenty-five year career with the North Palos Fire Protection District (NPFPD) began at the age of eighteen, in 1991. In 1999, he became a full time firefighter/paramedic. In 2007, he was appointed Emergency Medical Services coordinator. In 2011, Petitioner was promoted to the rank of Lieutenant. Firefighter/paramedics with the North Palos Fire Protection District are responsible for providing emergency medical services, rescue and fire suppression.

Petitioner testified a job description received into evidence accurately outlines the specific duties, work conditions and characteristics required of Petitioner. (PX19). As Lieutenant, Petitioner is responsible for the operation and supervision of the station and bureaus under his command. (PX19). He is responsible to serve as the company officer and take command of firefighting operations at the scene of a fire. (PX19, §209).

As a firefighter/paramedic, Petitioner is required to perform hazardous tasks under emergency conditions, involving strenuous exertion under adverse conditions such as fire, heat, smoke, darkness and cramped and confined surroundings. (PX19, §200). The working conditions required of Petitioner include the ability to:

- Tolerate extreme fluctuations in temperature while performing physically demanding work in hot, humid environments while wearing equipment that significantly impairs body-cooling mechanisms,
- Transition from hot to cold and from humid to dry elements frequently,
- Perform a variety of tasks on slippery, hazardous surfaces such as roof tops or from ladders,
- Work in areas where sustaining traumatic or thermal injury is possible,
- Face exposure to carcinogenic dusts such as asbestos, toxic substances such as hydrogen cyanide, acids, carbon monoxide or organic solvents either through inhalation or skin contact,
- Perform complex tasks during life threatening emergencies,
- Work for long periods of time requiring sustained physical activity and intense concentration,
- Face life or death decisions during emergency conditions,
- Make a rapid transition from rest to near maximal exertion without warm-up periods,
- Operate in environments of high noise,
- Work from heights without fear, and

- Face exposure to grotesque sights and smells associated with illness, trauma and burns. (PX19, §200.4).

Furthermore, Petitioner is required to tolerate emotional and psychological stress, function effectively under stress, and deal with the morbid, the macabre, the repugnant, the abnormal, the morose, the psychotic, the neurotic and the otherwise unpleasant or unusual facets or results of human behavior. (PX19, §200.6).

Petitioner testified concerning his typical day as a firefighter. Each 24-hour shift begins at 7:00 a.m. Generally, the morning consists of equipment inspections, firehouse duties and training. After lunch at noon, the firefighters again participate in training exercises and inspections. From 3:00-4:00 p.m., the firefighters perform mandatory workouts with weights or treadmills. Throughout the day and night, the crew responds to emergency calls as they are received, both fire and ambulance calls. Upon the completion of their shift, the crew is off for the next 48 hours.

Firefighters for NPFPD are required to undergo periodic Fitness for Duty Exams by Dr. Terence Moisan, Medical Director for North Palos. (PX7, PX13, P. 6-7). Prior to September 2015, Petitioner was evaluated fifteen times by Dr. Moisan and found to be fit for duty. (PX7, PX13, P. 11-13).

Petitioner testified he is 6'5" and weights around 260 lbs. He has never been a smoker. Petitioner testified that prior to September 2015, he did not have any problems with his heart, nor had he ever received any medical treatment for heart problems.

On September 24, 2014, Petitioner was working a normal duty day as shift Lieutenant at NPFPD. During mandatory fitness, while running on a treadmill, Petitioner began to experience burning in his throat and chest. Later that shift, while responding to a dryer fire at a home, Petitioner again experienced burning in his throat and chest while on a roof inspecting the dryer vent. On both occasions, Petitioner felt he was suffering from heartburn or Gastroesophageal reflux. On both occasions, the symptoms went away and Petitioner did not seek any treatment or notify anyone of his condition. Petitioner completed the rest of his shift without incident and was off the next 48 hours. During that 48 hour period, Petitioner testified he did not engage in any strenuous activities.

The following day, Petitioner travelled to Kankakee, Illinois to inspect some property, without incident. The next day, Petitioner travelled to Coloma, Michigan. While in Michigan, Petitioner again began to experience a burning sensation in his throat. Eventually, he began to experience an increase in symptoms, prompting him to go to the Emergency Room. On the way to the Lakeland Hospital in Michigan, Petitioner began to experience chest pain.

Medical records received into evidence reveal that Petitioner presented with severe chest pain to Lakeland Hospital on September 26, 2015. (PX5). It was noted that the pain began several days earlier. (PX5). Petitioner was diagnosed with a myocardial infarction, or a heart attack. (PX5). Petitioner was given medication, stabilized, and transferred to Lakeland Medical Center in St. Joseph, Michigan via ambulance. (PX5, PX1).

Later that day, Petitioner underwent a cardiac catheterization and placement of a stent due to a blockage of the right descending artery by Dr. Dilip Arora. (PX1). The history taken at Lakeland Medical center revealed that Petitioner was a 42-year-old male here from Chicago having symptoms which he thought to be GI discomfort since he does not have much risk factors. (PX1). Petitioner remained hospitalized until September 29, 2015. (PX1).

While hospitalized, Petitioner's wife exchanged text messages with the North Palos Fire Protection Fire Chief, Dan Russell. (PX20). Chief Russell was informed of Petitioner's condition and the fact that he would not be available to work. (PX20). Chief Russell expressed concern for Petitioner and indicated he would visit Petitioner upon his return home. (PX20).

Upon his return to Chicago, Petitioner again experienced chest pain and sought care at Little Company of Mary Hospital (LCMH) on September 30, 2015. (PX3). Petitioner underwent an emergent repeat cardiac catheterization and it was determined that the stent was functioning well. (PX3). Petitioner came under the care of Dr. Daniel Rowan, a cardiologist at LCMH. (PX4).

On October 5, 2015, Petitioner was evaluated by Dr. Rowan. (PX4). Dr. Rowan noted Petitioner suffered a myocardial infarction due to plaque rupture. (PX4). Dr. Rowan prescribed a stress EKG and cardiac rehabilitation. (PX4). An October 14, 2015 stress EKG revealed excellent exercise capacity. (PX4).

Petitioner testified he began a program of cardiac rehabilitation at Little Company of Mary Hospital.

Petitioner testified he met with Chief Daniel Russell in his office at NPFPD on October 15, 2015 and together they filled out an "Application for Disability Pension Benefits" form. Occupational Disease was listed as the pension sought by Petitioner due to a heart attack suffered on September 26, 2015. (PX21). The form was notarized and dated October 29, 2015. (PX21).

On November 2, 2015, Petitioner returned to Dr. Rowan. (PX4). Dr. Rowan noted no problems with the cardiac rehabilitation and instructed Petitioner to continue with the program. (PX4). On November 11, 2015, Petitioner was admitted to LCMH after suffering a fainting spell while in cardiac rehabilitation. (PX3). Petitioner was discharged the following day with a Holter Monitor to record his heart readings. (PX3)

On November 17, 2015, Petitioner was evaluated by Respondent's medical director, Dr. Moisan. (PX7). Dr. Moisan noted he "reviewed at great length the recent history of Mark" and the "prior fire department chart in detail." Dr. Moisan indicated that Petitioner "has no family or significant risk factor for coronary artery disease." (PX7). Further, Dr. Moisan's history indicated "he had stuttering chest discomfort which he interpreted as reflux for approximately 3 days before developing classic angina" treated with stenting in Michigan. (PX7). Dr. Moisan noted that Petitioner's job duties included:

> putting on full turnout gear, working in extremes of climate with some zero and/or greater than 100° temperature with mask and carry/pulling hose while going up ladders. This is an element other than just the physical stress to the cardiovascular

> issues. Additionally, he is at increased risk for bleeding, particularly intracranial with any head trauma which could lead to permanent impairment including death. (PX7).

Dr. Moisan indicated that the stress in Petitioner's occupation has been "associated with the development of coronary disease." (PX7).

Dr. Moisan stated in that November 17, 2015 note that a return to work would be precluded under the National Fire Protection Standards. Dr. Moisan did note a variance could be granted by him for Petitioner to return to work with the consent of the NPFPD, while recognizing the potential stressors of "extremes of heat, cold, climbing ladders, rescuing the public," under "adverse conditions at any time of the day or night." (PX7).

Petitioner continued to be evaluated by Dr. Rowan. (PX4). On September 15, 2015, Dr. Rowan released Petitioner to return to work in a full duty capacity. (PX4).

Petitioner testified that despite his release to work by his treating cardiologist, Petitioner was required to be released to work by Respondent's Medical Director, Dr. Moisan and Respondent. At the time of the 19(b) hearing, Petitioner remained off work as a firefighter/paramedic and was not allowed to return to work by Respondent's medical director, Dr. Moisan.

Petitioner presented the testimony of Respondent's Medical Director, Dr. Terence Moisan, a physician board-certified in pulmonology and occupational disease medicine. (PX13, P. 4-5). Dr. Moisan testified as the Medical Director of NPFPD, he performs Fitness for Duty

Exams for the Department as well as evaluating the appropriateness of the return to duty for injured firefighter and paramedics. (PX13, P. 6-7). Previously, Dr. Moisan served as one of the primary authors of the National Fire Protection Association's (NFPA) standards for firefighter's cardiovascular and pulmonary health. (PX13, P. 5-6).

Dr. Moisan noted that his first Fitness for Duty exam of Petitioner was January 8, 1996. (PX13, P. 11-12). Dr. Moisan performed a series of exams of Petitioner over the ensuing twenty-four years, through May 12, 2015. (PX13, P. 12-13). At no time did Dr. Moisan note any evidence of heart disease. (PX13, P. 12-13).

Dr. Moisan confirmed that Petitioner's heart issues began prior to the trip to Michigan. (PX13, P. 18-19). In addition, Dr. Moisan noted that his concern with Petitioner returning to work with NPFPD was not only his cardiovascular status, but also the extreme stressors under adverse conditions he would be exposed to as a firefighter. (PX13, P. 21-22).

Dr. Moisan confirmed he has not allowed Petitioner to return back to work as of the July 20, 2016 deposition. (PX13, P. 27-28, 30-31). Dr. Moisan confirmed that any return to work would require his approval, along with the approval of Respondent. (PX13, P. 45). At no time did Dr. Moisan note any malingering or secondary gain issues. (PX13, P. 47).

Dr. Moisan noted that firefighting duties, such as the ones performed by Petitioner over his twenty-five year career, increase the risk of developing coronary artery disease. (PX13, P. 40-41, 64-65). Further, Dr. Moisan concluded, that it was more likely true than not true that

Petitioner's firefighting activities contributed to his coronary artery disease. (PX13, P. 43). However, to what percentage firefighting activities contributed, Dr. Moisan could not say. (PX13, P. 40, 43, 73).

Petitioner presented the report of Dr. Mark Lampert, a cardiologist hired by the North Palos Fire Protection District Pension Board to evaluate Petitioner. (PX14). Dr. Lambert stated that it was possible that Lt. Folsom's service as a firefighter contributed to his disability, as he did not have traditional risk factors for the myocardial infarction that occurred in September 2015 and was in otherwise excellent physical health. (PX14, P. 2).

Also received into evidence was a June 2007 National Institute of Occupational Safety and Health publication, Preventing Fire Fighter Fatalities Due to Heart Attacks and Other Sudden Cardiovascular Events. (PX17). NIOSH is a part of the United States Department of Health and Human Services. (PX17). In 1998, Congress funded the NIOSH Fire Fighter Fatality Investigation and Prevention Program to investigate cardiovascular disease in the fire service, resulting in this document. (PX17, P. 2). According to that document, heart attacks and coronary artery disease (CAD) are two conditions under the umbrella term, cardiovascular disease (CVD). (PX17, P. 2).

The report states "[c]oronary artery disease among firefighters is due to a combination of personal and workplace factors. The personal factors are well known: age, gender, family history, diabetes mellitus, hypertension, smoking, high blood cholesterol, obesity and lack of exercise. [cite omitted] Not as widely known, however, is that firefighters have exposures to

workplace factors that are associated with adverse cardiovascular outcomes." (PX17, P. 2). The article then lists a series of workplace exposures that contribute to the development of coronary artery disease, including: fire smoke, heavy physical exertion, heat stress, noise exposure, and shift work. (PX17, P. 2-5).

Petitioner submitted Heart Disease in the Fire Service, an article outlining the risk associated with firefighting and coronary heart disease (CHD). (PX16). The narrowing of the coronary arteries from atherosclerosis is referred by different interchangeable terms, coronary heart disease (CHD), coronary artery disease, ischemic heart disease and others. (PX16, 10). The article states "[f]irefighters face hazardous exposures and exceptional working conditions that may increase their risk of CHD. These can be divided into acute and chronic stressors." (PX16, P. 19). The chronic stressors include long sedentary periods, smoke exposure, noise, shift work, and occupational stress. (PX16, P. 19-20).

Also received into evidence for the purpose of impeachment was Cardiovascular Risks in Firefighters, authored by Respondent's examiner, Dr. David Samo. (PX18). Dr. Samo wrote that "[l]ine of duty exposures may increase firefighters' risk for cardiovascular disease." PX18, P. 68).

Respondent presented the testimony of its §12 examiner Dr. Daniel Fintel, a board-certified cardiologist. (RX1, Ex. 1). Dr. Fintel diagnosed Petitioner as having suffered a single vessel coronary artery occlusion that led to myocardial infarction that was successfully treated with an angioplasty. (RX1, P. 11-12). All of the treatment Petitioner received was reasonable

and necessary to treat his condition. (RX1, P. 12). Dr. Fintel testified that Petitioner's functional capacity has returned to normal and that Petitioner could return to work as a firefighter. (RX1, P. 12-13).

Dr. Fintel stated that Petitioner's activities as a fireman did not cause Petitioner's myocardial infarction. (RX1, P. 13).

On cross-examination, Dr. Fintel acknowledged his first introduction with this matter began with correspondence with Respondent's attorney. (RX1, P. 21-22, PXA). In a six-page letter dated April 1, 2016, Michael Rusin summarized Respondent's theory of the claim, stating, "It is our position that the petitioner did not suffer any kind of work accident or injury on September 24, 2015 that resulted in his heart attack on September 26, 2015. It is our position that his employment as a firefighter is not a causative factor in his heart attack and heart disease." (RX1, PXA P. 2,5). Respondent's attorney then requested Dr. Fintel's opinion concerning causal connection. (RX1, PXA P. 5-6). Respondent's attorney next opined "[w]e believe that the petitioner is at MMI and can return to work without any restrictions." (RX1, PXA P. 5). Respondent's attorney then asked Dr. Fintel if he agreed. (RX1, PXA P. 5).

Dr. Fintel testified after examining Petitioner and reviewing the medical records provided by Respondent, he then discussed this matter with Respondent's attorney before finalizing his report. (RX1, P. 30-31).

Dr. Fintel testified that his opinion could change if there was relevant material that was not provided to him. (RX1, P. 19). Dr. Fintel was not provided Dr. Moisan's deposition testimony, nor did he know his involvement as Respondent's medical director. (RX1, P. 23-24, 29). Similarly, Dr. Fintel was not provided Petitioner's fitness for duty examinations that were performed Dr. Moisan. (RX1, P. 28-29). Dr. Fintel was not provided with the NFPA standards, in fact, he was not familiar with that entity. (RX1, P. 27). Dr. Fintel was not provide a job description for firefighters at NPFPD. (RX1, P. 53).

Dr. Fintel confirmed that he has never served as a medical director nor performed Fitness for Duty examinations for any municipality or fire department. (RX1, P. 26). While Dr. Fintel has done extensive research in his field, he conceded that he hasn't authored any research in the area of the risks associated with firefighting and the development of cardiovascular disease. (RX1, P. 26-27).

On cross-examination, Dr. Fintel discussed the NIOSH publication Preventing Firefighter Fatalities Due to Heart Attacks and other Sudden Cardiovascular Events. (PX17, RX1, P. 33-38). Dr. Fintel agreed that this is the type of publication reasonably relied up by experts in his field. (RX1, P. 56). Dr. Fintel conceded that coronary artery disease among firefighters is due to a combination of personal and workplace factors, including exposure to fire smoke, heavy exertion, heat stress, noise exposure, and shift work. (RX1, P. 36-37). While regard to Petitioner, Dr. Fintel testified that Lt. Folsom would have been exposed to those workplace factors that could have caused his coronary heart disease. (RX1, P. 43, 45). However, Dr. Fintel testified Petitioner's firefighting activities would have a "slight" contribution to his isolated left

descending aerial stenosis. (RX1, P. 53). Later, Dr. Fintel acknowledged that Petitioner's firefighting duties had a "small" contribution to his coronary heart disease. (RX1, P. 69).

Respondent also presented the testimony of Dr. Daniel Samo, a board-certified emergency medicine physician. (RX2, P. 5). Dr. Samo diagnosed Petitioner as having a myocardial infarction, angioplasty with stent placement and stated Petitioner was doing well. (RX2, P. 11). Dr. Sano opined his review of the literature supports the opinion that "firefighting is not causally related to the development of coronary artery disease, as far as science tells us." (RX2, P. 12). Therefore, Dr. Samo opined Petitioner's heart attack was not related to his job. (RX2, P. 12).

On cross-examination, Dr. Samo acknowledged that he is neither a pulmonologist nor cardiologist. (RX2, P. 14). He was hired by an attorney for North Palos to do his exam of Petitioner. (RX2, P. 19).

Dr. Samo also testified that his opinion could change if there was relevant material that was not provided to him. (RX2, P. 21). Dr. Samo was not provided Dr. Moisan's deposition testimony. (RX2, P. 23-23). Similarly, Dr. Samo was not provided Dr. Fintel's §12 report or his deposition. (RX2, P. 23). Dr. Samo was also not provide a job description for firefighters at NPFPD.

Dr. Samo testified that Petitioner would be precluded from returning to work as a firefighter as a result of his heart attack due to his risk for sudden incapacitation, which would be a danger to himself, his co-workers and the public. (RX2, P. 26, 28).

Dr. Samo discussed the NIOSH publication Preventing Firefighter Fatalities Due to Heart Attacks and Other Sudden Cardiovascular Events. (PX17, RX2, P. 32). Dr. Samo testified he disagreed with the statement contained in the publication that "[c]oronary artery disease among firefighters is due to a combination of personal and workplace factors." (PX17, P. 2, RX2, P. 34). In fact, Dr. Samo specifically disagreed with the publications conclusion that fire smoke, physical exertion, heat stress, noise exposure or shift work were associated with the development of coronary artery disease. (RX2, P. 36-37).

Despite his supposed disagreement with the publication's conclusion that workplace factors contribute to coronary artery disease in firefighters, a review of the document reveals that Dr. Samo participated in the authorship of the document as a peer reviewer. (PX17, P. 18). Dr. Samo also identified NIOSH as an authoritative source that would be reasonably relied upon by a physician in his field. (RX2, P. 46, 57).

Dr. Samo also discussed the publication, Heart Disease in the Fire Service. (PX16, RX2, P. 51-56). Dr. Same identified this as the type of document that would be reasonably relied upon by an expert such as himself in his field. (RX2, P. 58). Dr. Samo agreed that Petitioner suffered from coronary heart disease and that firefighters face hazardous exposures and exceptional work conditions that may increase their risk of coronary heart disease. (RX2, P. 53). Dr. Samo

disagreed with the finding that firefighters are exposed to both acute and chronic stressors including smoke exposure, noise, physiological stress, shift work, and physical workloads that can increase the risk of the development of coronary heart disease as outlined in the publication. (RX2, P. 53-56, PX16, P. 19-21).

Dr. Samo agreed that Petitioner did not have a family history or other risk factors for coronary artery disease. (RX2, P. 39-40). At no time did Dr. Samo note any malingering or secondary gain issues with Petitioner, who he found honest and truthful. (RX2, P. 46).

Respondent also presented the testimony of a third hired expert, Dr. Timothy McDonough, a cardiologist. (RX3, P. 6). Dr. McDonough testified Petitioner's only risk factors for the development of coronary artery disease were his age and gender. (RX3, P. 11). Dr. McDonough diagnosed Petitioner with coronary artery disease that resulted in a myocardial infarct that was treated with a stent. (RX3, P. 12). Dr. McDonough testified that he didn't think Petitioner's heart attack was related to his work activities because it occurred a couple of days after his last shift. (RX3, P. 13). Dr. McDonough did not believe Petitioner could return back to work as a firefighter given his heart condition and the physical and emotional stress he would be exposed to upon a return to work. (RX3, P. 43, 47, 50-51).

On cross-examination, Dr. McDonough testified he was unaware of the symptoms that developed at work prior to Petitioner's heart attack, nor was he aware of medical records that reflected that history. (RX3, P. 20-21). Dr. McDonough could not answer whether Petitioner's firefighting duties might have contributed to the development of his coronary artery disease, as

he felt that required speculation on his part. (RX3, P. 22-24). Furthermore, Dr. McDonough could not answer whether it was more likely true than not true that firefighting activities contribute to the development of coronary artery disease, as he felt any answer would be speculation and he stated "I don't think I know the evidence to state that that's true." (RX3, P. 28-29).

However, after reviewing the NIOSH publication Preventing Firefighter Fatalities Due to Heart Attacks and Other Sudden Cardiovascular Events, Dr. McDonough conceded that some aspects of firefighting can cause or contribute to cause the development of coronary artery disease. (PX17, RX3, P. 33). Furthermore, Dr. McDonough acknowledged that there was no way to rule out Petitioner's firefighting duties as contributing to his coronary artery disease. (RX3, P. 33). Dr. McDonough identified the NIOSH publication as the type of publication reasonable relied upon by physicians such as himself, and that Dr. Samo participated in its publication. (PX17, RX3, P. 65, 66).

Finally, the following exchange took place:

> Q: As we sit here today, you can't point to any evidence that would refute the opinion that Lieutenant Folsom's firefighting activities caused or contributed to cause to some percentage of his coronary artery disease, true?
> A: Right. I think that's an impossible thing to prove. (RX3, P. 74).

Respondent presented the testimony of Battalion Chief Chris Perry. Chief Perry was the Battalion Chief on shift the last day Petitioner worked, September 24, 2015. Chief Perry testified that he was not aware of any issues or problems experienced by Petitioner on his last shift. Furthermore, Chief Perry indicated that if Petitioner was injured on his last shift, he should have filled out an accident report per NPFPD rules. (RX4, RX6).

On cross-examination Chief Perry admitted that he has suffered from heartburn symptoms while working at NPFPD like those described by Petitioner. He conceded that he also did not fill out an accident report, but simply waited for the symptoms to subside.

Chief Perry also confirmed the job description received into evidence accurately outlines the specific duties, work conditions and characteristics required of Petitioner. (PX19). He also confirmed that an employee that is receiving benefits from NPFPD is not allowed to be employed in any manner, with or without compensation. (RX4, P. 4-4). Prior to returning to work as a firefighter, Chief Perry explained an injured employee such as Petitioner must be cleared by Respondent's medical director, Dr. Moisan. Chief Perry corroborated Petitioner's testimony that he had not yet been returned to work by Dr. Moisan. Finally, Chief Perry described Petitioner as an honest, trustworthy person, who is not a complainer.

Respondent also presented the testimony of Gina Degleffetti, the head of Human Resources for NPFPD. She testified that Petitioner was paid a combination of sick/vacation time along with Temporary Total Disability benefits since September 24, 2015. She also confirmed that she notarized PX21, Petitioner's Application for Disability, on October 29, 2015. The form had already been completed when she notarized the document.

Finally, Ms. Degleffetti testified that she believed any medical payments made on behalf of Petitioner would have been made irrespective of an accidental injury under the Illinois Workers' Compensation Act.

Conclusions of Law 19IWCC0372

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

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

The People of the State of Illinois, through their elected officials, have determined a sufficient connection exists between firefighting activities and the development of coronary artery disease such that the Illinois Workers' Compensation Act was amended in 2007 to afford protections to firefighters with five years of service. Petitioner has 25 years of service. Pursuant to §6(f) of the Act, any condition or impairment of health of a firefighter, which result directly or indirectly from any heart or vascular disease or condition, 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 employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. 820 ILCS 305/6(f).

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or, principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. Id.

In a case involving a heart attack, a claimant need not show that the employment was the sole or even principle causative factor of the heart attack, the Petitioner must only prove that his or her employment was one causative factor of the heart attack. Flowers v. J.H. Spell & Associates, 99 IIC 0435 citing Sears, Roebuck & Co. v Industrial Comm'n, 79 11 2d 59 (1980).

The Arbitrator finds that Petitioner's coronary artery disease, and resultant heart attack is causally connected to his work activities as a firefighter/paramedic with Respondent.

The Arbitrator notes Dr. Moisan, Respondent's medical director, testified Petitioner's firefighting activities contributed, to some extent, to his coronary artery disease and that Petitioner is unable to return to work as a firefighter with NPFPD. It is well settled that statements made by an agent of a party concerning a matter within the scope of his agency constitute admissions by the party. Pavlik v. Wal-Mart Stores, Inc., 323 Ill.App.3d 1060, 1065 (1st Dist. 2001). Admissions are binding on the party making them and may not be controverted. Rath v. Carbondale Nursing & Rehab., 374 Ill.App.3d 536, 538 (5th Dist. 2007). An admission has the effect of "withdrawing a fact from contention." Id. Dr. Moisan's statements concerning the causal connection and Petitioner's current condition are admissions by a party, and as such, are binding on Respondent.

Further, Respondent's §12 examiner, Dr. Fintel also agreed that Petitioner's firefighting duties contributed, in some "small," "slight" fashion to his coronary heart disease. Given Respondent attorney's extensive involvement in the crafting of Dr. Fintel's opinions, it cannot be said that these opinions were the result of an independent examination. Nevertheless, Dr.

Fintel's concessions on cross-examination support the conclusion that Petitioner's coronary artery disease arose out of and in the course of his employment with Respondent.

The opinions of Drs. Samo and McDonough are less credible. Dr. Samo agrees that firefighting activities can contribute to coronary artery disease when he is authoring articles in the academic arena, but rejects those conclusions when paid by an attorney in a disputed legal claim. Dr. McDonough testified that he was unfamiliar with the evidence concerning firefighter risks and coronary artery disease.

In the present case, the rebuttable presumption afforded firefighters in §6(f) effectively shifts the burden to Respondent to prove that Petitioner's 25 years employment history of firefighting duties contributed in no way to his coronary artery disease, which would be extremely difficult, given the Petitioner's long employment history. Respondent's best evidence to rebut the statutory presumption is that the heart attack occurred when Petitioner was off work, while engaged in recreational activity that was remote in time and place to his employment.

The Arbitrator finds Petitioner's testimony to be credible. The Arbitrator notes that Respondent declined to offer testimony from Petitioner's co-workers or supervisors to refute Petitioner's testimony of his physical condition prior to September, 2015.

Petitioner's September 26, 2015, myocardial infarction arose out of and in the course of his firefighting duties with Respondent and his present condition is causally related to his firefighting duties.

(E) Was timely notice of the accident given to Respondent?

In the Request for Hearing, (Arb.X1), Respondent disputed proper notice of Petitioner's heart attack. Under §6(c), notice of an incident shall be given to the employer as soon as practicable, but not later than 45 days after the incident. 820 ILCS 305/6(c). It is undisputed that Respondent received text messages from Petitioner's wife the day following his heart attack. Further, it was undisputed Petitioner filled out an Application for Disability Pension Benefits based on Occupational Disease on October 15, 2015 with Respondent's Chief Russell, that was notarized by Respondent's Human Resource director on October 29, 2015, well within the 45 days required under the Act. Therefore, the Arbitrator finds that Respondent received timely notice of the incident.

(J) Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner submitted the following medical expenses related to his coronary artery disease and resulting heart attack without objection concerning reasonableness and necessity:

Exhibit 8 – Lakeland Health Care:	$ 56,521.91
Exhibit 9 – John Herbick, D.O.:	$ 1,239.00
Exhibit 10 – Little Company of Mary Hospital:	$53,885.44
Exhibit 11 – Daniel Rowan M.D.:	$ 2,564.00
Exhibit 12 – Advocate Christ Medical Center:	$ 9,720.00

Based on the above, the Arbitrator finds Respondent responsible for medical expenses by the above providers.

(K) What amount of compensation is due for Temporary Total Disability?

Petitioner was unable to work from September 29, 2015 until the time of the 19(b) hearing. The undisputed testimony is that Petitioner cannot return to work until cleared for duty by Respondent's Medical Director, Dr. Moisan. To date, Petitioner has not been released to work by Dr. Moisan given the concern that Petitioner's current condition and the extreme physical and mental stressor required of a firefighter could pose a safety risk to Petitioner, his co-workers and the public. The Arbitrator finds that Respondent is responsible for temporary total disability benefits in the amount of $1,379.73/week for 55 1/7 weeks.

(M) Should penalties or fees be imposed upon Respondent?

No penalties are awarded in this matter. Without the presumption afforded by Section 6 of the Act, causation in this case may have been too speculative to render an award. Additionally, the Arbitrator notes that this case may be one of first impression regarding the interpretation of Section 6(f). In short, it was reasonable to deny the present claim in order to determine how the court would interpret the law.

(N) Is Respondent due any credit?

Section 8(j) of the Act states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act." The credit "does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act." Id. An employer has the burden to establish its entitlement to a §8(j) credit. Elgin Board

of Education School District U-46 v. Illinois Workers' Compensation Commission, 409 Ill.App.3rd 943 (1st Dist. 2011). The right to a credit is narowly construed. Id. Respondent's Human Resource/Personnel Director, Gina DeGleffetti testified that she believed any medical payments made on behalf of Petitioner would have been made irrespective of an accidental injury under the Illinois Workers' Compensation Act. Therefore, the Arbitrator has no choice but to find that an §8(j) credit is inappropriate.

Additionally, pursuant to Section 8(j) of the Act, Petitioner is held harmless for any payments made by Petitioner's group health provider, when in the injured workers' employer contributes to paying the premium.

(O) Evidentiary issues

Respondent has made several objections to the admission of medical literature submitted by Petitioner including PX16, Heart Disease in the Fire Service, PX17, Preventing Fire Fighter Fatalities Due to Heart Attacks and other Sudden Cardiovascular Events, and PX18, Cardiovascular Risks in Firefighters.

Testimony concerning medical literature is proper where the literature is "reasonably relied upon by experts in the particular field." Becht v. Palac, 317 Ill.App.3d 1026, 1033-34 (1st Dist. 2000). An expert may be cross-examined with medical literature under any of the following circumstances: 1) the court takes judicial notice of the author's competence; 2) the witness concedes the author's competence, or 3) the cross-examiner proves the author's competence. Stapleton ex rel. Clark v. Moore, 403 Ill.App.3d 147, 159-60 (1st Dist. 2010) citing Bowman v. University of Chicago Hosp., 366 Ill.App.3d

577, 587 (1st Dist. 2006). No magical words need to be used in order to establish that an author is competent, or that a text is "authoritative," instead, testimony that the text is "standard," "well-respected" "a very good book" "a standard book, or "a good source" are sufficient. Fragogiannis v. Sisters of St. Francis Health Serv., Inc., 2015 IL App (1st) 141788, ¶28; see also Stapleton, 403 Ill.App.3d at 158 ("reliable authority").

An expert may be cross-examined with articles and treatises he does not recognize, provided some other expert has testified that the publications are authoritative. Iaccino v. Anderson, 406 Ill.App.3d 397, 408 (1st Dist. 2010).

In Darling v. Charleston Community Mem'l Hosp., 33 Ill.2d 326, 335-36 (1965), our Supreme Court recognized the importance of cross-examining experts with the use of medical literature:

> An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.

In this case, Dr. Fintel, Dr. McDonough, and Dr. Samo all testified that PX17, Preventing Fire Fighter Fatalities Due to Heart Attacks and other Sudden Cardiovascular Events, was the type of article reasonably relied upon by physicians such as themselves, providing sufficient foundation for the admission of that publication. As an addition basis for admission, the NIOSH document is a publication by the United States Department of Health and Human Services. Records and reports in any form of public offices or

agencies are admissible as an exception to the hearsay rule. Illinois Rules of Evidence 803(8). Official publications issued by a public authority are likewise self-authenticating. Illinois Rules of Evidence 902(5).

Similarly, PX16, Heart Disease in the Fire Service, was identified as a publication reasonably relied upon by physicians such as himself by Dr. Samo.

Finally, PX18, Cardiovascular Risks in Firefighters, was authored by Dr. Samo, and as a result, was properly admitted into evidence for the purposes of impeachment of Dr. Samo's opinions.

During the evidence deposition of Respondent's Medical Director, Dr. Moisan, Respondent objected to leading questions posed to Dr. Moisan by Petitioner's attorney. However, Illinois Rule of Evidence 611(c) explicitly provides that when a party calls as a witness an adverse party or an agent of an adverse party, "interrogation may be [made] by leading questions." See also: Skubak v. Lutheran General Health Care Sys., 339 Ill.App.3d 30, 38 (1st Dist. 2003) (a party or its agent may be called an examined by an opposing party as if under cross-examination). In this case, leading questions proposed to Dr. Moisan by Petitioner were proper given Dr. Moisan's status as an agent of an adverse party.

Finally, at the time of the close of proofs, Respondent objected to the admission of PX14, the report of Dr. Mark Lampert, a cardiologist hired by the North Palos Fire Protection District Pension Board. This was identified as a document reasonably relied

upon by physicians such as himself by Dr. Samo. (RX2, P. 57). Furthermore, when Petitioner moved the admission of Dr. Lampert's report during Dr. Fintel's evidence deposition, Respondent failed to make a timely objection. (RX1, P. 69-70). The failure to specifically and timely object waives the issue. Niego v. Walsh Construction Co., 12 IWCC 0238. As a result of Respondent's failure to make a timely object, Respondent has waived any objection to the admission of Dr. Lampert's report.

STATE OF ILLINOIS

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)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Karen Adams,
Petitioner,

vs. NO: 11 WC 36990

19IWCC0373

Illinois Secretary of State,
Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the decision of the Arbitrator filed on August 25, 2017. Notice has been given to all parties. The Commission, after considering issues including accident, causal connection, medical expenses, and nature and extent of permanent partial disability, and being advised of the facts and law, hereby reverses the Arbitrator's decision as described below

Petitioner, 56, alleged she sustained an injury to her left ankle and foot on August 8, 2011 after slipping on a wet tile floor at Respondent's facility in Schaumburg. After a hearing, the Arbitrator found that Petitioner failed to prove an accident that arose out of and in the course of her employment. Particularly, the Arbitrator found there was insufficient evidence of the floor being wet or of any other defect to the floor. All benefits were denied.

19IWCC0373

Upon review, the Commission takes a different view of the evidence and determines that Petitioner slipped on a liquid substance. Accordingly, the Commission finds that her injury arose out of and in the course of her employment. The Commission awards Petitioner temporary total disability compensation, medical expenses, and compensation for permanent partial disability reflecting 20% loss of use of the left foot under Section 8(e).

I. BACKGROUND

A. Injury, Treatment, and Present Condition

At the time of the August 8, 2011 injury, Petitioner was employed with the Secretary of State as a Public Service Representative. Her duties included assisting customers who were obtaining drivers' licenses or State IDs. She stated that she was required to walk throughout the facility -- "75 percent of the job is standing and/or walking." (Tr. 11). On August 8, 2011, she was working at Respondent's Schaumburg facility. Petitioner testified regarding her accident in the following manner:

> "I was escorting a customer from my work station to the supervisor's station… and in route, there was some type of liquid on the floor that I slipped onto the tiled floor… My shoe flew across the room, and I was down with my ankle and legs pretty much tucked underneath me."

(Tr. 11-12). Upon returning to her work station, she "already could tell something was not right." She was limping and in pain, and within the next half-hour, she observed swelling in her left ankle and foot. She orally notified the facility's supervisor of the incident and left work early. At home, she self-treated by elevating her foot and applying ice.

On August 10, 2011, Petitioner presented at Northwest Community Hospital, complaining of pain and swelling in her left foot. (PX 1). She was diagnosed with a strain and placed in a walking boot. Petitioner's pain and swelling persisted.

On September 6, 2011, Petitioner presented at Adult & Pediatric Orthopedics, where the record of Dr. Alan Gegenheimer indicated that she reported she "was walking away from the supervisor station and accidently slipped on the tile floor and rolled her left foot outward." An MRI disclosed multiple bone bruises suggestive of a stress fracture and also inflammation of the tibial and Achilles tendons. Petitioner began using a cane.

Over the next several months and into the spring of 2012, Petitioner continued treating at Adult & Pediatric Orthopedics, and continued to report an essentially unchanged condition. On January 9, 2012, she underwent another MRI, which disclosed findings of tendon tear. On January 16, 2012, Dr. Gegenheimer concurred with the radiologist's report, writing:

> This study was compared to a similar study performed on September 6, 2011. The bone bruises are seen on the previous study have resolved. There is a longitudinal tear within the posterior tibial tendon as well as significant synovitis around the posterior tibial tendon about 4-5 cm proximal to the medial malleolus and extending down towards its insertion ….

19IWCC0373

(PX 2).

On April 30, 2012, arthroscopic surgery was recommended because, as Petitioner was advised, her tendon had been "over-pronated and … stretched to the limit." (Tr. 29). On May 9, 2012, she underwent the surgery, after which she was put in a cast and crutches. The cast was removed about a month later. On June 25, 2012, she was prescribed orthotics. Petitioner also underwent physical therapy because she had developed "flat foot" due to loss of strength in her ankle and foot. The physical therapy was to help in recovering strength and stability in her foot. Effective July 21, 2012, she was released to regular duty. Thereafter, she had a handful of follow-up appointments on the following dates: December 17, 2012; January 28, 2013; July 9, 2013; and August 4. 2014. She has not seen any other doctors for her ankle since August 4, 2014.

Up until her surgery, Petitioner continued to work for Respondent despite her ongoing ankle and foot symptoms. She testified that she had difficulty doing her job, but she felt she "didn't have an alternative." (Tr. 20). Regarding the period of claimed temporary total disability, she was off-work from May 9, 2012 (date of surgery) through July 21, 2012 (date of release to regular duty). As for her current condition, at hearing she testified that her ability to walk is not the same now because of her left "flat foot" and weakness. She claims a permanent deformity and increased size to her left ankle, which is now "puffy," and continues to use orthotics. Petitioner, at the time of hearing, was employed by Respondent as an informal hearing officer. (T9-10).

B. Description in Injury/Accident Reports

Upon cross-examination, Respondent submitted two documents into the evidentiary record. The first is a "CMS Workers' Compensation Employee's Notice of Injury" completed on August 10, 2011, where Petitioner indicated that her injury occurred when she "Slipped on tiled floor after escorting customer to supervisor station." (RX 1). The second is a "Secretary of State DSD [Driver Services Department] Facility Accident Report Form" dated August 15, 2011. (RX 2). In describing the accident, she wrote on that form that she "slipped on tile floor." (RX 2). Petitioner acknowledged that she made no mention of any water or liquid substance on the floor in these two incident reports.

II. DISCUSSION

Whether a claimant's injuries are a result of a work-related accident is a factual determination within the province of the Commission. *Cano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 631 N.E.2d 724 (1994). This determination can be based upon direct or circumstantial evidence and the reasonable inferences which can be drawn from such evidence. *General Motors, 179 Ill. App. 3d 683, 693, 534 N.E.2d 992, 999.* A claimant's testimony standing alone may be sufficient to support an award of benefits under the Act. *Seiber v. Industrial Comm'n*, 82 Ill.2d 87, 411 N.E.2d 249 (1980).

In denying Petitioner's claim, the Arbitrator wrote that he was "persuaded by the facts revealed in cross-examination showing Petitioner did not say a single word in her accident forms about slipping on water or liquid," and that "nowhere in all of Petitioner's medical records is it noted that Petitioner said she slipped on water or liquid." (Arb. decision at 4).

19IWCC0373

The Commission takes a different view of the evidence. Petitioner testified at the hearing that she slipped on a wet tile. In both incident reports completed shortly after the incident, she wrote that she "slipped on tile[d] floor." As well, the September 6, 2011 record of Dr. Gegenheimer noted Petitioner's report that she "slipped on the tile floor." It is true that no explicit mention of a liquid substance was contained in these incident reports. However, the Commission finds that the presence of a slick substance on the floor is implied by Petitioner's use of the word "slip." "Slip" is consistent with the existence of liquid on the floor. Petitioner did not write that she tripped or stumbled or lost her balance. Further, the lack of detail of the type of liquid substance on which she slipped in those reports or the medical records is not inconsistent, and certainly does not contradict, her testimony.

Under the evidence presented, the Commission finds that Petitioner has met her burden of proof to show an accidental injury that arose out of and in the course of employment. The Commission further finds that her accident injury has caused 20% loss of use of her left foot under Section 8(e).

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed August 25, 2017, is hereby reversed as discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner total temporary disability benefits of **$ $444.33 per week for 10 and 3/7 weeks**, commencing May 9, 2012 through July 21, 2012, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent partial disability benefits of **$399.90 per week for 33.4 weeks,** because the accidental injury sustained caused **20% loss of use of the left foot**, as provided in Section 8(e) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses of $16,046.06 subject to the limits of Sections 8(a) and 8.2 of the Act.

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

19IWCC0373

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: JUL 22 2019

Marc Parker

Barbara N. Flores

o-05/23/19
mp/ac
68

DISSENTING OPINION

I respectfully dissent from the Decision of the majority. The Commission reversed the Decision of the Arbitrator, found a compensable accident, and awarded benefits. I would have affirmed and adopted the Decision of the Arbitrator through which benefits were denied.

Petitioner fell while at work on August 8, 2011 injuring her left foot/ankle. She testified that she slipped on liquid. However, there is absolutely nothing in the record to support that assertion. There is no mention of any liquid on the floor in either of the accident reports Petitioner executed or in any of the medical records Petitioner's submitted into evidence.

The Arbitrator found that Petitioner did not sustain her burden of proving she sustained a compensable accident because she did not establish there was any defect in the floor. He stressed that there was absolutely "zero" mention of any liquid in the record other than Petitioner's testimony. The Commission reversed the Decision of the Arbitrator based on the accident reports indicating that Petitioner alleged she "slipped" on the tile floor. The critical issue here is Petitioner's credibility. While the Commission acts as original finder of fact, as does the Arbitrator, in my opinion in most instances the Arbitrator is in a better position to assess the credibility of live witnesses. I see no reason for the Commission to overrule the Arbitrator's assessment of credibility in this case. Petitioner has not met her burden of proving that her fall was anything other than an idiopathic accident and not related to her work activities. Therefore, her accident was not compensable under the Act.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator finding Petitioner did not sustain her burden of proving a compensable accident and denied benefits. Therefore, I respectfully dissent.

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patrick O'Kane,

Petitioner,

vs. No. 12 WC 08827

City of Chicago,

19IWCC0374

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the appellate court. The appellate court reversed the part of the Commission's decision denying wage differential benefits and remanded the matter to the Commission "with instruction to calculate a wage differential benefit based upon the evidence of record." *O'Kane v. Workers' Compensation Comm'n*, 2018 IL App (1st) 171654WC-U, ¶ 34. The appellate court found Petitioner's pre-accident earning capacity was an average weekly wage of $1,408.00. *O'Kane*, 2018 IL App (1st) 171654WC-U, ¶ 30. Regarding Petitioner's current earning capacity, the appellate court stated: "The MedVoc reports establish by a preponderance of the evidence that the claimant had a current earning capacity of $8.25 per hour; $10.58 to $11.12 per hour; or as much as $14.25 per hour. *** Given that the record established that any wage point between $8.25 and $14.25 per hour could be the claimant's potential earnings in suitable post-accident employment, we find that the proper disposition in this matter is to *** remand the matter to the Commission to make a determination based upon the existing record as to what the claimant could earn in suitable employment. The Commission should set the wage differential award on that basis." *O'Kane*, 2018 IL App (1st) 171654WC-U, ¶ 32. For the reasons that follow, the Commission finds Petitioner's current earning capacity is $11.12 per hour, corresponding to a wage differential award of $642.13 per week.

In August of 2012, after Dr. Heller imposed permanent restrictions, Respondent initiated vocational rehabilitation. As noted by the appellate court, Petitioner failed to follow up on

19IWCC0374

multiple job referrals, failed to submit applications or resumes when requested by prospective employers, and provided incorrect or invalid contact information to prospective employers. "On November 4, 2013, MedVoc identified 15 prospective employers willing to hire [Petitioner] given his education, work history, and work restrictions. The positions varied in wage, and the mean wage was $11.12 per hour. [Petitioner] testified that he did not apply to any of the jobs identified in this labor market survey." *O'Kane*, 2018 IL App (1st) 171654WC-U, ¶ 18. In March of 2014, Petitioner found a job as a food delivery person at an hourly wage of $8.25. In April of 2014, Petitioner increased his hours to full-time. On September 12, 2014, MedVoc performed another labor market survey. Again, Petitioner did not apply for any of the jobs identified in the labor market survey. The Commission finds Petitioner's current earning capacity is $11.12 per hour, based on the labor market survey performed November 4, 2013, and confirmed by a subsequent labor market survey of September 12, 2014.

Accordingly, the Commission computes the weekly wage differential benefit as follows: 66 2/3% x ($1,408.00 - $11.12 x 40) = $642.13.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $642.13 per week commencing November 4, 2013 for the duration of his disability as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing his usual and customary line of employment.

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.

JUL 22 2019

DATED:
d-06/04/2019
SM/sk
44

Stephen Mathis

L. Elizabeth Coppoletti

DISSENT

I disagree with the majority's Decision to use the mean wage of $11.12 as part of the wage differential computation. Our Appellate Court in *Crittenden v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 160002WC, had instructed that specific evidence was required in any calculation involving a wage differential award:

> In making the calculation of a wage differential under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)), the Commission must determine 'the average amount which [the claimant] is able to earn in some suitable employment or business after the accident.' In calculating this average amount, if the claimant is working at the time of the calculation, the claimant must prove his actual earnings for a substantial period after he returns to work, and the Commission may apply his then current average weekly wage to the calculation. See *Gallianetti*, 315 Ill. App. 3d at 730; see also, *Levato v. Workers' Comp. Comm'n*, 2014 IL App (1st) 130297WC ¶ 29-¶ 30. However, as in the case at bar, if the claimant is not working at the time of the calculation, the Commission must rely on functional and vocational expert evidence. See *Gallianetti*, 315 Ill. App. 3d at 730 (labor market survey); *Levato*, 2014 IL App (1st) 130297WC at ¶ 12-¶ 13 (vocational rehabilitation specialist and labor market survey); *United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (1st) 121136WC ¶ 4-¶ 7 (vocational rehabilitation specialists).

Crittenden further specifies:

> In addition, where the claimant is not working at the time of the hearing, it is important to note that section 8(d)(1) requires that an average wage be derived from suitable employment for the claimant. Suitable employment is employment in which the claimant is both able and qualified to perform . . . For all of these reasons, we hold that in order to calculate a wage differential award, the Commission must identify, based on the evidence in the record, an occupation that the claimant is able and qualified to perform, and apply the average wage for that occupation to the wage differential calculation. As a corollary to this holding, the claimant is required to introduce evidence sufficient for the Commission to identify an occupation that the claimant is able and qualified to perform, and the average wage for that occupation. 2017 IL App (1st) 160002WC ¶ 24.

Under *Crittenden*, Petitioner is required to introduce evidence sufficient for the Commission to identify an occupation that the claimant is able and qualified to perform, and the

average wage for that occupation. Here, Petitioner testified at arbitration that he had been working approximately eight months as a food delivery personnel for a restaurant. By his unrebutted testimony as to his current job duties, Petitioner identified an occupation that he was capable and qualified to perform, and had been doing so for approximately eight months. Petitioner also testified that he earned $8.25 per hour (x 40 hours per week), or $330.00 per week. *Crittenden* clearly instructs that "if the claimant is working at the time of the calculation, the claimant must prove his actual earnings for a substantial period after he returns to work, and the Commission may apply his then current average weekly wage to the calculation." 2017 IL App (1st) 160002WC ¶ 23. This is precisely what Petitioner here has accomplished.

The majority's Decision to use the mean wage of $11.12 as part of the wage differential calculation is based on speculative evidence. The Commission's Decision must be supported by the record and not based on mere speculation or conjecture. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 215 (2003). According to Respondent's MedVoc Rehabilitation report, dated September 12, 2014, MedVoc determined that Petitioner could work as an unarmed security person or a coach cleaner, or in light cleaning and construction sales. MedVoc stated that Petitioner could "anticipate earning a mean entry-level wage of $11.12 per hour." In terms of the listed positions in MedVoc's September 12, 2014 report, those that were actually hiring, offered wages ranging from $8.25 to $12.25 per hour. In fact, each prospective job position listed a wage range and not a specific rate. The mean wage of $11.12 is simply not proof of Petitioner's actual earnings. The evidence demonstrates that Petitioner was actually earning $8.25 per hour.

More importantly, not only did Petitioner establish what he was able to earn post-accident, but he demonstrated that his wages came from suitable employment, or employment that Petitioner was able and qualified to perform. Petitioner was able and qualified to work as a food delivery person. What the record failed to show was that Petitioner was able and qualified to work as an unarmed security person, a coach cleaner, or in light cleaning and construction sales. There is no evidence that Petitioner could perform the duties associated with these positions. The record indicated that Petitioner had completed a 20-hour unarmed security training program while enrolled in MedVoc Rehabilitation's job placement program, but there is no evidence that Petitioner was able and qualified to perform this job. Notwithstanding MedVoc's list of prospective employers, MedVoc was unable to secure actual employment for Petitioner.

The majority further emphasizes Petitioner's lack of compliance with the vocational rehabilitation process. However, as noted by the Appellate Court in *Crittenden*, notwithstanding any alleged lack of compliance, the Commission must identify an occupation that Petitioner is able and qualified to perform and the average wage for that occupation based on the record. 2017 IL App (1st) 160002WC ¶ 25. Accordingly, I dissent from the majority's Decision to use the mean wage of $11.12 as I believe Petitioner proved and the record demonstrated that he was able to earn $8.25 per hour from suitable employment as a food delivery person.

D. Douglas McCarthy

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

☒ 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

Maria McCarty,
Petitioner,

19IWCC0375

vs.

NO: 16 WC 3507

Illinois State University,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 31, 2018, is hereby affirmed and adopted.

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

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

JUL 23 2019

DATED:
o7/11/19
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Stephen J. Mathis

Stephen J. Mathis

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0375

McCARTY, MARIA
Employee/Petitioner

Case# **16WC003507**

ILLINOIS STATE UNIVERSITY
Employer/Respondent

On 10/31/2018, 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 2.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0988 ASSISTANT ATTORNEY GENERAL
JORDAN A HOMER
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

OCT 31 2018

Brandon A. Rapacki, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0375

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Maria McCarty
Employee/Petitioner

v.

Illinois State University
Employer/Respondent

Case # **16** WC **3507**

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 **Christine Ory**, Arbitrator of the Commission, in the city of **Bloomington** on **November 27, 2017** and reassigned for issuance of a decision to the Honorable **Barbara N. Flores**, Arbitrator of the Commission. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 25, 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 as explained *infra*.

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

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

In the year preceding the injury, Petitioner earned $37,264.76; the average weekly wage was $716.63.

On the date of accident, Petitioner was 41 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 as explained *infra*.

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

As agreed by the parties, Respondent is entitled to a credit for medical bills paid through its group medical plan under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to the right foot (ankle) on November 25, 2015 as well as a causal connection between her condition of ill-being and accident at work as claimed.

Medical Benefits

Respondent shall pay the following reasonable and necessary medical services as reflected in Petitioner's Exhibits for medical bills that remain unpaid reduced pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act:

- OSF Occupational Health ($537.47 for treatment rendered on 11-25-15, 11-30-15, and 12-7-15)
- Bloomington Radiology ($38 for treatment rendered through OSF on 11-25-15)
- Cortese Foot and Ankle Clinic ($1200 for treatment rendered on 12-14-15, 12-23-15, 12-30-15, 1-7-16, and 1-14-16)

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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $477.75/week for 7 & 1/7th weeks, commencing November 26, 2015 through January 14, 2016 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 25, 2015 through November 29, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, based on the factors delineated in Section 8.1b of the Act, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $429.98/week for 8.35 weeks, because the injuries sustained caused the 5% loss of the right foot (ankle), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

October 31, 2018
Date

OCT 31 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Maria McCarty
Employee/Petitioner

v.

Case # **16** WC **3507**

Consolidated cases: **N/A**

Illinois State University
Employer/Respondent

FINDINGS OF FACT

The issues in dispute at this hearing include whether Petitioner sustained a compensable accident, whether there is a causal connection between such accident and Petitioner's condition of ill-being, Respondent's liability for medical bills, Petitioner's entitlement to a period of temporary total disability benefits from November 26, 2015 through January 14, 2016, the nature and extent of Petitioner's injury, and whether Respondent is liable for penalties pursuant to Sections 16, 19(k), and 19(l) of the Act. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Maria McCarty (Petitioner) testified that she was employed by Illinois State University (Respondent) on November 25, 2015 at Watterson Towers as a Building Service Worker performing janitorial and cleaning duties. She had been so employed at Watterson Towers for approximately six years and with Respondent for approximately 12 years in total as of January 24, 2006.

Prior to November 25, 2015, Petitioner underwent medical treatment with Dr. Cortese for a left foot injury and for plantar fasciitis with neuritis in her right heel. On June 17, 2014, Dr. Cortese performed surgery on Petitioner consisting of a decompression of the first branch of the lateral plantar nerve, right foot; partial plantar fascial release, medial aspect of right heel; removal of plantar calcaneus spur right heel, and injection for post-operative pain control. RX6. Dr. Cortese had a post-operative diagnosis of entrapment of the first branch of the lateral plantar nerve, right heel and plantar fasciitis. *Id.* Post-operatively, Dr. Cortese prescribed orthotics. On August 31, 2015, Dr. Cortese stated that Petitioner had some mild residual plantar fasciitis of the right heel with scar tissue build up, improved. *Id.*

Accident

On November 25, 2015, the Wednesday before Thanksgiving, Petitioner explained that the building was short-staffed with a lot of planned and unplanned employee absences. As a result, Petitioner had to cover an extra area including a stairway.

Petitioner testified that there are 28 floors at Watterson Towers, which is the tallest dorm in the United States. She explained that there are five houses and the elevator stopped on the third floor of each house, and a person needs to use the stairs to get to the other two floors of the house. Petitioner testified that the stair surfaces are

[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.

concrete covered in a metal slate instead of wood. There are approximately 13 steps in each flight of stairs. Petitioner testified that her cleaning supplies are located in the basement and delivered to every third floor.

On November 25, 2015, Petitioner explained how and when she went from floor to floor to perform her work. Petitioner testified that she started working in the Marshall House on the third floor then went down to the second and first floors before proceeding to the Pickering House. In order to do her job, she explained that she had to go down one, two and three flights of stairs to cover those three floors. She explained that she would go down one flight of stairs and perform her work on that first floor. Then, Petitioner would climb one flight of stairs and then take the elevator to go down to a break. After her break, she would take the elevator back up and go down two flights of stairs to go to the next floor and perform her work. Then, Petitioner would again climb up two sets of stairs, go down to lunch and then one final time go back up in the elevator and go down three sets of stairs and finish her last floor.

Petitioner explained that throughout the day she went up and down the stairs to perform her work on her regular floors and the "extras" that she had to do for the other area. She also went down and then back up the stairs to replenish cleaning supplies when she would run out. On November 25, 2015, Petitioner testified that she traversed the stairs more often than on a normal shift and was rushing to try to get all of the work on that day done.

Petitioner completed an accident form. RX2. She explained that she had an additional two flights of stairs within the first hour and a half on November 25, 2015. That morning, Petitioner testified that she took the elevator up to her closet on the third floor of Marshall and had some items in her hand. She went down to the first floor and was cleaning the restrooms, then to the second floor to clean the restrooms. Petitioner explained that she was moving faster than normal. While going from Marshall 1 down to Pickering 5, Petitioner testified that she slipped on the stairs and managed to grab the railing, but her right foot twisted when she landed. She let go of the items that she had in her hand (i.e., some rolls of garbage bags, a sponge or a cloth). Petitioner testified that she was "stressing" over the extra area that she had and was "kind of rushing through everything." She further testified that she has no idea why her foot slipped.

Petitioner testified that she was in a little bit of pain when her foot slipped. She explained that she felt a little twist and kind of an ache at first, but once she got up and continued to work she did not think anything of it and after some time her pain kept increasing. Petitioner testified that her foot was a little swollen and her pain increased much more than she expected such that she got help going back up the stairs from when it happened and going down to report it to her foreman.

Petitioner testified that she reported the incident to her foreman, Jeff Schaefer (Mr. Schaefer), and told him that this was the last time that she was going to be rushing to try to get things done because, every time she rushed through things, she hurt herself. Petitioner testified that she also told Mr. Schaefer that she, more than likely, needed to go to the doctor so she would not be working the rest of the day.

On cross-examination, Petitioner testified that when she reported the injury to Mr. Schaefer she told him that she was walking the stairs going from floor to floor when she "slipped, tripped over down the stairs[.]" Petitioner testified that she specifically told him that she was able to grab herself on the railing. She also told him that she tried pulling or holding herself so that she would not fall any further down the stairs because she was about halfway up at the time of the fall. Petitioner further testified that she told him that she missed a step.

Respondent offered several documents into evidence reflecting Petitioner and Mr. Schaefer's report of the accident. RX1-RX3.

Petitioner completed a Workers' Compensation Employee's Notice of Injury Report (incident report) at approximately 10:00 a.m. regarding her injury at 9:30 a.m. RX1. She reported that she "[t]ripped while walking up stairwell." *Id.*

Mr. Schaefer also completed a Supervisor's Report of Injury or Illness. RX2. He noted Petitioner's report that she was "[g]oing from Marshall 1 down to Pickering 5 to work on those floors." *Id.* The following accident description was noted:

> Maria said she was coming down the stairs from Marshall one to Pickering 5, missed one of the stairs and twisted her ankle. She did it at 9:30 and told me at 10. At that time she said it didn't hurt and just laighed it off as being a "clutz". At 11am she came down and said it started to hurt while she was vacuuming and needed to go to promptcare [sic]. We did the initial report, I gave her the other papers she needs, called Doug Saxton and sent her to occupational medicine.

Id.

Medical Treatment

The medical records reflect that Petitioner presented to Dr. Chow at OSF complaining of right foot pain, a throbbing sensation without numbness, tingling, or ankle pain. PX1. Dr. Chow recorded a consistent history of accident noting Petitioner's report that she did not fall and that she caught herself on the banister with her right hand and left hand on the stairway. *Id.* Petitioner reported that the right foot slowly became more painful since twisting it and she could no longer bear weight. *Id.* On physical examination, the right foot was tender along the fifth metatarsophalangeal joint (the pinky toe) and less tender along the dorsum of the right foot. *Id.* Dr. Chow ordered an x-ray of the right foot, also completed that day, which revealed mild osteoarthritis of the metatarsophalangeal joint of the great doe and no evidence of fracture or dislocation. *Id.* Petitioner was diagnosed with a right foot sprain, given crutches for support, and placed on restrictions of sedentary work only. *Id.* Respondent did not have work within these restrictions.

On November 30, 2015, Petitioner returned to Dr. Chow. PX1. Petitioner reported that her foot was much better, and there was some throbbing, but she was able to bear weight. *Id.* Dr. Chow noted that Petitioner's pain was 4 out of 10, that she was using an Ace wrap and taking Ibuprofen, and that there was minimal swelling of the right lateral foot. *Id.* Dr. Chow placed Petitioner on restrictions of no climbing stairs with limited ambulation. *Id.*

On December 7, 2015, Dr. Chow's records reflect that Petitioner continued to limp and had difficulty walking. PX1. Petitioner reported throbbing in the outer aspect of the right foot at least twice a day and wearing a supportive tennis shoe. *Id.* Upon physical examination, Petitioner had positive tenderness and mild swelling in the lateral aspect of the right foot. *Id.* Dr. Chow diagnosed a right foot sprain and prescribed restricted work of no climbing and limited ambulation. *Id.* Petitioner testified that Respondent did not have work within the restrictions and it denied her workers' compensation claim.

On December 14, 2015, Petitioner began treatment with Dr. Cortese, a podiatrist who had previously treated her for bilateral foot pain. PX2. Dr. Cortese noted a consistent history of accident and Petitioner's report of continued pain on the outside of her foot at the dorsal lateral midfoot region right foot. *Id.* Dr. Cortese noted

that Petitioner's pain was aggravated by walking and relieved with rest. *Id.* Upon physical examination, Dr. Cortese noted mild edema over the dorsal lateral mid foot region, right foot, over the extensor digitorum brevis muscle belly region, and pain to palpitation in the base of the fifth metatarsal, right foot. *Id.* Dr. Cortese took additional x-rays and compared them to the OSF x-ray reports of November 25, 2015. *Id.* Dr. Cortese's diagnosis was subacute sprain/strain, dorsal lateral midfoot, rear foot, right foot; mild localized edema, right foot, and pain in the foot. *Id.* Dr. Cortese fitted Petitioner with an unna boot and kept her off work. *Id.*

On December 30, 2015 and January 7, 2016, Dr. Cortese noted Petitioner's reports of ongoing pain and swelling in the right foot and continued her off work restrictions. PX2. As of January 14, 2016, Dr. Cortese noted that Petitioner was 85 to 90% healed, however she had some ongoing pain. *Id.* Dr. Cortese prescribed a supportive ankle brace for her right foot and released her back to work without restrictions. *Id.*

On May 19, 2016, Petitioner returned to Dr. Cortese for bilateral foot pain. PX2. He prescribed new shoes and orthotics. *Id.* As of June 17, 2016, Dr. Cortese noted Petitioner's report that the lateral side of her right foot was starting to bother her with pain at a level of 1 to 2 out of 10 on the pain scale. *Id.* Dr. Cortese also noted Petitioner's scar tissue in the right heel from a previous injury. *Id.* He took Petitioner off work for left foot discomfort which he rated 4 to 6 out of 10. *Id.* On June 24, 2016 and July 15, 2016, Petitioner returned to Dr. Cortese for her pre-existing left foot condition. *Id.*

Additional Information

Regarding her current condition of ill-being, Petitioner testified that she still has a little bit of pain and throbbing, especially when she is driving. She explained that elevating her foot makes it feel better. Petitioner testified that walking for a long period of time makes her foot feel worse and it feels a little sore after a day of work.

Petitioner testified that she still wears the custom orthotics that the doctor had prescribed prior to this incident at work. However, she explained that her right heel pain was more in her heel and arch area whereas after the incident her pain is located more on the outside of her foot and ankle.

Petitioner has continued working for Respondent since her accident and testified that she has not received a wage increase since her accident.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

"An employee's injury is compensable under the Act only if it arises out of and in the course of the employment." *University of Illinois v. Industrial Comm.*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place

where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm.*, 129 Ill. 2d 52, 58 (1989)).

In this case, Respondent stipulates that the accident dispute relates to whether the incident on November 25, 2015 arose out of Petitioner's employment. *See* AX1. An injury must have its origin in some risk related to the employment so as to create a causal connection between the employment and the accidental injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). "Stated otherwise, 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.' [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 378 Ill. Dec 320, 325 (*citing Sisbro*, 207 Ill. 2d at 204 (*quoting Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d at 58)).

The accident dispute in this case relates to whether the accident on November 25, 2015 arose out of Petitioner's employment. *See* AX1. In consideration of the record as a whole, the Arbitrator finds that Petitioner's injury on November 25, 2015 arose out of her employment with Respondent as claimed. In so concluding, the Arbitrator finds that Respondent's assignment of additional work to Petitioner qualitatively and quantitatively placed her at greater risk than the general public in order to fulfill her duties.

Petitioner was the only witness to testify at the hearing. She gave uncontroverted testimony that she was assigned to work an additional area on November 25, 2015, the Wednesday before Thanksgiving, due to absences by her co-workers. The only way in which Petitioner could perform her janitorial duties within each "house" was to take the elevator to the third floor and then traverse metal-covered stairs to the other two floors. As a result of the limited staffing and increased workload to complete within her shift, Petitioner explained that she was rushing around to perform work in her and the additionally assigned areas in a timely manner, even limiting the extent of the work (i.e., not vacuuming if unnecessary) in order to complete her work.

While traversing the stairs and holding some cleaning materials, Petitioner explained that she slipped on the stairs and managed to grab the railing, but her right foot twisted when she landed. The medical records from OSF on the date of accident confirm Petitioner's testimony of a twisting mechanism of injury. Moreover, Dr. Chow confirmed on physical examination that Petitioner had clinical signs of trauma to the right foot corroborating her complaint of the injury. It is notable that Petitioner also testified that she has no idea why her foot slipped and later testified that she did not recall any defect in the stairs. However, the more contemporaneous incident report submitted by Petitioner on the date of accident and the initial medical record from OSF reflect Petitioner's report that she "slipped" or "tripped" on the stairs. While Mr. Schaefer's report indicates that Petitioner missed one of the steps, it also reflects that Petitioner twisted her ankle. Whether Petitioner slipped on some substance, tripped on a step, or missed a step resulting in a twisting injury to the right foot, and moreover, the only evidence adduced at the hearing relating to the circumstances of the work on November 25, 2015 came from Petitioner who testified that she was rushing to perform her normal duties as well as those of others. No contrary evidence was presented by Respondent.

Given the foregoing, the Arbitrator finds that Petitioner was subjected to an increased risk resulting from the additional workload caused by co-worker absences which thereby increased the frequency and speed with which she used the stairs, which were the only means for her to travel between most floors to perform her janitorial duties. Thus, in light of the totality of the record, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to the right foot on November 25, 2015 as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As noted in the accident analysis above, Petitioner has established that she sustained a compensable injury on November 25, 2015. Petitioner sought prompt medical attention on the date of accident. Dr. Chow noted his clinical confirmation on physical examination of Petitioner's subjectively reported symptoms. Petitioner also testified that her pre-existing right heel pain was different from her post-accident right foot complaints. Petitioner's podiatrist, Dr. Cortese, noted her ongoing complaints in the right foot to a different part of the foot than that for which she had previously received medical treatment for plantar fasciitis. No contrary Section 12 examination report or medical opinion was submitted into evidence. Based on the foregoing, the Arbitrator finds that Petitioner has established a causal connection between her condition of ill-being and injury at work on November 25, 2015.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after her accident at work. In consideration of the treatment records, medical bills, and in reliance on the credible testimony of Petitioner, the Arbitrator finds that the treatment rendered to Petitioner is reflective of reasonable and necessary medical treatment to address the effects of her accident at work. Therefore, the Arbitrator awards payment of the medical bills submitted in Petitioner's Exhibits after reduction pursuant to Sections 8(a) and 8.2 of the Act as follows:

- OSF Occupational Health ($537.47 for treatment rendered on 11-25-15, 11-30-15, and 12-7-15)
- Bloomington Radiology ($38 for treatment rendered through OSF on 11-25-15)
- Cortese Foot and Ankle Clinic ($1200 for treatment rendered on 12-14-15, 12-23-15, 12-30-15, 1-7-16, and 1-14-16)

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

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits and temporary partial disability benefits, the Arbitrator finds the following:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County*

v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

Petitioner testified that she was restricted from working full duty by her physicians during the claimed temporary total disability period. The medical records corroborate Petitioner's testimony that she was placed off work or on work restrictions that could not be accommodated by Respondent. Thus, the Arbitrator finds that Petitioner has established her entitlement to temporary total disability benefits from November 26, 2015 through January 14, 2016 as claimed.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was offered into evidence. Thus, the Arbitrator assigns no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed by Respondent as a Building Services Worker at the time of the accident. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident with decades of anticipated work ahead of her. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), the future earning capacity of the employee, the Arbitrator notes that there is no evidence of diminishment in Petitioner's future earnings capacity as a result of the accident. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained an sprain or strain to the right ankle requiring conservative medical treatment before a release back to full duty work. Dr. Cortese noted Petitioner's improvements as well as her continued reports of pain. Petitioner testified that she continues to experience some symptoms with increased walking and after work compared with her pre-accident condition. Thus, the Arbitrator assigns significant weight to this factor.

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 5% loss of use of the right foot (ankle) pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WAUKEGAN

☒ 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

Nicki Nast,

Petitioner,

vs. NO: 12 WC 38431

Eye Specialists of Chicago &
Highland Park,

Respondent.

19IWCC0376

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 temporary disability, permanent disability, medical expenses, penalties, credit and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2018, is hereby affirmed and adopted.

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

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

19IWCC0376

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: JUL 23 2019
o071719
BNF/mw
045

Barbara N. Flores

Deborah Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NAST, NICKI
Employee/Petitioner

Case# **12WC038431**

EYE SPECIALISTS OF CHICAGO & HIGHLAND PARK
Employer/Respondent

19IWCC0376

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

If the Commission reviews this award, interest of 2.07% 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:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
205 W RANDOLPH ST SUITE 1750
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT E HARRINGTON JR
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

NICKI NAST,
Employee/Petitioner

Case # **12 WC 38431**

v.

Consolidated cases:

EYE SPECIALISTS OF CHICAGO & HIGHLAND PARK,
Employer/Respondent

19IWCC0376

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 **April 23, 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 19IWCC0376

On **10/11/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being in her left hip only ***is*** causally related to the accident. SEE DECISION

In the year preceding the injury, Petitioner earned $**46,072.00**; the average weekly wage was $**886.00**.

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

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

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

Respondent shall be given a credit of $**86,240.58** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**86,240.58**.

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

ORDER

- Respondent shall pay Petitioner reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related left hip injury only pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

- Respondent shall pay Petitioner TTD/maintenance of $590.67 per week for 134-3/7 weeks commencing 7/31/13 through 2/23/16. Respondent is entitled to a credit for amounts paid and overpaid.

- Respondent to pay Petitioner $531.60 for period of 175 weeks representing 35% loss of use of person as a whole under 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.

Carolyn M. Doherty

Signature of Arbitrator

6/5/18
DATE

JUN 6 - 2018

FINDINGS OF FACT

This matter was previously tried under Section 19 B of the Act by a different Arbitrator on July 30, 2013. In a Decision issued on 9/24/13, and affirmed by the Commission on 6/13/14, the Arbitrator found causal connection for Petitioner's left hip condition and her left hip replacement surgery. In the instant matter, Petitioner is currently requesting findings in relation to her low back and continued left hip subsequent to July 30, 2013, as well as the nature and extent of her injuries. ARB EX 1. The Arbitrator notes that the Arbitrator in the 19B Decision specifically found causal connection for Petitioner's condition of ill-being in her left hip at the time of the hearing which included her continued complaints of left thigh pain which developed after her left hip replacement.

By way of background, the 54 year old Petitioner testified that on 10/11/12, she worked for Respondent Eye Specialists as a technician. Her physical job duties at that time included patient care and exams as well as office and computer work. In the first 19B hearing it was determined that Petitioner sustained a work related accident on 10/11/12 while she was cleaning the office refrigerator. While cleaning the fridge Petitioner stumbled while holding onto a chair to get up from a kneeling position and felt pain in her groin. Six months before this accident, in March 2012, Petitioner underwent a right hip replacement which was not at issue in the first trial and is not at issue in the current matter. In addition, Petitioner underwent a lumbar fusion in 2011 which was also not at issue in either hearing.

Prior to the 2013 19B trial, Petitioner treated for her left hip and underwent a left hip replacement performed by Dr. Sherman in November 2012. Petitioner was still treating for her left thigh pain at the time of the last trial in July 2013 and testified that she had further medical appointments scheduled for after the trial.

At the current trial, Petitioner testified that subsequent to the July 30, 2013 trial, she continued to treat with her primary care physician, Dr. Lang for complaints of radiating back pain and left thigh pain. She testified that she did not recall when the back pain began. She testified that Dr. Lang administered epidural injections to her low back in August 2013. After the second injection Petitioner testified that she developed a drop foot on her right foot which causes her to trip. She stated her foot has been in this condition since the second injection in August 2013.

Dr. Lang, testified via evidence deposition on 2/10/17. PX 8. Petitioner first saw Dr. Lang subsequent to the first hearing on August 1, 2013. She appeared on a follow up from an ER visit complaining of lower back and buttock pain. His records indicate that the pain developed as Petitioner was getting up from a seated position the night before. He noted that she reported pain in her lower right back and buttock but denied radicular pain into the leg. He ordered an MRI of the lumbar spine which was done on 8/2/13 and compared to the lumbar MRI done earlier on 1/16/13. The MRI indicated post operative changes at L5-S1 without recurrent herniation and spondylotic changes resulting in mild to moderate stenosis at the remaining intervertebral disc levels, not significantly changed from prior studies. PX 4. Dr. Lang then turned her care over to orthopedic, Dr. Sherman.

Petitioner saw Dr. Lang occasionally over the next few years through her last visit of 1/21/17. Petitioner continued to complain of right drop foot and burning in her legs along with sciatica on those visits from 2013 to 2017. She also saw him for general health care visits. PX 1, 3. In his narrative report dated August 18, 2016, Dr. Lang noted that Petitioner has been his patient for 15 years and that since her left hip surgery following her accident of 10/11/12, she "had a difficult post-operative course which has resulted in ongoing left leg and left hip pain. ... due to ongoing leg pain she was unable to return to work." PX 8, dep ex 2. He testified that his opinion has not changed and that he does not have an opinion as to whether her inability to work is permanent. PX 8, p. 14. On cross exam, Dr. Lang testified that the last visit on 1/21/17 was actually a sick visit and the

office notes do not reflect any complaints or treatment related to the low back or hip or any work restrictions. Dr. Lang referred to Petitioner's other treating physicians for her work status and restrictions. Dr. Lang referenced one visit in October 2014 where Petitioner mentioned that she walked "crooked" and that she was "tripping" but he did not observe this first hand. He further testified on cross that he is not able to say that Petitioner cannot return to any work in any capacity due to her current conditions. PX 8, p. 34. He testified that his prior narrative statement regarding her ability to work was "more observational" and that he was simply noting that Petitioner had not been back to work.

Dr Sherman previously replaced Petitioner's left hip. Following the hip replacement in November 2012, Dr. Sherman ordered left hip and lumbar MRI exams in January 2013 which indicated soft tissue fluid collection presenting with residual postoperative soft tissue mass or seroma and lumbar post operative changes consistent with her prior fusion. Petitioner returned to Dr. Sherman in May and June 2013 complaining of continued burning left hip pain. Dr. Sherman ordered an ESI due to his feeling that Petitioner's left thigh pain resulted from a lumbar problem at L4-5. Petitioner underwent the injection as noted above. Petitioner testified that Dr. Sherman then sent her to Dr. Erulkar, a spine specialist in his practice, and on 8/21/13, he noted that Petitioner recently had a lumbar injection and was now having weakness on the right side, pain in her right leg and was using a cane. PX 2. Dr. Erulkar ordered a CT myelogram and lumbar MRI and determined Petitioner was experiencing right foot drop and lumbar radiculopathy. Noting Petitioner's prior fusion surgery Dr. Erulkar believed Petitioner was now suffering from adjacent level disc disease at L4-5 above her fusion level at L5-S1. PX 9, 14, PX 2.

Dr. Sherman testified that an epidural injection can cause a foot drop. He testified this condition was "new" as of August 2013. PX 9, p. 14-17. On 9/10/13 Petitioner saw Dr. Erulkar to discuss the results of the CT myelogram he previously ordered and noted the results showed adjacent level disc disease and spondylolisthesis at L4-5, adjacent to her fusion site at L5-S1. PX 2. Dr. Erulkar discussed lumbar surgery with Petitioner but she rejected the surgery. PX 2. She testified at trial that does not want lumbar surgery and is not requesting lumbar surgery.

Petitioner continued to see Dr. Sherman complaining of left thigh burning pain which he originally attributed to her left hip replacement surgery as the pain was not present prior to the surgery. PX 9, p. 18-21. However, at his deposition, he testified that the left thigh pain was now most likely radicular and "it seemed more clear to me that the problem was coming from her back as opposed to her hip replacement." PX 9, p. 21. However, he clarified that he believed the lumbar problem which caused the radicular pain in her left thigh was related to her left hip replacement surgery as it likely occurred when she was rolled over on the surgical table. PX 9, p. 23. He testified that a bone scan and x-rays after the surgery indicated that her left thigh pain was not from her left hip implant. PX 9, p. 23. As of 9/8/14, Dr. Sherman noted that Petitioner reported she was "debilitated" from her conditions of constant pain in her left thigh, weakness in her right leg, an inability to stand for a long period of time, can't change positions from sit to stand" and that Petitioner "made it clear to me that she couldn't work because she couldn't sit, she couldn't stand." His exam revealed pain to palpation of the left thigh and right ankle weakness. Dr. Sherman determined that Petitioner had "permanent lumbar radiculopathy, status post hip replacements, probable meralgia paraesthetica, ... that's the other thing that can happen at the time of a hip replacement, the nerve that comes over the broom of the pelvis can be compressed from positioning, from just the mechanics of twisting and at that point I didn't know other than to treat the symptoms what possible ways to cure her issues were [sic]." PX 9, p. 25. He opined that because of these conditions Petitioner was unable to work. P. 25.

Dr. Sherman continued to see Petitioner through October 2015 for her left thigh complaints which she had complained of since the surgery and for her lumbar pain and right leg pain and chronic foot drop which

developed after the steroid injection. PX 1. Petitioner underwent the EMG of her lower extremities on 1/21/16. It was normal. PX 1. In February 2016, Petitioner returned to report increasingly severe low back pain radiating down both legs to the toes and that she was unable to sit for more than a few minutes at a time which interfered with her efforts to return to work. The history portion of the report further states the reason this has become an issue is because there has been efforts to get her back to work and the problem is she cannot sit because of the severity of the pain in her lower back and legs." The doctor diagnosed lumbar stenosis which was exacerbated by sitting. He concluded "I do not think she can work because she is unable to sit."He ordered Petitioner to see a lumbar spine surgeon for her stenosis. PX 4. He did not see Petitioner again until January 16, 2017 when she reported more pain in her lower back radiating to the back of her hips, increasing weakness in her legs and that she was falling due to her legs buckling. PX 5, PX 9. Petitioner walked with a limp, was tender to palpation across the lower back, her lumbar mobility was restricted and her flip test was positive bilaterally. X-rays of her implants looked good and spine x-rays confirmed the fusion at L5-S1 and the degeneration above the L5-S1 fusion. He recommended an EMG of the lower extremities to determine functionality and "to see if there is a spinal reason for her leg weakness." PX 5. The EMG performed on 1/25/17 was compared to the January 2016 EMG and showed no significant change aside from "right lower lumbar paraspinal nerve root irritability of undetermined chronicity." PX 2. Dr. Sherman testified that he does not know if Petitioner saw a neurosurgeon. He determined that Petitioner's condition worsened in the year between visits and he attributed her falls to her weakness in her legs from the stenosis in her back. He continued to opine that Petitioner was permanently disabled from work as a result of her "accident at work". PX 9, p. 35.

On cross exam, Dr. Sherman testified that the left hip replacement he performed in 2012 was successful. He again stated that her ongoing problems are related to her lumbar spine which were caused by torque on her spine during hip surgery, or as a consequence of an epidural injection, or a natural progression of the prior fusion surgery pre-accident. He agreed that "we're really speculating as to what actually caused a lumbar problem that she has got." Pp. 39. He again testified that her symptoms are from her lumbar stenosis and that there are no findings in the left hip or left leg to explain her symptoms. PX 9, p. 48. He further testified that she has two well functioning hips at present and that nothing in terms of her left hip itself prevents her from working. PX 9, p. 58. Lastly, he agreed that he does not know the conclusive cause of her stenosis, spondylosis or radiculopathy in her lumbar spine. He initially thought her left thigh complaints were related to the left hip replacement but now thinks "it may be from other reasons." P. 67.

On re-direct, Dr. Sherman again testified that the hip surgery performed in November 2012, exacerbated a pre-existing condition in her lumbar spine and the fact that the left thigh pain started after that surgery "factors into his opinion." He testified, "She wasn't having that kind of pain before. She was having that kind of pain after, and I have to think that there was a cause and effect somewhere there. Whether it was positioning, whether it was a change in the way she was walking, I don't know what exactly but the reason I think this is because of the temporal relationship." He further opined that the epidural injection caused the right leg pain and foot drop in the form of an aggravated pre-existing condition. P. 69.

Dr. Deutsch testified by evidence deposition on 1/18/17. He is a neurologist who performed Petitioner's fusion in 2011. He testified that Petitioner returned on a few occasions in October 2011 and then did not return to see him until March 6, 2013 when she complained of pain in her left thigh. Upon request, Dr. Deutsch opined in July 2016 that Petitioner's left thigh pain reported in 2013 was not from her back but from her intervening left hip replacement. In so opining, he noted that Petitioner had advised him that the left thigh pain started immediately after the left hip surgery. He further testified that the MRI from January 2013 did not indicate a cause of the left leg pain and Petitioner did not report a new spine injury or problem. P. 10. He stated that the lumbar MRI evidence of spondylolisthesis at L4-5 would not account for her left leg symptoms. Finally, he testified that Petitioner had no back pain but only left thigh pain. P. 11-15. He released Petitioner on March 6,

2013 with a recommendation for a possible spinal cord stimulator to treat the leg pain. p. 11. He agreed this recommendation was speculative. P. 17.

On cross, Dr. Deutsch testified that in 2013 he was not treating Petitioner for her left hip or left leg after her hip surgery. He did clarify that she had left leg complaints in 2011 prior to her fusion which he felt were related to her back problems for which she had the fusion surgery. After her fusion, in July 2011, Petitioner reported no left leg problems. P. 19. He released Petitioner to return to work. P. 15. When he saw her again in 2013 he did not think her problems were related to her lumbar spine but to her hip surgery.

Dr. Ghanayem is Respondent's Section 12 examiner who saw Petitioner on April 24, 2017. He testified via evidence deposition on October 18, 2017. RX 5. He was not asked to render an opinion on Petitioner's left hip. Rather, he rendered an opinion on Petitioner's lumbar spine. Based on his exam of Petitioner and review of her medical records and treatment, he opined that she did not have lumbar radiculopathy but only mild stenosis at L4-5 on review of the lumbar MRI from October 2015. He testified that her nerves were not pinched and he did not find any compression to explain radicular complaints. P. 14.

Petitioner did complain of residual left sided pain in her thigh with a resulting limp. He opined that her left thigh complaints (meralgia paresthetica) resulted from the left hip replacement as Petitioner stated she woke from the surgery with the complaints. P. 15. He further opined that Petitioner could work at lease sedentary level and that an FCE with validity testing might help. P. 20. He does not believe Petitioner is permanently disabled. P. 25.

A labor market survey was performed on 9/10/14 based on Petitioner's release to sedentary work level in 2013. RX 1. Petitioner's attorney provided notes from Drs. Sherman and Lang indicating that Petitioner was unable to return to any work as of August 2014 and was then permanently disabled. The VCM determined that Petitioner had transferable skills and the capacity for re training. However, the VCM was guarded regarding a successful outcome of voc services as Petitioner had not worked for 2 years, was receiving social security disability, was taking Norco daily for subjective pain complaints and was not released to work by her treating physicians. Nevertheless, the VCM determined that full and part time jobs were available in customer service, receptionist, optometric assistant, data entry clerk, scheduler, and appointment clerk.

June 29, 2015, Petitioner attended a Section 12 exam with Dr. Jacobs at Respondent's request. RX 2. He examined Petitioner with regard to her left hip and did not render any opinion regarding her low back complaints. He opined that she is status post left total hip arthroplasty for osteoarthritis with persistent lateral hip and thigh pain; possible meralgia parasthetica vs. lumbar radiculopathy. He opined that with regard to her left hip Petitioner was able to return to work full time with permanent restrictions of no standing or walking more than 1 hour per day and no lifting over 25 pounds. RX 2.

Petitioner began active vocational job search efforts with Tracy Peterlin on September 21, 2015 following the opinion of Dr. Jacobs that she could return to sedentary work. RX 1. These efforts continued through February 23, 2016 when the efforts were terminated due to determined non cooperation by Petitioner for failing to complete a six hour computer training class. Petitioner indicated that she could not tolerate the length of the classes which was 3 hours.

At trial, Petitioner testified that she was cooperative with the vocational efforts and that she looked for jobs each week never missing a meeting. Petitioner testified that she did her best to track down jobs and follow up. RX 1 indicates Petitioner was cooperative in the job search and followed up with a majority of the provided leads. She testified that Ms. Peterlin recommended computer training to gain computer skills and her first training was

scheduled for February 2016. Petitioner agreed the course was 6 hours over two days. Petitioner testified that she was in minimal pain when she started the day of training but after sitting for 1 hour her back pain worsened and began shooting down her left thigh. Petitioner testified that she did not take her Norco that day so she would not be "loopy" for the training. The training facility contacted her to come back but she said no because she could not sit for long. Petitioner agreed they offered to come to her house to train her and shorten the period but she still said no cause she could not sit at all -even in her own house. Thereafter, Ms. Peterlin testified that she authored a report in February 2016 that Petitioner was not cooperative and benefits were terminated.

At trial, Tracy Peterlin testified that in her opinion Petitioner did not cooperate with the job search efforts and was not compliant with vocational efforts. She testified that as vocational efforts began, Petitioner intended to move out of state but then did not move. Petitioner agreed to a one week vacation instead. She further thought that Petitioner's refusal of the computer course proffered accommodations was also unreasonable and showed non cooperation. She further opined that in her opinion had Petitioner completed the vocational efforts including computer training she would have been placed in a job.

On Sept 21 2017 Petitioner attended an FCE at ATI prescribed by her new primary care physician, Dr. Stavrakos per the recommendation of IME Dr. Ghanayam in April 2017. The validity determination was deemed invalid due to Petitioner's complaints of pain with all movement. Petitioner testified that she gave her best effort in sitting, standing, pushing, pulling, and carrying weights but she could not complete many of the activities due to radiating shooting and burning pain down her left leg.

Petitioner testified that she currently has burning in her left leg from hip to knee on her thigh and that she must use a cane to walk. She must concentrate to move her right foot to get the foot to move. She testified that her left hip is not painful but that the pain is from her low back going down her left leg. Petitioner takes Norco and Mobic. Petitioner testified that her daily activities including getting up and dressed but that she does nothing during the day. She alternately sits and stands and can sit for about 10 -15 minutes before she must stand up. She testified that she was able to sit through the length trial because she took pain medication before the trial. Petitioner testified that she is unable to do any of her own shopping because she can't walk through the store in pain. She is able to descend the basement stairs but does not go to the second floor of her home as it is upstairs. Petitioner testified that she does not go out for walks but she is able to drive with pain after 10-15 minutes of sitting. Sleeping requires pain medication. Petitioner testified that the cane was provided after her right hip replacement and not after the left hip replacement. She stated she uses the cane for balance when she leaves the house.

RX 7 is surveillance video taken of Petitioner on 2/3/18 and 3/6/18. RX 9 is additional video taken on 3/18/18. RX 7 depicts Petitioner depicts Petitioner walking into a building for a medical appointment with a cane. She is walking slowly with a slight wobble and holding the cane. Petitioner is seen sitting in the waiting and patient registration areas with no apparent difficulty or pain behaviors. At one point, she bends slightly to reach with her cane under a chair. Petitioner was present at that doctor's office for approximately 2 hours where she completed paperwork and sat in the waiting area. She arrived at that facility at 12:24 p.m. and left that facility at 2:29 p.m. On 3/6/18, Petitioner is seen getting in and out of her car, driving, and climbing a few steps up to doors at two different locations again with a slight wobble but without the use of her cane. Again, no pain behavior is noted. On 3/18/18, Petitioner is depicted walking to her garage with bags on both arms and no cane. She is also depicted throughout the entire day walking to and from her car with no cane, driving to many locations for over 15 minutes in driving duration, and walking in a brisk manner albeit with a slight wobble. Again, no pain behavior is noted by the Arbitrator.

Petitioner viewed the videos at trial and agreed that she drove more than 10 to 15 minutes in the videos but that she was in pain after doing so. She further agreed to the depiction of her using stairs as well as walking without a cane on multiple occasions. Petitioner testified that she did not use a cane outside of the house if she could hold onto something while walking. Petitioner testified that she was able to perform the depicted activities because she took her pain medication on the dates of video. Petitioner was not observed holding onto anything while walking without her cane in the videos.

CONCLUSIONS OF LAW

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

In support of the Arbitrator's decision relating to (F) causal connection, the Arbitrator states as follows:

The Arbitrator notes that causal connection for Petitioner's left hip, leg, and thigh complaints was established via the first Arbitration Decision, is the law of the case before this Arbitrator, and will not be disturbed in this Decision. The Arbitrator finds in this matter that Petitioner's current condition of ill-being as it relates to her left hip, leg, and thigh continues to be causally related to the October 11, 2012, work-related accident and the original left hip injury. In so finding, the Arbitrator notes the assessments of Drs. Jacobs and Deutsch regarding the left thigh and leg indicating that Petitioner is status post left total hip arthroplasty for osteoarthritis with persistent lateral hip and thigh pain and possible meralgia parasthetica.

However, based on the record in its entirety, the Arbitrator finds that Petitioner has not established causal connection between any other alleged injury to any other body part and the October 11, 2012, work-related accident or to the causally related left hip injury, based upon a preponderance of the credible evidence. Specifically, the Arbitrator finds no causal connection between Petitioner's work accident and her related left hip surgery and sequelae, and Petitioner's complaints of lumbar pain, radiculopathy and right leg drop foot. In so finding, while the Arbitrator notes one of Dr. Sherman's opinions that Petitioner's lumbar condition was caused during her left hip surgery and thus causally connected to the accident, the Arbitrator finds the credibility of this opinion was lessened by his ultimate testimony that he was "... really speculating as to what actually caused a lumbar problem that she has got." Lastly, the Arbitrator notes that the more persuasive medical evidence indicates that Petitioner's lumbar pain and symptoms are likely the result of the natural progression of the prior fusion surgery which Petitioner underwent prior to her work related accident. Petitioner herself testified that she does not know what caused her lumbar problems other than they started when she was getting up from a chair. Accordingly, the Arbitrator finds no causal connection for Petitioner's conditions other than those related to her original left hip injury and its left thigh sequelae.

In support of the Arbitrator's decision relating to (J) medical bills, the Arbitrator finds as follows:

Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with her causally related left hip and it sequelae as noted above pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, including pursuant to Section 8(j) if any.

In support of the Arbitrator's decision relating to (K) TTD/maintenance and (N) credit, the Arbitrator states as follows:

Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds that Petitioner was temporarily and totally disabled and entitled to periods of maintenance commencing July 31, 2013, (the day after the 19(b) Hearing) to February 23, 2016, the day vocational efforts ended as noted above for a period of 134-3/7 weeks. Respondent is entitled to credit for amounts paid, including any overpayment for TTD paid post 2/23/16, if any.

In support of the Arbitrator's decision relating to (L) nature and extent, the Arbitrator states as follows:

Petitioner's attorney made a statement on the record that Petitioner was claiming a medical permanent total disability and is waiving a wage loss claim. Based on the foregoing, the Arbitrator finds that Petitioner failed to establish that she was permanently and totally disabled from a medical standpoint or from an odd-lot stand point. Noting that Petitioner waived any claim for wage loss, the Arbitrator awards 35% loss of use of a person as a whole for Petitioner's October 11, 2012, left hip injury under Section 8(d)(2) of the Act.

In support of this finding, the Arbitrator notes that Dr. Sherman's varied medical opinions, issued over the course of many years, that Petitioner is unable to return to any work are based on numerous conditions suffered by Petitioner including her lumbar and right leg complaints which are not related to the work accident or injury as detailed above. PX 9, p. 25. Further, no medical opinion at trial indicates that Petitioner is unable to work due solely to the causally related left hip and thigh condition. In addition, the Arbitrator relies on the most credible opinions of Drs. Jacobs and Dr. Ghanayem with regard to Petitioner's ability to return to sedentary work. These credible opinions coupled with Petitioner's abandoned vocational rehab efforts forego a finding of odd-lot permanent total disability.

Further underlying all of the Arbitrator's findings is the video surveillance evidence submitted at trial. The video evidence undermines Petitioner's trial testimony that she needs her cane to walk outside, that she has difficulty using stairs, that she is unable to drive for longer than 15 minutes due to pain and that she is unable to sit for long periods of time. Petitioner is video depicted performing all of these functions most notably without exhibiting any pain behavior.

The Arbitrator has considered the necessary factors to determine impairment under Section 8.1b of the Act to the extent possible based on the evidence provided at trial. Based on the finding of causal connection for Petitioner's left hip surgical replacement, the documented medical evidence of her continued left hip condition, Petitioner's testimony regarding her current condition, the video surveillance evidence, the vocational evidence and Petitioner's ability to return to a sedentary occupation, the Arbitrator finds that Petitioner sustained 35% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

In support of the Arbitrator's decision relating to (M) penalties or fees, the Arbitrator states as follows:

Based on the record in its entirety, the Arbitrator finds that Respondent's conduct was not so unreasonable, delayed, or vexatious so as to justify the imposition of penalties or fees under the Act. Petitioner's request for such penalties and fees under Sections 19K, 19L and 16 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

HELEN ALLEN,

Petitioner,

vs. NO: 14 WC 37429

FORD MOTOR COMPANY,

Respondent.

19IWCC0377

DECISION AND OPINION ON REVIEW

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

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Arbitrator considered the five factors under Section 8.1b of the Act and determined that Petitioner sustained thirty-five percent (35%) loss of use of the person as a whole. The Arbitrator found that Petitioner established that she was partially incapacitated from pursuing the

duties of her usual and customary line of employment pursuant to Section 8(d)2 of the Act. The Commission agrees with the Arbitrator's Decision relative to the first factor [reported level of impairment], third factor [age of employee], and fifth factor [evidence of disability] under Section 8.1b of the Act. However, the Commission, after reviewing and reweighing the evidence pertaining to the second factor [occupation of the injured employee] and fourth factor [employee's future earning capacity], finds the PPD award to be excessive. The Commission instead finds that Petitioner is entitled to twenty-two-and-a-half percent (22.5%) loss of use of the person as a whole under Section 8(d)2 of the Act.

With respect to the second factor, Respondent took exception to the Arbitrator's 35% loss of use of the person as a whole award under Section 8(d)2 of the Act. Respondent argued that Petitioner was not partially incapacitated from pursuing her usual and customary employment duties, and that this claim was distinguishable from *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC. Although *Jackson Park Hosp.* dealt with the issue of a wage differential under Section 8(d)1 [which was not at issue here], the case stood for the proposition that the Commission could not simply compare apples to apples, but must consider all the evidence around a claimant's pre-injury and post-injury employment.

In the case at bar, the Arbitrator emphasized the fact that although Petitioner returned to work for Respondent in the same capacity as a plumber/pipefitter and still retained the same job title and access to overtime, and, in fact, was earning more than she did prior to the July 8, 2014 accident, she was unable to perform many of the tasks associated with her trade. Petitioner testified that, "Right now my job duties is to basically supervise the pipefitters that come into the department to work the overtime. I tell them what it is I need done because I can't do the work." (T.46). The Arbitrator further stated, "Respondent elected to offer her an accommodated, supervisory job two months prior to trial but there is no guarantee this accommodation will continue." The Arbitrator believed Petitioner's job was a created position. (Arbitrator's Decision, pg. 12). Petitioner similarly argued that Respondent was unable to accommodate Petitioner's restrictions from August 28, 2016 until April 23, 2018, less than two months before arbitration. Petitioner stated in her Brief, "As trial approached, Ford suddenly and miraculously found a position for Allen to perform which negated any claim for a wage differential or maintenance benefits." (Petitioner's Brief, pg. 4).

The Commission finds that the Petitioner did establish that her injuries partially incapacitated her from pursuing the duties of her usual and customary line of employment. In other words, her occupation changed. In her Brief, Petitioner relies on *First Assist Inc. v. Indus. Comm'n*, 371 Ill. App. 3rd 488 (2007), which stood for the proposition that despite similar job titles, not all nurses perform the same job functions and not all nurses are paid the same. Here, although Petitioner has the same job title pre- and post-injury, she can no longer perform her regular duties as a plumber/pipefitter. She is instead limited to supervising and directing people. The evidence also demonstrates that after the work accident, Petitioner attempted her regular duties as a plumber/pipefitter for Respondent's various departments, and she was unable to perform those duties for any length of time.

With respect to the fourth factor, the Commission does not believe the evidence supports the conclusion that the Petitioner has or will suffer diminished earnings. While the Arbitrator

seems to be saying the Petitioner's current job is a sham, there was no evidence upon which to base that conclusion.

In light of the foregoing, the Commission finds that Petitioner established by a preponderance of the evidence that her cervical and right shoulder injuries partially incapacitated her from pursuing the duties of her usual and customary line of employment as a plumber/pipefitter. However, as explained above, the Commission modifies down the weight assigned by the Arbitrator relative to the second and fourth factors under Section 8.1b of the Act, and finds instead that a PPD award of 22.5% loss of use of the person as a whole under Section 8(d)2 of the Act is more appropriate and in line with the totality of the evidence in this case.

Additionally, the Commission corrects the Arbitrator's award of maintenance from August 28, 2016 through April 22, 2018, and finds that Petitioner was entitled to temporary total disability (TTD) benefits for that period. During that time, Petitioner was actively treating with Dr. Robinson and then Dr. Lowe, who allowed Petitioner to continue working with her permanent restrictions. Respondent accommodated Petitioner's restrictions beginning April 23, 2018. As such, the Commission finds that Petitioner was entitled to TTD from August 28, 2016 through April 22, 2018, and not maintenance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 20, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to temporary total disability benefits of $1,329.34 per week for 86 weeks, commencing August 28, 2016 through April 22, 2018, 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 pay to Petitioner the sum of $735.37 per week for a period of 112.5 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused 22.5% loss of use of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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 the Circuit Court.

DATED: JUL 23 2019

D. Douglas McCarthy

19IWCC0377

DDM/pm
O: 6-19-19
052

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALLEN, HELEN
Employee/Petitioner

Case# **14WC037429**

FORD MOTOR COMPANY
Employer/Respondent

19IWCC0377

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:

0147 CULLEN HASKINS NICHOLSON ET AL
MICHAEL A ROM
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
NIGEL S SMITH
900 COMMERCE DR SUITE 900
OAKBROOK, IL 60523

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

Helen Allen
Employee/Petitioner

Case # **14WC037429**

v.

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

Ford Motor Company
Employer/Respondent

19IWCC0377

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 **6/18/2018 & 7/19/2018**. 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

19IWCC0377

On **07/08/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**103,637.04**; the average weekly wage was $**1,993.02**.

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

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

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

The parties stipulated Petitioner was temporarily totally disabled from July 15, 2014 through December 16, 2014. Respondent shall be given a credit of $**29,230.86** for TTD, $**0** for TPD, $_____ for maintenance, and $_____ for other benefits, for a total credit of $**29,230.86**.

After proofs were closed, the parties agreed that Respondent is entitled to a credit of $**67,911.40** under Section 8(j) of the Act, with this figure representing the net amount of disability benefits paid to Petitioner.

ORDER

Respondent shall pay Petitioner maintenance benefits of $1,329.34 per week for 86 weeks commencing 8/28/2016 through 4/22/2018 (the day before Petitioner began an accommodated job at the Sharonville facility) as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $735.37 per week for 175 weeks because the injuries sustained caused the loss of use of a man to the extent of 35% pursuant to Section 8(d)2 of the Act.

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

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

Molly C Mason

Signature of Arbitrator

8/20/18
Date

AUG 20 2018

Helen Allen v. Ford Motor Company
14 WC 37429

Summary of Disputed Issues

The parties agree Petitioner sustained an accident on July 8, 2014, while working as a plumber/pipefitter for Respondent. They also agree Petitioner provided timely notice of the accident and was temporarily totally disabled from July 15, 2014 through December 16, 2014. The disputed issues include causal connection, maintenance from August 28, 2016 through April 23, 2018 and nature and extent. Arb Exh 1. T. 6/18/18, pp. 4-6. The claim was bifurcated. Proofs were closed on July 19, 2018. The parties subsequently reached an agreement as to the net amount of disability benefits paid to Petitioner.

Arbitrator's Findings of Fact

Petitioner was the sole witness at the initial hearing of June 18, 2018. She testified she currently lives in a rural area in southern Ohio. T. 6/18/18, p. 13.

Petitioner testified she attended trade school to become a plumber/pipefitter after she graduated from high school. She holds a state certificate of completion. She served in the United States Army between June 1982 and March 1985. T. 6/18/18, pp. 14-15.

Petitioner testified she began working as a plumber/pipefitter for Respondent on August 21, 2000. T. 6/18/18, p. 15. She continued working in this capacity throughout her career at Respondent. T. 6/18/18, p. 15.

Petitioner testified she is 5 feet, 7 inches tall. She weighs 193 pounds. T. 6/18/18, p. 15.

Petitioner testified she began working in the body shop in Respondent's Chicago assembly plant in April 2014. Her duties involved fixing welding robots, maintaining the HVAC equipment and piping, changing out sealers and robot water filters and performing other small repairs. T. 6/18/18, p. 17. She described a sealer as a lubricant that is applied between two metals before the metals are welded together by a robot. T. 6/18/18, p. 19. She was expected to lift up to 40 pounds. She regularly performed bending and stooping. Some of the pipes and equipment she worked on were overhead. T. 6/18/18, pp. 17-19.

Petitioner testified she was injured on July 8, 2014, while working with Larry Scott to change out filters in the main body shop and another body shop. This process involved shutting off overhead valves that were 2- or 3-inch in size. Petitioner testified it was necessary to pull down on a handle in order to access the valves. The handle was 18 to 24 inches long. She had to stand on her tiptoes in order to reach the handle and use her weight to pull it down. T. 6/18/18, pp. 22-24.

Petitioner testified the valves she was trying to access were old and not well lubricated. About a month before the accident, she went to her supervisor and asked that the valves be changed because she was "straining to get [them] open and closed." T. 6/18/18, p. 23.

Petitioner testified she felt a strain on her neck and right shoulder while reaching up and attempting to move the handle on July 8, 2014. Her shoulder felt "really tight" and she experienced

very bad pain. T. 6/18/18, p. 24. She denied having any prior injuries or treatment to her neck or right shoulder. T. 6/18/18, pp. 24-25. [Records in PX 1 reflect Petitioner went to Respondent's medical facility on November 12, 2002, complaining of neck and bilateral shoulder stiffness secondary to being struck by a tow motor that was backing up. The examining EMT noted no bruising or abrasions and some areas of stiffness in both shoulders. Petitioner returned to the facility two days later and reported improvement.]

Petitioner testified she contacted her supervisor, Mike Svickas, after the accident and told him she had just injured her shoulder. T. 6/18/18, p. 25. She then resumed working. As the workday progressed, she began experiencing numbness and tingling in her fingers. T. 6/18/18, p. 26.

Petitioner testified she first underwent treatment, at Respondent's in-house medical facility, four days after the accident. She was unable to get into the facility earlier because the plant was on shutdown and the facility was closed. During the period before she went to the facility, her right arm felt "not real," as if it was made of plastic, and her fingers were numb. She addressed these symptoms by taking pain pills. T. 6/18/18, p. 27.

Petitioner testified the initial care at Respondent's medical facility consisted of heat treatments. Because no doctor was available to see her, personnel at the facility told her to see her own physician. T. 6/18/18, p. 27.

Petitioner testified she saw her primary care physician, Dr. Hasanat, on July 15, 2014. T. 6/18/18, p. 28. In her note of that date, the doctor recorded a consistent history of the July 8, 2014 work accident. She noted complaints of 8/10 right shoulder pain and numbness/tingling of the right arm and first through fourth digits. On examination, she noted right paracervical and parathoracic tenderness on palpation, tenderness on the posterior aspect of the right shoulder, +4/5 muscle strength and a slightly weaker grip on the right. She prescribed medication, rest and physical therapy. She provided Petitioner with an "off work" note. PX 1.

Petitioner acknowledged undergoing a right upper extremity EMG on July 22, 2014. Dr. Holmes performed this study. Petitioner could not recall whether Respondent referred her to Dr. Holmes. T. 6/18/18, p. 28.

Dr. Holmes' report of July 22, 2014 reflects a referral from Respondent's assembly plant. Dr. Holmes recorded a consistent history of the July 8, 2014 work accident. He noted complaints of tingling in the right hand, particularly in the second, third and fourth fingers, radiating up the right arm, along with some right scapular and posterior neck pain. He described the EMG/NCV results as normal but recommended that the study be repeated if Petitioner's symptoms persisted, noting that denervative changes take four weeks to develop. PX 4.

Petitioner underwent a right shoulder MRI the following day, July 23, 2014. This study, performed without contrast, showed no evidence of rotator cuff, labral or biceps tearing, moderately severe degenerative changes of the acromioclavicular joint and heterogeneous fluid within the subcoracoid recess, possibly equivalent to adhesive capsulitis. PX 2, 4.

Petitioner testified she began a course of physical therapy at Flexeon on July 23, 2014. At some later point, Flexeon was bought out by ATI. T. 6/18/18, pp. 28-29. Flexeon records in PX 1 identify Dr. Lewis as the referring physician.

On July 30, 2014, Dr. Hasanat advised Petitioner of the MRI results and referred her to Dr. Nigro of Bone and Joint Physicians for further evaluation. PX 4.

Petitioner first saw Dr. Nigro on August 4, 2014. The note of that date does not appear to be complete in that it does not include any treatment recommendations. The doctor recorded a consistent history of the work accident and subsequent treatment. He indicated that Petitioner had experienced some minor right shoulder soreness for several months before the accident but this did not affect her ability to perform full duty.

On initial examination, Dr. Nigro noted pain with forward elevation above 90 degrees, some weakness with "empty can" testing, positive Neer and Hawkins impingement testing, some decreased sensation in the right thumb and index through ring fingers and negative elbow flexion testing.

Dr. Nigro obtained right shoulder X-rays. He interpreted the films as showing moderate acromioclavicular joint degenerative joint disease. PX 1, 2.

Petitioner returned to Dr. Nigro on August 11, 2014. The doctor noted that Petitioner remained symptomatic and denied improvement secondary to a prescribed Medrol Dosepak. He also noted that Petitioner felt physical therapy was aggravating her symptoms. On right shoulder re-examination, he noted positive Neer and Hawkins tests, significant acromioclavicular joint tenderness, equivocal O'Brien's testing, paraspinal tenderness over the cervical spine and rhomboids and decreased sensation over the index, middle and ring fingers.

After reviewing the right shoulder MRI results, Dr. Nigro indicated he felt Petitioner was experiencing "two problems," namely rotator cuff tendinitis and impingement syndrome along with symptomatic acromioclavicular joint arthritis. He also felt there might be a cervical spine component. He administered a subacromial joint space injection and indicated he planned to seek authorization for a cervical spine evaluation from workers' compensation. He directed Petitioner to stay off work for three weeks, pending the cervical spine MRI, and take a two-week break from physical therapy. PX 1, 2.

Petitioner returned to Dr. Nigro on August 21, 2014. The doctor noted a complaint of persistent pain shooting down the right arm with some associated numbness in the right hand excluding the small finger. He indicated Petitioner was now taking Tramadol twice per day for pain. On right shoulder re-examination, the doctor noted a painful arc of motion above 90 degrees, positive impingement signs, significant acromioclavicular joint tenderness to palpation and mild weakness throughout rotator cuff strength testing limited by pain. He noted that Petitioner's case manager was now approving cervical spine treatment. He recommended cervical spine X-rays and MRI imaging along with Tramadol and directed Petitioner to remain off work. PX 2, 4.

Petitioner underwent a cervical spine MRI on August 25, 2014. This study, performed without contrast, showed degenerative changes in the cervical spine, with multi-level disc disease, diffuse disc bulging at C4-C5 with peridiscal osteophytes indenting the spinal cord abutting bilateral exiting C5 nerve roots and diffuse disc bulging at C5-C6 with peridiscal osteophytes abutting the spinal cord and bilateral exiting C6 nerve roots. PX 1, 2.

Petitioner underwent a cervical spine CT scan the following day, August 26, 2014. This study showed no evidence of acute cervical spine fracture or dislocation and multi-level degenerative changes.

The interpreting radiologist commented that these changes could be "better assessed" via MRI imaging. PX 1.

Petitioner testified that Dr. Nigro administered three injections to her right shoulder. The numbness and tingling in her fingers persisted following these injections. T. 6/18/18, p. 30. Dr. Nigro then referred her to Dr. Miz. Dr. Miz later referred her to another physician.

Petitioner returned to Dr. Nigro on August 29, 2014, with the doctor noting the MRI results. The doctor expressed the belief that most of Petitioner's symptoms were coming from the cervical spine, citing the stenosis documented on the MRI. He referred Petitioner to his partner, Dr. Miz, a spine surgeon, directed Petitioner to remain off work and deferred additional shoulder treatment. PX 1, 2, 4.

Petitioner first saw Dr. Miz on September 9, 2014. In his note of that date, the doctor noted that he had approval for an initial evaluation only. He recorded a history of the work accident and subsequent care.

On initial examination, Dr. Miz noted significant restriction of flexion, extension and external rotation, negative Spurling's testing, markedly painful shoulder abduction and elevation and intact sensory. He described the recent MRI as of "poor diagnostic quality" but showing abnormalities at C4-C5, C5-C6 and C6-C7 with some degree of disc bulging. He described the foramen as "difficult to evaluate" but concluded that Petitioner had "at least some degree of foraminal stenosis bilaterally at C5-C6."

Dr. Miz's impression was that Petitioner had a "multi-factorial pain syndrome with likely some of her pain shoulder-related and some of her pain radiculopathic." He recommended four weeks of therapy to address the cervical radiculitis, followed by epidural steroid injections if the therapy proved unhelpful. He indicated Petitioner would require repeat imaging if the injections helped to look for evidence of any right-sided cervical root compression that would be amenable to surgery. PX 2.

On September 16, 2014, Dr. Nigro noted ongoing right shoulder and radiating right arm complaints. He administered an intra-articular glenohumeral cortisone injection. He recommended that Petitioner return to him in eight weeks. PX 2, 4.

Petitioner testified she saw Dr. Wolin for purposes of a shoulder examination on September 23, 2014, at Respondent's request. Petitioner testified this examination lasted fewer than five minutes. T. 6/18/18, pp. 31-32.

In his report of September 23, 2014, Dr. Wolin, an orthopedic surgeon, recorded a history of the July 8, 2014 work accident and noted that Petitioner reported experiencing a "strain" in her right shoulder with repetitive overhead movements for three months prior to this accident. He also noted that Petitioner had undergone physical therapy and two shoulder injections to date but remained symptomatic. He indicated that Petitioner complained of numbness in the digits of her right hand as well as pain in her right shoulder and right neck area. He stated that Petitioner denied any previous right shoulder injuries and was currently off work.

On examination, Dr. Wolin noted diffuse tenderness over multiple locations in Petitioner's right arm and across the region of the base of her neck. He indicated that, when he attempted to move Petitioner's right arm in any direction, she cried and grabbed his arm to prevent further movement. He

stated that attempted passive range of motion of the shoulder produced cogwheeling in the opposite direction, that attempted range of motion of the neck "could not be performed due to guarding" and provocative testing of the shoulder "could not be performed due to cogwheeling." He noted diffuse decreased sensation "in a stocking glove distribution" to the right upper extremity.

Dr. Wolin indicated Petitioner's symptoms and his examination findings did not correlate with any shoulder pathology of which he was aware. He found no relationship between the work accident and Petitioner's subjective complaints. He saw no need for treatment or work restrictions. PX 1, 2.

At Respondent's request, Petitioner saw Dr. An for a cervical spine examination on October 7, 2014. T. 6/18/18, p. 32. Dr. An is associated with Midwest Orthopaedics at Rush. In his report, Dr. An documented the work accident and subsequent care. He noted that Petitioner was off work due to ongoing neck and right arm pain. On examination, Dr. An noted tenderness to palpation in the midcervical region and paraspinal muscles, a significantly decreased range of neck motion and slightly decreased sensation in the C6-7 dermatome. He indicated it was difficult to perform the Spurling's maneuver due to Petitioner's limited range of motion.

Dr. An addressed diagnosis and causation as follows:

> "Diagnosis for the cervical spine is pre-existing cervical spondylosis with some foraminal stenosis causing some right C6-C7 radicular symptoms. I believe that objective finding of the pain pattern and MRI scan support the subjective complaint of the neck and arm pain. The patient has pre-existing condition of disc degeneration spondylosis but the patient was asymptomatic with pre-existing condition and became symptomatic after work injury. Therefore, I do believe that her chronic condition is related to work injury from the aggravation factor."

Dr. An recommended medication and physical therapy, to include neck traction. He recommended "sedentary light duty work with no lifting greater than 10 pounds" and no bending or twisting of the neck. He indicated Petitioner might be a candidate for an epidural steroid injection if her condition did not improve in four weeks. He did not recommend any type of surgery. PX 6.

A "referral form" in PX 1 reflects that Dr. Lewis of Respondent referred Petitioner to Dr. Miz on August 29, 2014, secondary to a diagnosis of "cervical radiculopathy." PX 1.

Petitioner returned to Dr. Nigro on October 28, 2014. The doctor noted the intervening Section 12 examinations. He also noted that Petitioner had started therapy, per Dr. Miz, but remained symptomatic.

Dr. Nigro took issue with Dr. Wolin's opinions. Based on his review of Dr. Wolin's report, he concluded the doctor did not really examine Petitioner's right shoulder. He stated his belief that "most of [Petitioner's] right upper extremity pain is coming from her neck." He recommended that treatment focus on the cervical spine. He told Petitioner to return to him for a possible right shoulder MR arthrogram if cervical spine treatment did not relieve her symptoms. He directed Petitioner to stay off work until she could see Dr. Miz. PX 2.

Petitioner returned to Dr. Miz on October 30, 2014. The doctor noted complaints of 9/10 neck pain, neck clicking and stiffness and shoulder achiness. He also noted Dr. An's opinions and treatment recommendations. He referred Petitioner to Dr. Charuk for epidural steroid injections. He noted that Petitioner was off work per Dr. Nigro. He did not release Petitioner to work. PX 2.

Petitioner first saw Dr. Charuk on November 10, 2014. The doctor noted a history of the work accident and subsequent treatment. After examining Petitioner and noting a mildly positive Spurling's sign on the right, along with diminished sensation throughout the right arm, he recommended a right C7-T1 interlaminar epidural steroid injection. He administered this injection on November 26, 2014. PX 2.

On December 10, 2014, Dr. Charuk noted that the November 26, 2014 injection afforded between 45% and 60% relief but that Petitioner was still experiencing radiating right arm pain and numbness and tingling in her fingers. He recommended a second injection and added Flexeril to Petitioner's medications. He released Petitioner to light duty as of December 15, 2014, with no lifting over 10 pounds. PX 2.

Petitioner testified she received temporary total disability benefits while she was off work in 2014. She resumed light duty in December 2014. At that time, she understood her restrictions to be no lifting over 10 pounds and limited overhead work. Respondent was able to accommodate those restrictions by assigning her to the "tool crib," where she maintained small manual spray guns. She did not have to work on robots in the "tool crib." T. 6/18/18, pp. 33-34.

Petitioner returned to Dr. Charuk on January 13, 2015 and reported worsening symptoms. The doctor noted that he was still awaiting approval of the second injection. He also noted that Petitioner had resumed light duty. On re-examination, he again noted a positive Spurling's sign on the right. He allowed Petitioner to continue light duty with no lifting over 10 pounds and no overhead work with the right arm. He recommended that Petitioner continue attending therapy. PX 2.

Dr. Charuk administered a second epidural steroid injection at the right C7-T1 interlaminar level on January 21, 2015. PX 2.

Petitioner returned to Dr. Charuk on February 12, 2015. She reported some improvement following the second injection but indicated she was still experiencing neck pain, numbness and tingling in her fingers and headaches. The doctor recommended a third injection and continued physical therapy. He again imposed restrictions of no lifting over 10 pounds and no overhead use of the right arm. PX 2.

An ATI therapy discharge note of April 22, 2015 reflects ongoing complaints of 5-7/10 right arm pain. PX 3.

At Respondent's request, Dr. An re-examined Petitioner on May 22, 2015. In his report of that date, he noted that each of the three cervical spine injections provided about six weeks' relief. He also noted that Petitioner was better overall and back to light duty but still experiencing neck pain.

On re-examination, Dr. An noted minimal tenderness to palpation in the mid-cervical region and trapezius muscle bilaterally. He described Spurling's testing as negative.

Dr. An again found causation via an aggravation theory. He recommended permanent light duty restrictions of about 15 pounds lifting, no frequent bending or twisting and no overhead work. He described the treatment to date as reasonable, necessary and related to the work accident "based on an aggravation factor." He recommended home exercise rather than any additional formal therapy. He also recommended occasional over the counter non-steroidal, anti-inflammatory medication or Tylenol. PX 7.

Petitioner underwent an initial physical therapy evaluation at ATI on May 28, 2015. The evaluating therapist noted complaints of right-sided neck pain, neck tightness and headaches.

On April 20, 2016, Petitioner saw Dr. Robinson at Dr. Hasanat's referral. Petitioner testified she began seeing Dr. Robinson because Dr. Charuk left his practice. T. 6/18/18, p. 33.

In his initial note of April 20, 2016, Dr. Robinson recorded a history of the July 2014 work accident and subsequent treatment. He noted that Petitioner was still experiencing significant right-sided neck and arm symptoms, despite three injections, and occasionally experiencing left-sided symptoms as well. He interpreted the cervical spine MRI as showing a central bulge at C4-C5 as well as some bulging at C5-C6 and C6-C7. He recommended a repeat cervical spine MRI and prescribed Cyclobenzaprine and Naproxen. He directed Petitioner to return to him in a few weeks to consider additional injections. PX 8.

Petitioner testified she underwent a third cervical spine MRI on May 10, 2016. T. 6/18/18, p. 33. This study, performed without contrast, showed degenerative changes in the cervical spine from C4-C5 to C6-C7 with mild posterior disc ridge complexes. PX 8.

Petitioner returned to Dr. Robinson on May 11, 2016. The doctor indicated the repeat MRI showed bulging from C4 through C7 but no significant neural foraminal narrowing or stenosis. He indicated Petitioner was still complaining of significant neck pain with headaches. On re-examination, he noted a limited range of right shoulder motion and mild weakness in the right upper extremity, distally and proximally. He recommended right-sided facet joint injections and prescribed Alprazolam. PX 8.

Dr. Robinson administered right-sided facet joint injections at C4-C5, C5-C6 and C6-C7 on June 8, 2016. PX 8.

Petitioner returned to Dr. Robinson on June 22, 2016 and reported about 30% improvement following the facet joint injections. Petitioner continued to complain of right-sided neck and shoulder pain. The doctor noted she wanted to try to return to work within her permanent restrictions of no lifting over 15 pounds and no bending or overhead work. He released her to work but restricted her lifting to 5 pounds. He directed Petitioner to return to him in a month to see whether her lifting could be increased to 15 pounds. PX 8.

Petitioner saw Dr. Robinson again on July 22, 2016 and reported having returned to work. Petitioner indicated she was required to stand for long periods at work and found this bothersome. She complained that her headaches had recurred. She requested physical therapy. Dr. Robinson characterized this request as reasonable. He took Petitioner off work until August 5, 2016, prescribed therapy and refilled the Naprosyn. He directed Petitioner to return to him in one month. PX 8.

At the next visit, on August 25, 2016, Dr. Robinson noted that Petitioner was trying to work within her permanent restrictions but was still experiencing right-sided neck pain radiating up into her head. He also noted that Petitioner expressed a desire to continue therapy and undergo additional injections. He noted that the therapy he had ordered at the last visit had not been approved. He again recommended the therapy and also recommended repeat facet joint injections.

Dr. Robinson noted that Petitioner asked to be taken off work but that he "suggested she continue to work with her permanent restrictions." He directed her to return to him in two weeks, following the repeat injections. He administered the repeat injections on September 21, 2016. PX 8.

Dr. Robinson's last note is dated October 4, 2016. The doctor noted that Petitioner reported improvement secondary to the repeat injections but was still experiencing neck pain and associated headaches. He also noted that Petitioner had been unable to pursue the previously recommended therapy due to lack of approval. He again recommended this therapy and directed Petitioner to return to him in six weeks. PX 8.

Petitioner testified she applied to Respondent for a transfer to her "home base" in Ohio. Her union contract allowed her to apply for this. She simply had to complete some papers in labor relations. T. 6/18/18, p. 35. She had originally "hired in" in Ohio, in 2002, and worked there until January 2012, when she moved to the Illinois facility. T. 6/18/18, p. 35. Respondent granted her request for a transfer. She moved to Ohio in August 2016 and began working at Respondent's facility in Sharonville. She started out in the "center shop." After one week, she began working in an outpost that maintains equipment in a particular section of the facility. She attempted to continue working in this outpost but the job involved bending, stretching, some overhead work and some heavy lifting. T. 6/18/18, p. 37. After four or five days, she went to a scheduled appointment with Dr. Robinson and told him she was having difficulty performing her assigned duties. Dr. Robinson maintained her restrictions. She returned to the Sharonville facility and discussed the situation with her supervisor. He directed her to labor relations, where she was told Respondent could not honor the restrictions. T. 6/18/18, pp. 37-39. At the direction of labor relations, she continued to report to the Sharonville facility every Monday at 10 AM. She would pick up a form at labor relations and deliver it to a "safety guy" who would sign off, indicating he could not place her. She would then take the signed form back to labor relations and go home. She continued reporting to the Sharonville facility every Monday for about three months, at which point she was told no accommodation was available and thereafter she needed to report monthly rather than weekly. T. 6/18/18, p. 41.

Petitioner testified that, at this point, she started seeing Dr. Lowe, an orthopedic surgeon in Huntington, West Virginia. Dr. Lowe prescribed Vitamin D, Naproxen, pain medication and an EMG study of her right upper extremity. T. 6/18/18, pp. 42-43. He has imposed restrictions of no lifting over 15 to 20 pounds, no overhead work and limited bending and stretching. T. 6/18/18, p. 43.

Records in PX 5 reflect Petitioner first saw Dr. Lowe on September 30, 2016. The doctor recorded complaints of neck pain, radiating right arm pain and occasional numbness and tingling in the right hand. He noted that Petitioner had been off work since August 28, 2016 and had last undergone a cervical injection in September 2016. PX 5.

Petitioner returned to Dr. Lowe on October 7, 2016. On examination, he noted a restricted range of cervical spine motion, "essentially 30-35 degrees of extension and a similar amount of flexion." He also noted decreased sensation in the right index finger and weaker grip strength on the right. He

interpreted a cervical spine MRI as showing "osteophytes potentially pushing against the spinal cord from C4-C5 to C6-C7, but more dominant at C4-C5, which would correlate with radicular pain into the right arm and decreased sensation in the index finger." He indicated that surgery "could be considered" but that it might not be successful. He prescribed laboratory tests and Neurontin, to "make the nerves less sensitive." He described Petitioner as "mighty young to be giving up a good job" but noted that the cervical spine restriction "probably cannot be overcome." PX 5.

On October 28, 2016, Dr. Lowe noted that Petitioner remained symptomatic and off work. On right shoulder examination, he noted limited flexion and abduction as well as slight pain with impingement testing. He described Petitioner's cervical spine range of motion as "relatively normal this morning." He started Petitioner on Vitamin D and indicated he might need to have his partner review the shoulder situation. PX 5.

At the next visit, on November 22, 2016, Dr. Lowe noted some relief with the Vitamin D. On re-examination, he again noted restricted cervical spine motion, questionably decreased sensation on the lateral side of the right hand and weaker grip strength on the right. He discontinued the Naprosyn and started Petitioner on Celebrex. He also indicated a repeat cervical spine MRI might be needed. PX 5.

On January 6, 2017, Dr. Lowe noted that Petitioner remained symptomatic and off work. He also noted that the Celebrex was denied. He started Petitioner on Duexsis. A subsequent telephone note of January 9, 2017 reflects this medication was also denied so the doctor started Petitioner on Meloxicam. PX 5.

On February 1, 2017, Dr. Lowe imposed restrictions of no lifting over 25 pounds, limited bending and no overhead work. PX 5.

On March 31, 2017, Dr. Lowe noted that Petitioner remained symptomatic. On re-examination, he again noted that the right arm was slightly weaker than the left. He described this as "real, not a put-on." He also noted a slight tremor in the right arm when Petitioner appeared to be exerting significant strength. He indicated Petitioner could not resume her usual occupation due to the problem with the right upper extremity. He prescribed Vitamin D and home exercises. PX 5.

On May 30, 2017, Dr. Lowe noted ongoing right-sided symptoms as well as tingling in the left hand. On bilateral hand examination, he noted positive Phalen's, worse on the right, and a minor, "unexplained" tremor in the right hand. He diagnosed carpal tunnel syndrome and recommended wrist cock-up splints, to be worn at night. He also prescribed EMG/NCV testing. He described Petitioner as "disabled from her occupation as a plumber," noting she could not perform overhead work due to her weakness and right hand tremor.

On August 8, 2017, Dr. Lowe noted that Petitioner had undergone nerve conduction studies and that the results were normal. On re-examination, he noted slightly restricted cervical spine motion and limited active abduction of the right shoulder. He continued the restrictions (no lifting over 15-20 pounds, no overhead work and no frequent bending/lifting) for six months. PX 5.

Petitioner returned to Dr. Lowe on February 13, 2018 and reported that her headaches had returned. The doctor again noted right arm weakness on examination. He renewed the Vitamin D and work restrictions. He referred Petitioner to Dr. Bolano for evaluation of possible triggering of the right

middle finger. He continued the previous restrictions, indicating that Petitioner was "probably not suited for manual work." PX 5.

Dr. Bolano evaluated Petitioner's right middle and little finger on February 22, 2018. He described the duration of her finger symptoms as "six months." He injected the right middle finger with Kenalog, to address the triggering, and directed Petitioner to return to him in four weeks. PX 5.

Petitioner returned to Dr. Bolano on March 22, 2018 and reported significant improvement following the right middle finger injection. The doctor released her from care on a PRN basis. PX 5.

Petitioner testified she resumed working for Respondent on Monday, April 23, 2018, after being told Respondent had found a job within her restrictions. Ali Bazir of Respondent called her the Thursday before April 23rd and told her to report on Monday. T. 6/18/18, pp. 43-44. She returned to a plumber/pipefitter job in construction maintenance. She is still performing this job. The job is primarily supervisory and is within her restrictions. T. 6/18/18, p. 44. She oversees the work of pipefitters and apprentices who come in to perform overtime. She tells these workers what she wants done and how she wants it done. The job involves overtime. She is able to work 12 hours per day, five days a week, and can also work eight hours per day on Saturdays and Sundays. She is required to lift five pounds, at the most. For the most part, she walks around or operates a golf cart, lining up workers to do projects that another pipefitter gives her. T. 6/18/18, pp. 43-47.

Petitioner testified that, had her current supervisory job been made available to her at any time during the period she reported in weekly and monthly, she would have returned to work. T. 6/18/18, p. 45. During that period, she tried to find outside work on her own. Since she is a disabled veteran, she sought work through her counselors at the Veterans Administration. T. 6/18/18, pp. 45-46. After those counselors told her she was eligible for more schooling, she signed up for a paralegal course at Mountwest Community College in Huntington, West Virginia. After she returned to work for Respondent, she withdrew from this course but hopes to resume in August 2018, at which point she can take classes online. T. 6/18/18, pp. 45-46.

Petitioner testified she applied for Social Security disability benefits in January 2018, after being directed to do so by Respondent. Respondent never offered her vocational retraining. T. 6/18/18, p. 48.

Petitioner testified she did not receive any workers' compensation benefits between August 2016 and her return to work on April 23, 2018. She received short-term disability benefits for a year and then began receiving long-term disability benefits. T. 6/18/18, p. 49.

Petitioner testified her right arm and hand are weaker than her left arm and hand, even though she is right-handed. She does not have the same strength she had before the accident. She experiences a lot of pain in her neck and shoulder blades. If she turns too quickly, she experiences a sharp, "toothache" type of pain. She also experiences neck pain four or five times a day during periods of inactivity. She can be sitting or lying down and begins to feel pain in a "plum" sized area. This pain begins to radiate after four or five minutes and will then calm down. T. 6/18/18, p. 52. She also experiences intermittent trembling of her right arm. The fingers of her right hand are numb. T. 6/18/18, p. 51. She wakes up with a headache six days a week. Her headaches linger for about two hours or until she takes Ibuprofen. If she has to take a road trip, she takes over the counter pain medication, such as Ibuprofen, in advance. If the trip lasts for more than four hours, she takes

additional pain medication. She is able to get through her workdays. T. 6/18/18, p. 53. She takes Naproxen prescribed by Dr. Lowe. She also takes medication for depression. T. 6/18/18, pp. 54-55.

Petitioner testified that, to her knowledge, Respondent has paid her medical bills. T. 6/18/18, p. 55.

Petitioner identified a document as a list of her current work restrictions. She obtained this document from a secretary at the medical department at Respondent's Sharonville facility. T. 6/18/18, p. 56. She walked into the department, asked for the list and obtained it. T. 6/18/18, p. 56.

Under cross-examination, Petitioner testified the distance between her residence in Proctorville, Ohio, and Respondent's Sharonville facility is 173 miles. She makes this commute only once every two weeks. For the most part, she stays with her sister, who lives only 18 miles from the facility. She drives on her own from her sister's residence to work. T. 6/18/18, pp. 57-58. Dr. Lowe's office is about five miles from her Proctorville residence. She sees Dr. Lowe primarily to obtain medication and maintain her restrictions. T. 6/18/18, p. 59. As of the accident, she earned $32.50 per hour. She has since received a raise to $33.50 per hour. This is the same rate she would be earning if she were working at Respondent's Chicago facility. T. 6/18/18, p. 60. She feels she was harmed economically due to being away from work for a while but not in terms of her hourly wage. T. 6/18/18, p. 60.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in her favor, credibility-wise. She did not exaggerate her current symptoms.

Dr. Wolin, Respondent's shoulder examiner, noted guarding and cogwheeling when he evaluated Petitioner on September 23, 2014. In contrast, Dr. An, Respondent's cervical spine examiner, did not note any guarding, cogwheeling or symptom magnification. He recommended treatment and, ultimately, permanent work restrictions. Petitioner's current treating physician, Dr. Lowe, described her right arm weakness and tremor as "real, not a put-on." PX 5.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between her undisputed accident of July 8, 2014 and her current condition of ill-being?

The Arbitrator finds that Petitioner established a causal connection between her undisputed work accident of July 8, 2014 and her current right arm/shoulder and cervical spine conditions of ill-being. In so finding, the Arbitrator relies on the following: 1) the fact Petitioner successfully performed a variety of physical duties for Respondent for a number of years before the accident; 2) the records from Respondent's medical facility (PX 1), which document only one pre-accident report of shoulder and neck complaints, on November 12, 2002, with Petitioner reporting improvement two days later; 3) Petitioner's credible description of the awkward positioning and force that led to her injury; 4) the causation opinions voiced by Dr. An, Respondent's cervical spine examiner; and 5) the causation opinions voiced by Dr. Miz and Dr. Lowe.

The Arbitrator finds persuasive Dr. Miz's opinion that the work accident resulted in a multi-factorial pain syndrome, with both the neck and right shoulder contributing to Petitioner's symptoms.

Dr. Hasanat noted both localized right shoulder and radicular right arm complaints on July 15, 2014, only a week after the accident. Dr. Lowe, Petitioner's current treating physician, regularly documents both cervical spine restriction and right arm and hand weakness.

The Arbitrator further finds that Petitioner did not establish a causal connection between the undisputed work accident of July 8, 2014 and the right middle finger trigger finger condition diagnosed by Dr. Bolano in February 2018. Dr. Bolano's note of February 22, 2018 documents a six-month history of triggering. PX 5. Petitioner did not testify to this condition or attempt to link it to the work accident.

Is Petitioner entitled to maintenance from August 28, 2016 through April 23, 2018?

The Arbitrator finds that Petitioner is entitled to maintenance from August 28, 2016 through April 22, 2018 (the day before she began her accommodated job at Respondent), with Respondent receiving credit in the amount of $67,911.40, per the parties' post-arbitration stipulation, for the net amount of the disability benefits it paid during this period.

In awarding maintenance, the Arbitrator notes the permanent restrictions recommended by Dr. An, one of Respondent's examiners. The Arbitrator also notes Petitioner's credible and detailed testimony concerning the efforts she made during this period to comply with Respondent's directives and to look for accommodated work on her own, without any assistance. Respondent did not call any witness to refute Petitioner's testimony that she checked in with Respondent's Sharonville facility on a periodic basis, as required, to determine whether accommodated work was available.

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 the nature and extent of Petitioner's injury. That section sets forth five factors to be considered in determining permanency, with no single factor to be given greater weight than any other. The Arbitrator finds the first factor, i.e., any AMA Guides impairment rating, irrelevant as neither party offered such a rating into evidence. The Arbitrator assigns significant weight to the second and third factors, Petitioner's occupation and age at the time of injury. Petitioner returned to work for Respondent in April 2018, following a long hiatus. She is still a plumber/pipefitter in terms of her job title, salary and access to overtime, and is earning more than she did before the accident (see RX 2-3), but is unable to perform many of the tasks associated with her trade. Her injury involves her dominant right arm. Respondent elected to offer her an accommodated, supervisory job two months prior to trial but there is no guarantee this accommodation will continue. Petitioner credibly testified her accommodated position consists of acting as a conduit for another supervisor. That individual describes the project that needs to be accomplished and she conveys this description to a team of tradesmen and apprentices. Petitioner's credible description of her duties persuades the Arbitrator that her current accommodated job is a created position. [See Jackson Park Hospital v. IWCC, 2016 IL App (1st) 142431WC for an analysis of such a position in the context of a wage differential claim.] As for the issue of age, Petitioner was 49 as of the 2014 accident. The Arbitrator views her as a middle-aged individual who could reasonably anticipate working and experiencing the effects of her injury at work for another 12 to 15 years. As for the fourth factor, future earning capacity, the Arbitrator again notes that, while Petitioner was reaping the financial benefits of her trade as of trial, there is no assurance she will continue to do so in the future. From a medical/restrictions standpoint, she is not able to perform many of the duties required of a plumber/pipefitter. With respect to the fifth and final factor, evidence

of disability corroborated by the treating medical records, the Arbitrator notes the examination findings of Drs. Nigro, Miz, Robinson and Lowe along with the various MRI and EMG results.

The Arbitrator, having considered the foregoing along with Petitioner's credible testimony as to her current symptoms and limitations, finds that Petitioner has established permanent partial disability equivalent to 35% loss of use of the person as a whole, representing 175 weeks of benefits under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GERI MOULTRIE,

Petitioner,

vs.

NO: 14 WC 27677
15 WC 17718

DIAGRAPH BRADLEY,

Respondent.

19IWCC0378

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 partial disability-nature & extent only, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACTS

A. Background

Petitioner, a 56-year-old packer/pourer, had been employed by Respondent for over 30 years. Petitioner performed various jobs over the years and had been a packer/pourer for about the last 10 years.

In this position, she worked in the "ink room" where she would package and ship various types of ink, some of which was for tattoos. Petitioner explained that she would pack the product, put it on a skid, and then wrap it and send it out. She worked alongside another co-worker who would pour the ink into the gallon cans and Petitioner packed four gallons into a box that she labeled. The boxes were stacked taller than she was by the fourth layer. As such,

Petitioner had to reach, pick up and throw up boxes. She testified that there were about 98 gallons per skid.

B. Accidents and Interim Medical Treatment

Petitioner sustained two undisputed accidents while employed by Respondent. The first accident occurred on May 29, 2014 when she injured her back. Petitioner explained that boxes were stacked three and four high, so she could not slide boxes there. She had to lift and scoot them over. Given her short stature, Petitioner explained that she had to move her body around to correctly get gallons of ink into the boxes. While engaged in this activity, Petitioner stated that it was too far, so she kind of reached out and sprained her back.

Petitioner testified that, when she did hurt her back, she thought it was just one of those things, she just worked really hard that day. The next day she was instructed by her supervisor to use a dolly in the absence of an otherwise available hoist to scoot a very heavy multi-purpose white barrel across the room and then hoist it up. As Petitioner did not have the hoist to use, she had to take the barrel off and pick it up herself. She explained that the barrel was bigger than she was. Petitioner stated that the barrel was very heavy to pick up, so she had to lean, pull it, and lean back at which time she hurt her back. Petitioner felt pain in her back that ran into her legs. She testified that her right leg hurt every day and night, and she could not figure out what was wrong with her.

Petitioner then went to Dr. Zambrano at the Center for Medical Arts for treatment the next day. Therapy was prescribed as well as a lumbar MRI and EMG/NCV for diagnostic purposes. Petitioner underwent the MRI in September of 2014. Per Dr. Zambrano, the MRI revealed disc bulges with spinal stenosis. Petitioner also underwent the recommended EMG/NCV on July 24, 2014. The interpreting physician noted right radiculopathy at L3-4 and right peroneal neuropathy due to axonal loss.

Petitioner continued to undergo medical treatment with medications and therapy. She was prescribed various pain medications, additional physical therapy, and an epidural steroid injection that she ultimately underwent on August 19, 2015. Petitioner testified that the injection was not helpful at all with her pain.

By December 11, 2014, Dr. Zambrano of the Center for Medical Arts released Petitioner to return to work with no lifting over 30 pounds. Petitioner received no medical treatment with Dr. Zambrano from December 10, 2014 to May 28, 2015. Petitioner had gone to SIH Brain and Spine, Dr. Criste, pain management, in January and March 2015 still waiting for the ESI authorization.

Petitioner then sustained her second undisputed accident on May 27, 2015. She testified that the supervisor told her to move a skid that had only one box of ink on it, which she responded that she could not do. He told her it was only the one box, and to just move it out of there as they needed it. Petitioner waited for someone else to move it, but no one else would. She also kept calling the safety manager, but she did not answer the call. In order not to be insubordinate, Petitioner took a two-wheeler, jacked it up, and pushed the skid with the dolly up

the hill. By the end of the day, she was hurting really bad, so she clocked out and went home.

The following day as she was getting ready for work, Petitioner testified that she went to bend over, and she could not get up. She yelled for her husband to come and help her, and she finally got up and he helped her get dressed. Petitioner went to work and told her supervisor that she hurt herself, as she could not bend over and could not reach anything.

C. Additional Medical Treatment

The medical records reflect that June 29, 2015, Dr. Zambrano reinstated a 30-pound lifting restriction with no overhead lifting due to the chronic back pain. Dr. Newell, on September 2, 2015, noted no improvement after an ESI. He ordered an upgraded MRI and EMG and recommended sedentary work.

On September 30, 2015, Petitioner underwent the previously recommended lumbar MRI. The interpreting radiologist found the following: mild grade degenerative spondylolisthesis at L3-4; stable bilateral foraminal stenosis left greater than right at L3-4, L4-5, and most severe L4-5; no evidence of disc protrusion; no acute compression fractures; mild central canal stenosis L3-4; and a right-side renal transplant.

Petitioner underwent additional physical therapy at RIC/SIH. She testified that a point came when it did not seem that she would improve sufficiently to return to work, and her doctors placed her on restrictions.

The medical records reflect that Petitioner eventually underwent a functional capacity evaluation (FCE) on October 15, 2015 to assess her strength and abilities. The evaluating physical therapist noted that there were segmental inconsistencies suggesting sub-maximal effort. However, the therapist also stated that "Reliability of Pain results obtained during testing indicate pain could have been considered while making functional decisions." Petitioner was placed at a sedentary work level with only occasional lifting below waist level at 15 pounds. She was noted to be able to perform 55.3% of the demands of her job, and increased pain was noted with testing.

Dr. Zambrano reviewed the FCE report of October 15, 2015 and placed Petitioner at maximum medical improvement. Petitioner testified that she understood that she was basically released from his medical care, and as good as she was going to get. She understood the restrictions were permanent based on the FCE.

D. Section 12 Examination – Dr. Chabot

On March 18, 2016, Petitioner underwent a Section 12 examination with Dr. Chabot at Respondent's request. Dr. Chabot issued a report in which he diagnosed Petitioner with history of chronic back strain, chronic lumbar radiculopathy, history of chronic renal failure, status post bilateral kidney transplant, and status post aortic valve replacement. Dr. Chabot noted that the EMG/NCV failed to reveal active radiculopathy. He also noted that Petitioner's functional capacity evaluation was most likely performed with submaximal effort, finding that the 15-

pound limit noted in the report was conservative.

Notwithstanding, Dr. Chabot ultimately found causal connection and opined that "it is possible that [Petitioner's] job duties aggravated her underlying degenerative condition. She has multiple profound comorbidities that could contribute to her generalized deconditioning and the work duties she performed could have aggravated her underlying conditions." He also opined that Petitioner was capable of more frequent lifting in the 5/10-pound range and occasional lifting of 35 pounds. Dr. Chabot did not feel that Petitioner was well-suited for her prior job duties as outlined in her job description, and that "[s]he would not tolerate job duties that require repetitive bending, twisting and lifting." He further stated that "[t]hese recommendations are based on her age and profound multiple comorbidities and not necessarily due to her chronic back complaints." Dr. Chabot concluded that Petitioner was at

E. Evidence Deposition – Dr. Chabot

Dr. Chabot gave testimony at an evidence deposition taken on January 27, 2017. Dr. Chabot is a board-certified orthopedic spine surgeon. He testified that he did perform a Section 12 examination of Petitioner at request of Ms. Carter from Genex for Respondent.

In contrast to the findings in his report, at his deposition Dr. Chabot opined that Petitioner suffered only a temporary aggravation or exacerbation of her pre-existing degenerative condition. He further opined that her work restrictions were unrelated to the accidents and, rather, solely related to her underlying issues and co-morbidities.

F. Additional Information

Petitioner testified that after the second accident and the treatment thereafter, she never did return to her former job. She understood that returning to work "would damage [her]." After her release from her physician's care and placement at maximum medical improvement, Petitioner understood that she was basically done with treatment.

Also after her second accident, Petitioner explained that her back and leg pain changed. She explained that she could not move or bend over, and her leg was like a log. Petitioner testified that it was also kind of hard to walk; the pain just went down her right leg such that she could hardly "walk right."

Petitioner also agreed at the hearing, as noted in the medical records, that she was a high risk for surgery given her prior kidney transplant and surgery could not be considered because of her other health issues.

Petitioner further testified that after she saw her doctors and they released her, it was clear that she would not return to work. She eventually applied for and has been receiving Social Security Disability (SSD) benefits, but she agreed that her SSD case was not strictly related to her back condition, but also to her many different health issues. Besides having had a kidney transplant, Petitioner also had an aortic heart valve replacement. Petitioner also agreed other than SSD benefits, she has had no income since she stopped working for Respondent. Petitioner

19IWCC0378

further conceded that she had not looked for any work.

II. ANALYSIS

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

With regard to subsection (i) of §8.1b(b), neither party submitted an AMA impairment report for consideration. Thus, the Commission gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner performed a heavy manual labor position prior to the accidents at work, which she testified that she can no longer perform and is corroborated by the results of her valid functional capacity evaluation. Thus, the Commission gives greater weight to this factor.

19IWCC0378

With regard to subsection (iii) of §8.1b(b), Petitioner was 56 and 58 years old at the time of her first and second accidents respectively. Thus, the Commission gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner was released with permanent restrictions that would prevent her from returning to her full duty position as a packer/pourer with Respondent. Petitioner applied for, and receives, social security disability benefits as a result of her multiple health conditions, including her low back condition after her accidents at work. There is no evidence that Petitioner attempted a job search within a sedentary restriction. Petitioner had worked for Respondent for 30 years as a laborer in various positions, and there is no information in the record regarding her education and training. Moreover, there is no evidence that Petitioner would be able to find work within her restrictions as indicated by the considering her work history. Petitioner gave unrebutted testimony that she was unable to return to her former employment with Respondent, which is corroborated by her functional capacity evaluation results and Dr. Chabot's opinions as contained in his Section 12 examination report. Thus, the Commission gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), Petitioner suffered two accidents involving her low back that resulted in extensive conservative medical treatment and permanent work restrictions preventing her from returning to her work for Respondent. Petitioner underwent physical therapy, medication management and epidural steroid injections. After her second accident at work, Petitioner underwent additional medical treatment including a recommendation for surgery, which she was unable to undergo given her prior kidney transplant and other health issues. Respondent's Section 12 examiner, Dr. Chabot, initially opined that Petitioner's restrictions were causally related to Petitioner's accidents at work. Petitioner's treating physician, Dr. Zambrano, agreed with the work restrictions as did Dr. Newell. The medical records reflect Petitioner's continuing complaints of low back pain and leg radiculopathy. Petitioner worked for Respondent for 30 years and had no work experience beyond labor work experience. The accidents resulted in permanent work restrictions affecting Petitioner's ability to return to her occupation. Thus, the Commission gives greater weight to this factor.

The Commission notes that Section 8(d)2 of the Act addresses injuries to the Person-as-a-Whole stating that compensation is awarded under the section "... if such injuries partially incapacitate [the employee] from pursuing the duties of h[er] usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive h[er] right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section then in any of the foregoing events ...." 820 ILCS 305/8(d)(2) (LEXIS 2011).

The record as a whole establishes that Petitioner has sustained a loss of occupation and cannot return to her customary line of employment as a result, in part, of her accidents at work. Thus, the Commission finds that the facts and circumstances evidenced in this case establish an award of 25% loss of the person-as-a-whole, and herein, modifies to increase the arbitration award as such. This award being more consistent with prior cases of similar nature and result.

19IWCC0378

the permanency award on its determination that Petitioner's work-related injuries resulted in the loss of her normal profession. I disagree with that determination by the majority.

The Arbitrator assessed Petitioner's permanent disability in light of her pre-existing and unrelated serious co-morbid conditions and determined that the work injuries resulted in loss of 12.5% of the person-as-a-whole. In contrast, although the majority notes that Petitioner testified to her other unrelated conditions of ill-being, it ignores those conditions in assessing her current level of disability. The majority bases its permanency award on the assumption that Petitioner's level of current disability and her inability to perform her previous job activities are caused solely by the work injuries to her back. I believe the Arbitrator's analysis is preferable.

In addition, Respondent's Section 12 medical examiner, Dr. Chabot, noted that Petitioner had extensive pre-existing degenerative disc disease, his clinical examination was relatively benign, the objective acute findings regarding her back condition were relatively minor, there were suggestions of symptom magnification in her medical records, and that he believed Petitioner provided sub-optimal effort in her FCE. He also opined correctly, in my opinion, that her unrelated and serious pre-existing health issues significantly contributed to her current level of disability.

For the reasons stated above, based on the entire record before us, I would have affirmed the Arbitrator's permanency award. Therefore, I respectfully dissent.

DLS/dw
O-7/11/19

Deborah L. Simpson
Deborah L. Simpson

19IWCC0378

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $468.96 per week for a period of 125 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 25% loss of Petitioner's person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $58,800.00. 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: JUL 24 2019

Barbara N. Flores

BNF/jsf
7/11/19
045

Marc Parker

Commissioner Simpson dissenting
14 WC 27677 – Moultrie v Diagraph
Dissent

I respectfully dissent from the Decision of the majority. The majority modified the Decision of the Arbitrator to increase the permanent partial disability award from 62.5 weeks, representing loss of 12.5% of the person-as-a-whole, to 125 weeks representing loss of 25% of the person-as-a-whole. I would have affirmed the Arbitrator's permanency award in its entirety.

Petitioner sustained two accidents on May 29, 2014 and May 27, 2015 resulting in injuries to her lower back. She was treated conservatively after both accidents. Petitioner had an FCE on October 15, 2015 in which she was rated as able to work at a sedentary physical demand level, which was below the physical demand level of her job. She was released with permanent restrictions based on the FCE results.

Petitioner testified that she was on Social Security disability. However, on cross examination, she acknowledged that the determination of her disability included her pre-existing conditions of renal failure, with subsequent kidney transplant, and cardiac condition, with aortic valve replacement, in addition to her back condition. The majority based its 100% increase in

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOULTRIE, GERI
Employee/Petitioner

Case# **14WC027677**
15WC017718

DIAGRAPH BRADLEY
Employer/Respondent

19IWCC0378

On 1/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

GERI MOULTRIE
Employee/Petitioner

v.

DIAGRAPH BRADLEY
Employer/Respondent

Case # **14 WC 27677**

Consolidated cases: **15 WC 17718**

19IWCC0378

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 **Herrin**, on **November 14, 2018**. By stipulation, the parties agree:

On the dates of accident, **05/29/2014 and 05/27/2015**, Respondent was operating under and subject to the provisions of the Act.

On these dates, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of these accidents were given to Respondent.

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

In the year preceding the injuries, Petitioner earned **$40,643.20**, and the average weekly wage was **$781.60**.

At the time of injuries, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

ORDER

Respondent shall pay Petitioner the sum of $**468.96**/week for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **a 12.5% loss of use of a person-as-a-whole** .

Respondent shall pay Petitioner compensation that has accrued from **05/29/2014** through **11/14/2018**, and shall pay the remainder of the award, if any, in weekly payments.

Cases 14 WC 27677 and 15 WC 17718 are no longer consolidated with cases 11 WC 45128, 12 WC 26250, and 13 WC 06876.

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.

Edmund Lee
Signature of Arbitrator

12/30/18
Date

JAN 7 - 2019

Geri Moultrie
vs.
Diagraph Bradley

19IWCC0378

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of arbitration, the sole issue in dispute is the nature and extent of Petitioner's injuries from the accidents of May 29, 2014 and November 14, 2018. Additionally, cases 14 WC 27677 and 15 WC 17718, were previously consolidated with cases 11 WC 45128, 12 WC 26250, and 13 WC 06876. Pursuant to the agreement of the parties, it is hereby ordered that cases 14 WC 27677 and 15 WC 17718 are no longer consolidated with cases 11 WC 45128, 12 WC 26250, and 13 WC 06876.

The Arbitrator Finds

Petitioner testified that, on both dates of accident, she worked for Respondent as a packer/pourer in the ink room. Petitioner testified her job duties included putting four one gallon containers of ink into a box, putting labels on the boxes, stacking the boxes on a pallet, and then wrapping the boxes that are stacked on a pallet. Petitioner testified that, on May 29, 2014, while at work, she reached overhead to tape a container and felt low back pain. Later during the day on May 29, 2014 at work, according to Petitioner's testimony, she picked up a mixer to chest level and leaned back and felt pain her low back and right leg.

According to the medical records admitted into evidence, Petitioner was seen by Dr. Zambrano on June 6, 2014 complaining of right leg pain (PX2). Petitioner underwent an EMG/nerve conduction study on July 24, 2014, which revealed right L3-L4 radiculopathy and right peroneal neuropathy due to axonal loss (PX3). The first time a work injury to the back is mentioned in the medical records is when Petitioner returned back to Dr. Zambrano on July 25, 2014, when Petitioner was complaining of moderate to severe low back pain radiating to the right leg down to the calf. This report also indicates an MRI was done which showed a disc bulge with spinal stenosis, however, the record does not contain an MRI report done prior to July 25, 2014. Petitioner was referred to physical therapy/occupational therapy and neurosurgery, and was to continue with pain management (PX2).

Petitioner was seen by a physician's assistant at SIH Brain and Spine Institute on August 1, 2014. Petitioner provided a history of injuring her low back at work while lifting two months prior. Petitioner also reported that her symptoms waxed and waned for two to three weeks, and then she began having pain going down the right leg. Petitioner reported that, the night before, she had numbness in the left leg from the knee down to her foot. The physician's assistant indicates that he reviewed an MRI of the lumbar spine which revealed multi-level lumbar spondylosis and varying degrees of foraminal stenosis. Petitioner was advised to continue physical therapy and seek further pain medication from her primary care physician (PX3).

Petitioner returned to Dr. Zambrano on September 5, 2014. Dr. Zambrano increased the dosage of Tramadol and gave Petitioner a prescription for Hydrocodone to take as needed. Petitioner was next seen for back pain by Dr. Zambrano's physician's assistant on October 31, 2014. Petitioner reported her symptoms as being

moderate. Petitioner was requesting an extension of her lifting restriction at work. Accordingly, Petitioner's lifting restrictions of lifting no more than 30 pounds were continued. Petitioner was also to continue physical therapy. Petitioner's lifting restrictions were again continued on November 5, 2014. On December 10, 2014, Dr. Zambrano continued the lifting restriction even though Petitioner was seen by Dr. Zambrano only for chronic renal failure, being a transplant recipient, Vitamin D deficiency, and well controlled hypertension (PX2).

Petitioner was seen by Dr. Criste at SIH Brain and Spine Institute on January 7, 2015 complaining of moderate low back pain radiating down to the right foot. Dr. Cristie recommended an epidural steroid injection. Petitioner was seen by Dr. Cristie's nurse practitioner on March 6, 2015 stating that she did not have the epidural steroid injections because workers' compensation denied the request. Petitioner reported that her low back pain had increased because she is no longer allowed to sit while working and has to stand all of the time. It was reported that Petitioner was not a surgical candidate due to Petitioner having a kidney transplant. Petitioner was given a prescription for Gabapentin and epidural steroid injections were still being recommended (PX3).

Petitioner testified that she re-injured her back on May 27, 2015 when she was moving a pallet with one box on it using a hand jack to go up an incline. Petitioner reported that, the next day, she could not straighten up after bending at the waist and she could not move her right leg.

On June 29, 2015, Dr. Zambrano reinstated a 30 pound lifting restriction with no overhead lifting due to chronic back pain (PX2). Petitioner was seen by Dr. Newell, a rehabilitation doctor, on September 2, 2015. Dr. Newell reported that Petitioner had no improvement with an epidural steroid injection. Dr. Newell ordered an updated MRI and EMG. Dr. Newell recommended sedentary work. The MRI was performed on September 30, 2015 and revealed mild Grade I degenerative spondylolisthesis at L3-4, stable bilateral foraminal stenosis, left greater than right, at L3-4 and L4-L5, with the findings most severe at L4-5, and mild central canal stenosis at L3-4 with no evidence of a disc protrusion. Petitioner underwent a functional capacity evaluation on October 20, 2015. The evaluator reported that Petitioner was able to perform 55.3% of the physical demands of her job as a pourer for Respondent. The evaluator reported that there were segmental inconsistencies during the testing resulting in mild sub-maximal effort on the part of Petitioner. The evaluator reported that pain could have been considered by Petitioner while making functional decisions. Based on the results of the FCE, the evaluator assessed Petitioner to be at the sedentary physical demand category at work, that being, occasional lifting below the waist height up to 15 pounds, lifting 5 pounds to shoulder height, and 5 pounds overhead, as well as, carrying 10 pounds with pushing and pulling of 20 pounds (PX5).

On November 16, 2015, Dr. Zambrano placed Petitioner at permanent restrictions of no lifting more than 15 pounds, occasional bending and squatting, and no climbing (PX2).

Petitioner testified that she has not been back to work. Petitioner also testified that she has not looked for employment and that she has applied for and is receiving Social Security Disability due, in part, to her having one kidney and undergoing an aortic

valve replacement unrelated to these claims. The job of an ink pourer requires, among other tasks, to be able to lift up to 50 pounds (PX8). It is noted that Petitioner did not testify as to her present condition and whether or not she continues to have any symptoms or complaints.

Petitioner underwent an independent medical examination at Respondent's request by Dr. Michael Chabot. Dr. Chabot is a board certified orthopedic spine surgeon licensed to practice medicine in Missouri and Michigan (RX1, pps. 5-6). Dr. Chabot's examination of Petitioner took place on March 18, 2016 (RX1, pps. 8-9). Dr. Chabot testified on direct examination that Petitioner had extensive degenerative changes in her back. Dr. Chabot testified that he did not agree with the FCE conclusion that Ms. Moultrie was only able to lift 15 pounds as Petitioner's performance during the FCE was sub-maximum. Dr. Chabot also testified on direct examination that he questioned the veracity of Ms. Moultrie's complaints of having debilitating back condition because Petitioner reported that she rarely used any medication to moderate her symptoms. Dr. Chabot also testified on direct examination that Petitioner's physical examination was relatively benign with her not exhibiting any significant guarding or difficulty moving. Dr. Chabot testified that these observations lead one to expect that Petitioner is not experiencing severe pain. Dr. Chabot also testified on direct examination that he was of the opinion that Petitioner could occasionally lift up to 35 pounds and frequently lift up to 5-10 pounds. Dr. Chabot further testified on direct examination that Petitioner had very profound co-morbidities in the form of chronic renal failure and an aortic valve replacement resulting in generalized deconditioning, as well as, her age and gender, which are contributing to the need for Petitioner having a lifting restrictions. Dr. Chabot testified that Petitioner had a temporary exacerbation of her low back condition as a result of the alleged work accidents, and by the time he examined her, he did not feel that that the work injuries were playing a role in Petitioner's continued complaints. Dr. Chabot also testified on direct examination that the restrictions he would place upon Petitioner are not a result of the aggravation of the back condition due to the work accidents and are solely due to the pre-existing back condition, chronic renal failure, and aortic valve replacement (RX1, pps. 11-15).

The Arbitrator Concludes

With regard to subsection (i) of 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a packer/pourer at the time of the accidents, and is unable to return to work in her prior capacity. However, the Arbitrator finds that Petitioner's inability to return back to work is not due to the work accidents, but is solely due to Petitioner's age, pre-existing spine condition, and unrelated co-morbidities of chronic renal failure and aortic valve replacement. This finding is supported by the unrebutted testimony of Dr. Chabot. Therefore, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accidents which occurred more than three years ago. As such, Petitioner will have a relatively short life to live with any ongoing

complaints/symptoms than the general public would have. Moreover, Dr. Chabot testified that Petitioner had recovered from a temporary aggravation of a pre-existing condition. This testimony was not rebutted. Therefore, the Arbitrator gives lesser weight to his factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that Petitioner has not looked for subsequent employment after reaching MMI even within the restrictions placed upon her by her treating doctor and she applied for and is receiving Social Security Disability benefits for unrelated conditions. Based on the previous finding that Petitioner's need for restrictions is not a result of the work accidents based upon Dr. Chabot's unrebutted testimony, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner did not testify as to any going complaints. According to the evidence, Petitioner has not treated for her condition of ill being since June 2015. The Arbitrator reiterates the finding that the restrictions placed upon Petitioner are not a result of the work accidents based on the unrebutted testimony of Dr. Chabot. Therefore, the Arbitrator gives lesser weight to this factor.

Based on the above factors and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of a person-as-a-whole due to a temporary aggravation of a pre-existing degenerative condition.

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

Joseph McGrane,

Petitioner,

vs.

NO: 17 WC 13006

Trane Chicago,

19IWCC0379

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and 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, 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 interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. The Commission finds Petitioner sustained significant permanent disabilities due to the September 28, 2016, work incident. After conservative treatment failed, Petitioner underwent back surgery involving a bilateral laminectomy at levels L3-L4, a right-sided microdiscectomy at levels L2-L3, and an interbody fusion through the posterior transforaminal approach at levels L4-L5. Following surgery, Petitioner attended extensive physical therapy. On September 20, 2017, the physical therapist wrote that Petitioner reported feeling much better and that the pain in his right thigh was a dull ache that waxed and waned. Petitioner reported that activity no longer affected his symptoms. He last saw his surgeon, Dr. Kahn, on October 4, 2017. On that date, Petitioner reported doing well but also complained of intermittent back pain that became worse with sneezing. Petitioner reported no radicular symptoms but did note occasional right thigh aches. He reported significant relief with physical therapy. Dr. Kahn discharged Petitioner from his care and told Petitioner to work on his diet and exercise, including his home exercise program.

On July 13, 2018, Dr. Hennessy conducted a Section 12 examination on behalf of Respondent. (RX 2). Petitioner complained of chronic pain that worsened considerably once he completed physical therapy. Dr. Hennessy opined that Petitioner's neurological examination results were normal. He further opined that the results of Dr. Kahn's final examination of Petitioner

in October 2017 were also neurologically normal. Dr. Hennessy determined that the results of the physical examination he performed revealed there might have been a pain generator other than Petitioner's lumbar spine. In fact, he testified that during parts of his examination, he found provocative signs that referenced Petitioner's hip, not his lumbar spine. After reviewing the results of Petitioner's physical examination, Petitioner's complaints, and the medical records, Dr. Hennessy determined Petitioner reached MMI at his final visit with Dr. Kahn on October 4, 2017. The doctor performed an AMA impairment rating and concluded Petitioner sustained a 15% whole person impairment due to the work injury.

During the arbitration hearing, Petitioner complained of chronic and severe back pain. He testified that he no longer golfs as much as he used to and now can only play nine holes of golf. Tr. at 35. Petitioner no longer rides his bike and has trouble carrying items up and down stairs. Petitioner testified that he can no longer sit or stand comfortably for prolonged periods. He testified that he can only drive one hour without needing a break and that he has been unable to visit China due to the extremely long flight. He testified that the pain in his right hip sometimes aggravates his back.

After carefully considering the evidence, including Petitioner's testimony of ongoing complaints, the Commission finds Petitioner sustained a 20% loss of use of the whole person. In so finding, the Commission assigns less weight to factor (v) of Section 8.1b(b)—evidence of disability corroborated by the treating medical records. While Petitioner testified that he continues to suffer from severe residual symptoms, the medical evidence paints a different picture. Dr. Kahn discharged Petitioner from his care on October 4, 2017, and prescribed no work or activity restrictions. Petitioner returned to his regular job in July 2017 and continued to perform all his work duties until his retirement. These work duties included using ladders to access rooftops. Petitioner has never sought additional treatment relating to his allegedly significantly deteriorating condition and does not take prescription medication to deal with his symptoms. In fact, Petitioner testified that he only occasionally takes over-the-counter pain medicine. Petitioner also admitted that his lumbar spine was not pain free prior to his work injury. While there is certainly no question that Petitioner's work injury aggravated the pre-existing condition of his lumbar spine, the Commission believes a finding that Petitioner sustained a 25% loss of use of the whole person does not adequately account for the lack of corroboration in the medical records regarding the severity of Petitioner's alleged ongoing complaints. After weighing the five factors pursuant to Section 8.1b of the Act, the Commission finds Petitioner sustained a 20% loss of use of the whole person.

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 December 17, 2018, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of **$775.18** for **100** weeks, because Petitioner's injuries caused **20%** loss of use of the whole person, as provided for in §8(d)2 of the Act.

19IWCC0379

IT IS FURTHER ORDERED 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 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: JUL 24 2019

d: 7/10/19
DDM/jds
52

Maria E. Portela

L. Elizabeth Coppoletti

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Decision of the Arbitrator. After considering the totality of the evidence, I believe the Arbitrator appropriately determined that Petitioner sustained a 25% loss of use of the whole person as result of the September 28, 2016, work incident.

Petitioner sustained an injury to his lumbar spine after stepping in a hole with his right foot and almost falling. Conservative treatment, including physical therapy and lumbar injections, failed to provide substantial relief for Petitioner's complaints of significant lumbar pain with radiculopathy. Petitioner eventually underwent lumbar surgery that involved a bilateral laminectomy at L3-L4, a right-sided microdiscectomy at L2-L3, and a posterior fusion at L4-L5. Petitioner was able to return to work without restrictions; however, Petitioner's position as a project manager was not physically strenuous. Even in this nonstrenuous position, Petitioner's supervisor testified that he observed Petitioner having difficulty or discomfort with some actions relating to his job. While Petitioner has no prescribed restrictions, he credibly testified that the work injury has significantly impacted his ability to enjoy his normal activities and hobbies. The Arbitrator diligently weighed all five factors pursuant to Section 8.1b of the Act and provided a well-reasoned and detailed explanation for the conclusion that Petitioner sustained a 25% loss of use of the whole person due to the work accident. I do not believe an award of 20% loss of use of the whole person adequately assesses the full extent of Petitioner's permanent disability.

19IWCC0379

For the forgoing reasons, I would affirm and adopt the Arbitrator's Decision and find Petitioner suffered a 25% loss of use of the whole person due to the September 28, 2016, work accident.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McGRANE, JOSEPH
Employee/Petitioner

Case# **17WC013006**

TRANE CHICAGO
Employer/Respondent

19IWCC0379

On 12/17/2018, 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 2.48% 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:

4036 MILLON & PESKIN LTD
MITCHELL PESKIN
310 S COUNTY FARM RD STE J
WHEATON, IL 60187

6205 HEYL ROYSTER VOELKER & ALLEN
BRAD A ANTONACCI
33 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

19IWCC0379

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

Joseph McGrane
Employee/Petitioner

v.

Trane Chicago
Employer/Respondent

Case # 17 WC 13006

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **September 18, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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 _____

STATE OF ILLINOIS

FINDINGS

On **September 28, 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 **$129,620.40**; the average weekly wage was **$2,492.70**.

On the date of accident, Petitioner was **69** 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 **$19,390.02** for TTD, **$n/a** for TPD, **$n/a** for maintenance, and **$n/a** for other benefits, for a total credit of **$n/a**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$775.18**/week for **125** weeks, because the injuries sustained caused the **25%** loss of the person as a whole, as provided in Section 8(d)2 of the Act, as set forth in the Conclusions of law attached herein.

Respondent shall pay Petitioner compensation that has accrued from September 28, 2016 through September 18, 2018 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

12/17/2018
Date

DEC 17 2018

Procedural History:

This matter was tried before Arbitrator Frank Soto on September 18, 2018. The disputed issues were whether Petitioner's current condition of ill-being was causally connected to his injury and the nature and extend of Petitioner's injury. The parties stipulated that Petitioner was paid TTD benefits from April 4, 2017 through July 7, 2017 and Respondent paid Petitioner $19,390.04 in TTD benefits. (Arb. Ex. #1)

Findings of Fact:

Joseph McGrane (hereafter referred to as "Petitioner") was employed by Trane Chicago (hereafter referred to as "Respondent") as a project manager. (T. 9-10). Petitioner testified that Respondent is an HVAC equipment manufacturer that also designs projects for buildings. (T. 12). Petitioner was hired by Respondent in 2013. (T. 10). Petitioner's job involved overseeing projects and he would hire subcontractors and oversee the management of construction projects. (T. 11-12). Petitioner's job required him to oversee projects in Will, Cook and DuPage Counties. (T. 12). Petitioner testified that his job duties included working on roofs and climbing ladders and staircases. (T. 13).

Petitioner testified, that on September 28, 2016, he was performing a site inspection, at a fire station, when he stepped into a hole causing him to fall backwards. Petitioner testified that he was caught by Dan Burrels and a fire department lieutenant. (T. 17). Petitioner testified that he ended up in a seated position on top of the hole but did not fall all the way down. (T. 18). Petitioner testified that the hole was oval and about the size of basketball. (T. 18).

Petitioner testified that his right ankle, knee and back was tender. (T. 19, 21). Petitioner testified that his condition progressively worsened over the next couple of weeks and he noticed right hip, right thigh and right knee pain which he never had before. (T. 20, 21). Petitioner also testified he was also experiencing moderate back discomfort. (T. 20). Petitioner testified that he reported the incident to Justin Smith the safety director. (T. 19-20). An accident report was completed, and Petitioner directed to Concentra for medical treatment. (T. 20).

On October 13, 2016 Petitioner started treating at Concentra. Petitioner reported worsening symptoms of pain in the right lateral hip and right buttock with pain that radiated into the right thigh. Petitioner further reported that his symptoms worsened after a trip without a fall at work on September 28, 2018. The exam noted antalgia on the right, joint pain, swelling and

stiffness. Petitioner was diagnosed with a strain of the right hip and right thigh and prescribed physical therapy. Petitioner was also placed on light duty. (PX1).

On November 8, 2016, Petitioner returned to Concentra. At that time, Petitioner reported pain in his lower back radiating to his right leg. (PX1). Petitioner was diagnosed with a lumbar strain and strain of the right hip and thigh. Petitioner was proscribed physical therapy and referred to an orthopedic specialist. (PX1).

Petitioner attended physical therapy at Athletico from October 26, 2016 through November 23, 2016. The initial history indicated that following his accident the Petitioner had pain in his ankle and knee and about a week later Petitioner began experience pain in his buttocks that radiated to his knee. On November 23, 2016 the therapist noted that Petitioner was experiencing constant pain. (PX4).

On November 30, 2016 Petitioner sought treatment with Dr. M. Kamran Khan, an orthopedic specialist. Dr. Khan noted that Petitioner had undergone therapy and recently experienced a progression of back pain radiating down his right leg in the L4-5 distribution. Dr. Khan diagnosed lumbar radiculopathy and osteoarthritis of the lumbar spine and prescribed a lumbar MRI and x-rays. (PX 2).

On December 7, 2016, Petitioner had an MRI at Silver Cross Hospital. (PX 2, PX 3). The MRI showed a right paracentral disc extrusion at L2-3 extending inferiorly into the right lateral recess. The MRI noted the extrusion could be abutting the right L3 nerve root. The MRI also noted a bulging disc at L3-4 eccentric to the right that could be causing right neural foraminal stenosis and was encroaching upon the exiting right L3 nerve root. (PX 2, PX 3).

On December 12, 2016, Petitioner returned to Dr. Khan who reviewed the MRIs. Dr. Khan indicated that the MRI showed two herniated discs on the right with extruded discs at L2-3 and L3-4. Dr. Khan also noted spondylolisthesis at L4-5. Dr. Khan referred Petitioner to pain management for injections and amended Petitioner's light duty restrictions to include no lifting more than five pounds. (PX2).

On January 4, 2017, Petitioner saw Dr. Anil Bajaj. Petitioner reported low back pain since a work accident of September 28, 2016 which progressively worsened. Petitioner reported that the pain emanated from the lower back and extended to the front of Petitioner's right thigh. Dr. Bajaj opined that Petitioner's symptoms were consistent with the L3-4 dermatomal distribution. Dr. Bajaj performed a lumbar epidural injection on the right at L3-4. (PX 3). Petitioner testified that

he had brief relief from the injections for only a couple of days. (T. 26). On January 20, 2017, Petitioner underwent a right L5-S1 lumbar epidural injection. (PX 3).

Petitioner returned to Dr. Khan on January 30, 2017. At that time, Petitioner reported right hip and right leg pain traveling down his thigh down to his calf. Petitioner also reported tingling and paresthesias. Dr. Khan recommended a transforaminal lumbar interbody fusion 4-5 and right decompression and discectomies at L2-3 and L3-4. (PX2).

On April 4, 2017, Petitioner underwent lumbar surgery with Dr. Khan at Silver Cross Hospital which consisted of a bilateral laminectomy, medial facetectomies, and foraminotomies at L3-4; right sided microdiscectomy at L2-L3; and a posterior fusion at L4-5 using local laminectomy bone and a Pioneer PEEK implant. (PX 2, PX 3).

Following surgery Dr. Khan took Petitioner off work. On May 3, 2017, Dr. Khan prescribed physical therapy. Petitioner attended physical therapy at Atheltico beginning on May 8, 2017. (PX4).

On July 5, 2018, Petitioner returned to Dr. Khan. At that time, Dr. Khan noted that Petitioner's preoperative symptoms had resolved. Dr. Khan released Petitioner to return to work without restrictions and recommended Petitioner complete physical therapy. (PX2). On September 20, 2017 Petitioner completed 46 physical therapy sessions and was discharged. (PX4). Petitioner returned to see Dr. Khan on October 4, 2017. Dr. Khan noted that Petitioner was still having intermittent lower back pain aggravated by sneezing causing a "jolt." Feeling. Dr. Khan also noted Petitioner continued to experience thigh aches at times. Dr. Khan directed the Petitioner to follow up in 6 months as needed. The Petitioner never returned to Dr. Khan. (PX2).

On July 13, 2018, Petitioner was examined by Dr. Ryon Hennessy pursuant to Section 12 of the Act. (RX2). Dr. Hennessy prepared an impairment rating. In his report, Dr. Hennessy noted that Petitioner reported his relief from his surgery had declined from 80% to about 50% improvement after stopping physical therapy. Dr. Hennessy also noted that Petitioner reported low back pain with mild activity and that Petitioner was never pain free. Dr. Hennessy found Petitioner to have a Functional History Grade Modifier of 2. Dr. Hennessy assessed a Grade Modifier of 0 after the physical examination noting that Petitioner was neurologically normal and had no atrophy, sensory deficits or motor weakness and a negative straight leg raise test. Dr. Hennessy opined that the Petitioner obtained maximum medical improvement on October 4, 2017.

Dr. Hennessy further opined that, pursuant to the AMA Guides, Sixth Edition, Petitioner had a 15% whole person impairment rating. (RX2).

Dr. Hennessy testified that he is an expert in the AMA Guides. (RX 1, Pg. 38). Dr. Hennessy testified that the AMA guides are not entirely evidence based and there are subjective components to it. (RX 1, Pgs. 45-46). Dr. Hennessy acknowledged that, under the Guides, the more significant the class a person is put into when determining impairment, the less effect the grade modifiers will have in moving within the class. (RX 1, Pgs. 61-63). Dr. Hennessy testified that the impairment is not disability. (RX 1, Pg. 48).

Petitioner testified that he stopped working for Respondent following his surgery and he was paid TTD benefits until being released to return to work by Dr. Khan on July 5, 2018. Petitioner testified that he returned to his job. (T. Pgs. 29, 30, 32). Petitioner continued to work for Respondent until he retired on April 20, 2018. (T. Pgs. 10, 34). After retiring, Petitioner started working for Nickelson Industrial Services performing consulting work. Petitioner testified that he works 24 hours a week at his new job. (T. Pg. 34).

Petitioner testified that prior to his accident he did not have any treatment for his lower back nor did he have any difficulty performing his job. (T. Pgs. 32, 33). Petitioner testified he is 71 years old and he continues to experience pain in his right hip that radiates down through his thigh and in his knee, which aggravates his back. (T. Pgs. 36, 38, 45, 48). Petitioner testified that his pain is always there whether he is sleeping or standing. (T. Pg. 36). Petitioner further testified that he is unable to ride his bike, perform yardwork, and carry things up and down the stairs to his basement. Petitioner also testified that he is unable to move furniture and he can't play golf as much as he prior to his injury. (T. Pgs. 35-36). Petitioner testified that his injury has adversely impacted his sex life. (T. Pgs. 35-36). Petitioner testified that his condition also impacts his ability to sit or stand for long periods and that he can't drive for more than hour without stopping. (T. Pgs. 35-36). Petitioner testified that he experiences difficulties sleeping and wakes up and change positions because his right hip, thigh and leg bother him. (T. Pg. 30).

Keith Maser testified for Respondent. Mr. Maser testified that he is employed by Respondent and that he worked in the same department as the Petitioner. Mr. Maser testified that Petitioner returned to work in July 2017 and that, after Petitioner returned to work, he did not notice any changes in Petitioner's job performance. (T. Pgs. 54-55). Mr. Maser did testify that he

would see the Petitioner adjust his position from sitting to standing due to discomfort. (T. Pgs. 55-56).

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With Respect To Issue (F) Whether the Petitioner's Current Condition of Ill-being is Causally Related to the Injury, the Arbitrator Finds as follows:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner's current conditions is causally connected to his work injury of September 28, 2016, set forth more fully below.

The Arbitrator notes that Petitioner's testimony concerning his accident was unrebutted. All the medical histories provided to the Petitioner's various doctors were consistent. Following his accident, the Petitioner developed progressively worsening pain and discomfort in his right leg and back which lead him to seek medical treatment. Prior to his accident Petitioner did not have any treatment for his lower back and did not have any difficulty performing his job with the Respondent. Following his accident, he was placed on light duty restrictions. Petitioner had a consistent course of medical treatment, starting with conservative care in the form of physical therapy and injections, and ultimately lower back surgery. The medical evidence and the Petitioner's testimony establish he did not have any reinjuries to his lower back since his accident.

The Arbitrator notes that Petitioner's complaints were corroborated by the medical records and that Respondent did not present evidence that Petitioner's current condition of ill-being was not related to his work accident of September 26, 2016.

Based upon the credible and unrebutted testimony of the Petitioner, the temporal sequence of the injuries and medical treatment, and the medical records and reports introduced into the record; the Arbitrator finds that the Petitioner's low back condition and the surgery he underwent with Dr. Khan on April 4, 2017 was also causally related to his September 28, 2016 accident. Petitioner's complaints are corroborated by the medical records. No evidence was presented the indicated Petitioner's current condition of ill-being was not related to his work accident of April 7, 2016.

With Respect to Issue (L), the Nature and Extend of the Injury, the Arbitrator Finds as Follows:

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
- (i) The reported level of impairment;
- (ii) The occupation of the injured employee;
- (iii) The age of the employee at the time of injury;
- (iv) The employee's future earning capacity; and
- (v) Evidence of disability corroborated by medical records.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that Dr. Hennessy found that Petitioner sustained a 15% whole person impairment rating. Dr. Hennessy used the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. Dr. Hennessy assigned a class 3 spondylolisthesis diagnoses to encompass multiple levels with a single diagnosis. Dr.

Hennessy did not think a Grade IV modifier for functional history was appropriate description of Petitioner's status. (RX 2). The Arbitrator gives this factor significant weight.

With regards to Subsection (ii) of Section 8.1b(b), the occupation of the injured employee. Petitioner returned to his usual and customary occupation until retiring in April 2018. Based on the Petitioner's description of his job with the Respondent, it did not appear to have been labor-intensive. Accordingly, the Arbitrator will place little weight on this factor.

With regards to Subsection (iii) of Section 8.1b(b), the age of the employee at the time of the injury. At the time of his accident, Petitioner was 69 years old. Petitioner was nearing the end of his work life and subsequently retired. Petitioner was not required to continue working with the effects of his injury for a long period of time. The Arbitrator gives this factor some weight in determining permanency.

With regards to Subsection (iv) of Section 8.1b(b), the employee's future earning capacity. Petitioner returned to work earing the same rate of pay as he was earning prior to his injury. Petitioner did not present any evidence that his future earning capacity was adversely impacted by his injury. Petitioner retired after returning to work and his retirement was not based upon his injury. The Arbitrator gives this factor little weight in determining permanency.

With regards to Subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records. The Arbitrator notes that after failing to have relief from physical therapy and epidural steroid injections, the Petitioner underwent a bilateral laminectomy, medial facetectomies, and foraminotomies at L3-4; a right sided microdiscectomy at L2-L3; and a posterior fusion at L4-5 using local laminectomy bone and a Pioneer PEEK implant. His surgery was extensive and encompassed three levels in his lower back. Dr. Khan's final examination on October 4, 2017 revealed that the Petitioner was still having intermittent lower back pain. Dr. Hennessy noted during his July 13, 2018 examination that the Petitioner had reported his condition declined from 80% to 50% after physical therapy ended. In his report, Dr. Hennessy listed various ongoing complaints stemming from the Petitioner's injury which were consistent with his testimony. Petitioner testified to ongoing issues that he continues to have from his back injury. These issues include radiating pain into his right leg and hip; back pain; a reduction in his physical activities, the inability to sit, stand and drive for long periods of time and difficulty sleeping. The Arbitrator finds that there is credible evidence of ongoing disability as reflected in the treating

medical records, Dr. Hennessy's report and the Petitioner's testimony. Accordingly, the Arbitrator assigns this factor significant weight.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of Person as a Whole and orders the Respondent to pay Petitioner the sum of $775.18 a week for a period of 125 weeks as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHELLE EGIZIO,
Petitioner,
vs.

NO: 12WC 27235

19IWCC0380

WAL-MART ASSOCIATES, INC.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, notice, permanent disability, temporary total disability, 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 September 26, 2018, is hereby affirmed and adopted.

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

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

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: JUL 25 2019
071719
DDM/jrc
052

D. Douglas McCarthy

Stephen Mathis

Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EGIZIO, MICHELLE
Employee/Petitioner

Case# **12WC027235**
12WC010767

WAL-MART ASSOCIATES INC
Employer/Respondent

19IWCC0380

On 9/26/2018, 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 2.32% 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:

1658 SAUNDERS CONDON & KENNY
JAMES J KENNEY
111 W WASHINGTON ST SUITE 1001
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BROOKE E TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0380

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

MICHELLE EGIZIO
Employee/Petitioner

v.

WAL-MART ASSOCIATES, INC.
Employer/Respondent

Case # **12** WC **27235**

Consolidated cases: **12 WC 10767**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **SEPTEMBER 28, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **AUGUST 16, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the average weekly wage was $**483.12**.

On the date of accident, Petitioner was **57** 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 $**1,932.48** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**1,932.48**.

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

ORDER

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

- The Arbitrator finds the Petitioner failed to prove that her current condition of ill-being is causally connected to her August 16, 2009 work accident. As such, her Application for Adjustment of Claim (**12 WC 27235**) 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

SEPTEMBER 26, 2018
Date

SEP 26 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHELLE EGIZIO,

Petitioner,

vs. NO: 12WC 10767

WAL-MART ASSOCIATES, INC.,

19IWCC0381

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, notice, permanent disability, temporary total disability, 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 September 26, 2018, is hereby affirmed and adopted.

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

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

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: JUL 25 2019
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DDM/jrc
052

Stephen Mathis

Elizabeth.Coppoletti

I dissent from the Majority's Decision to affirm and adopt the Arbitrator's denial of Petitioner's claim in 12 WC 10767. I find that Petitioner sustained an injury that manifested on February 15, 2012, as a result of her cumulative inventory work duties over several days on behalf of Respondent. I further find that Petitioner's current condition of ill-being as to her low back is causally related to the February 2012 accident.

The testimony and evidence adduced at arbitration demonstrate a consistent and credible history of Petitioner's work duties leading up to the date of injury, as well as the increasing pain she felt in her low back and legs, particular her right leg, while performing her inventory duties. Petitioner's pain became more noticeable and obvious, with the record supporting a manifestation date of February 15, 2012.

The case at bar presents an issue as to whether Petitioner sustained a specific injury or repetitive trauma, as well as on what date such injury occurred – whether it happened on February 15, 2012 or February 16, 2012. The Commission has original jurisdiction in cases which come before it. *Caterpillar Tractor Co. v. Indus. Comm'n*, 215 Ill. App. 3d 229, 237 (1991). The Commission also has the authority to consider new theories of recovery even if that theory was never presented to the Arbitrator and the claimant did not amend his application for adjustment of claim to include the new theory, so long as the Commission's consideration of the new theory does not prejudice a party's substantial rights. *Id.* at 238. The Commission's Decision to grant benefits under a new theory of recovery does not prejudice an employer's substantial rights if the employer is aware of evidence supporting the theory before the arbitration. *Id.* at 240; *See also*, *Freeman United Coal Mining Co. v. Indus. Comm'n*, 297 Ill. App. 3d 662, 667 (1998) (wherein the Appellate Court found that the Commission did not err when it found a different date of accident from that alleged in the application. The employer did not establish that it was prejudiced by the Commission's Decision finding a different date for the onset of the employee's injuries. The opinion further found that the Commission did not err in allowing the amendment to conform the application to the proof).

The case law clarifies the Commission's authority in such claims where the Application for Adjustment of Claim, such as in this case, states one date of injury and a general description of an accident that occurred while lifting, but the testimony and evidence at arbitration, together with the parties' Briefs, suggest a different accident date that involves either or both a specific or repetitive theory of recovery. I find that Respondent had ample opportunity, and in fact did consider each theory, each date, and addressed them. In light of this, I find that Respondent's

substantial rights have not been prejudiced. With that said, I would reverse the Arbitrator's Decision and find that Petitioner sustained a compensable, work-related injury – specifically, her low back and radicular injury, as a result of her cumulative duties over several days, and that such injury manifested itself on February 15, 2012.

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Sisbro Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Id.* An injury "arises out of" the employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

Compensable injuries under the Act may arise from a single identifiable event or be caused gradually by repetitive trauma. *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 194 (2005). An employee who suffers a repetitive-trauma injury may apply for benefits under the Act, but must meet the same standard of proof as a claimant who alleges a single, definable accident. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 64 (2006). "[T]he date of the injury in a repetitive-trauma compensation case is the date when the injury manifests itself - 'the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" *Id.* at 67. An employee alleging repetitive trauma "must still show that the injury is work-related and not the result of a normal degenerative aging process." *Edward Hines Precision Components*, 356 Ill. App. 3d at 194.

Relying on Respondent's own evidence in this claim, Respondent's Exhibit 13 are Petitioner's time cards which are consistent with Petitioner's testimony at arbitration. The time cards demonstrate that Petitioner was working for Respondent at the Evergreen Store, commencing on February 11, 2012, and continuing through February 15 and February 16, 2012. (T.55-56; RX13). Despite the Arbitrator's assertion that Petitioner could not recall what she was doing on any other day but February 16, 2012, Petitioner did in fact testify that on February 15, 2012, she had been moving and lifting different items from pallet to pallet; the items weighed between five pounds to 50 or more pounds. (T.58-59). Petitioner testified that she transferred hundreds of boxes in a single day. (T.59-60). After Petitioner filled a pallet of about 15 to 30 pieces, she would use a pallet jack to push or pull the pallet to its designated area. (T.60-61).

Respondent's Exhibit 2, completed on March 10, 2012, is the Associate Statement. The Associate Statement as to Petitioner's duties on February 15, 2012 was consistent with Petitioner's testimony at arbitration, and indicated that Petitioner's "back and legs were really sore from lifting, bending and [stooping]." (T.62-63; RX2). The Associate Statement went on to state that as Petitioner continued to perform the same duties on February 16, 2012, her back was really starting to hurt and she notified "Scott" at lunch time. (T.63-64; RX2). Petitioner's testimony at arbitration was consistent with the Associate Statement, completed less than one month from the alleged accident date.

Respondent urges this Commission to find Petitioner not credible as to her alleged accident at work, based on the testimony of its witness, Scott Scoles. Mr. Scoles had worked for Respondent on February 15, 2012 and February 16, 2012, as a co-manager at Respondent's Evergreen Park store. (T.127). Mr. Scoles denied that Petitioner had told him that her back had been hurting on February 15 or 16, 2012. (T.134-137). Respondent also relied on the fact that, "Petitioner did not report the accident to anyone for three weeks. She continued to work her normal duties until she was terminated." (Respondent's Brief, pg. 11). Respondent argues that Petitioner was familiar with Respondent's process for reporting work injuries as Petitioner had previously worked as a supervisor for Respondent. (Respondent's Brief, pg. 12).

This claim is a matter of credibility, and I find Petitioner credible. While we have Mr. Scoles' lone testimony, Petitioner's testimony is bolstered not only by Respondent's exhibits, but the medical records in evidence. For example, the medical records of Dr. Heffernan [Petitioner's primary care physician], Dr. DePhillips [Petitioner's treating neurosurgeon], and Dr. Chunduri [Petitioner's pain doctor], all state that Petitioner had severe complaints in her back and legs after lifting multiple/hundreds of boxes on February 15, 2012. (PX1; PX2). Respondent's Section 12 examiner, Dr. Mather also noted that Petitioner had injured her back on February 15, 2012 while lifting heavy boxes that weighed between five and 50 pounds. (RX1, Deposition Exhibit 2). Finally, Dr. Malek [Petitioner's 2nd, treating neurosurgeon] was the only doctor who indicated that on February 16, 2012, Petitioner was "lifting, pulling, twisting and loading plates at which point she had pain at about 10am." (T.81; PX5). Dr. Malek had relied on Dr. DePhillips' medical records and some therapy records, as well as Petitioner's testimony that she had injured herself on February 16, 2012. (PX11, pgs. 30-32).

Admittedly, the record, Petitioner's testimony, and the parties' Briefs are confusing as to what type of injury [specific or repetitive trauma] Petitioner sustained and on what date. Nonetheless, this does not defeat Petitioner's claim. Petitioner and Dr. Malek had stated that February 16, 2012 was the accident date. This may be possible given that Petitioner was performing the same duties she had been performing on February 15, 2012 [see Respondent's Exhibit 2]. Petitioner had been moving and lifting items weighing up to 50 or more pounds from pallet to pallet, and transferring hundreds of boxes in a single day. (T.58-60). Petitioner then used a pallet jack to push or pull a pallet of up to 30 pieces to a designated area. (T.60-61). Respondent did not rebut or deny that these were Petitioner's duties and that she was performing them on February 15 and 16, 2012. I rely on Respondent's exhibits and the medical records which provide the more reliable evidence as to when Petitioner's complaints or injury manifested, which in this case was February 15, 2012. It is further noted that Petitioner had been performing similar lifting duties for Respondent long before the accident date. Petitioner had worked for Respondent since 2007, with no complaints related to her low back until 2009. By late 2011, early 2012, Petitioner became a store associate, and testified to increased aches and pains due to lifting. Thus, the evidence supports a finding that Petitioner's low back condition was the result of her work duties, specifically repetitively lifting, for which said injury manifested itself on February 15, 2012.

Finally, Respondent argues that Petitioner's complaints of injury are not credible because Petitioner continued to work her normal duties until she was terminated. Our Supreme Court in *Durand v. Indus. Comm'n*, has previously stated that a Petitioner cannot be punished and

benefits denied for a work-related injury simply because an employee continued to faithfully perform his or her job duties despite bodily discomfort and damage. 224 Ill. 2d 53, 66 (2006).

I further find that Petitioner's need for the L4-5 fusion surgery was casually related to the February 2012 work injury. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). In preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Id.* at 204-205. It is axiomatic that employers take their employees as they find them. *Id.* at 205. "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434 (1982). Thus, 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. *Sisbro Inc.* at 205. In cases alleging repetitive trauma, the claimant generally relies on medical testimony establishing a causal connection between the work performed and the claimant's disability. *Nunn v. Ill. Indus. Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

Petitioner does have substantial, preexisting history involving her spine, including a previous cervical fusion from C5 to C7, a lumbar fusion at L5-S1, and Petitioner had sustained another work-related accident on August 16, 2009. (T.28-29; T.33; T.39). For the 2009 accident, Petitioner had been diagnosed with a concussion, cervical and lumbar strains, and a hand contusion. (PX3). Petitioner underwent physical therapy and returned to work full duty as of September 21, 2009. (T.37; T.101; PX3).

Petitioner acknowledged that after returning to work following her 2009 injury, she did experience difficulty in performing her duties for Respondent. For example, Petitioner's back would hurt more after prolonged standing, and sometimes she required assistance from her co-workers. (T.38). She was demoted to an associate's position at the end of 2011 or beginning of 2012. (T.40-41; T.46). Petitioner testified that she continued to have a lot more aches and pains relative to her back. "I don't know if it was the season or whatever, but you still did a lot of lifting and did a lot of different things. As an associate, you still had to do all that stuff." (T.41). Dr. Heffernan's [Petitioner's primary care physician] medical records up until February 2012 did show that Petitioner had continued back pain and lumbar radiculopathy. There was also an April 25, 2011 office visit note in Dr. Heffernan's records that stated that Petitioner had hurt her back at work lifting hundreds of boxes at Evergreen, and that Petitioner's pain was different from her chronic pain. (PX1; RX6). However, other than prescription medication, Petitioner was not receiving any other treatment and she continued to work her regular duties. (T.44; PX1).

While the record revealed that Petitioner may have had radiating pain in her legs prior to February 2012, Petitioner clarified on cross-examination, that prior to February 16, 2012, strenuous activities at work would aggravate her back, but not normal daily activities. (T.110; T.118). Following the February 15, 2012 reported injury, Petitioner returned to Dr. Heffernan for

treatment on February 29, 2012, wherein an MRI of the lumbar spine was ordered. (T.70; PX1). The office visit note from February 29, 2012, stated that Petitioner had an injury at work while lifting hundreds of boxes on February 15, 2012. Petitioner reported on and off severe back pain, as well as right leg pain. The office visit note also stated that Petitioner was not experiencing her usual back pain. (PX1). This recorded history conflicts with the Arbitrator's conclusion that Petitioner's report of injury was not credible because it followed her termination on March 8, 2012.

The MRI of the lumbar spine, completed on March 7, 2012, had no previous MRI for comparison, and revealed the prior, existing posterior fusion at L5-S1 with significant artifact that obscured further evaluation; there appeared to be some neural foraminal narrowing, right side greater than left; there was Grade 1 spondylolisthesis of L4 and L5 with facet arthropathy and ligamentum flavum thickening in a diffuse disc bulge; there was encroaching upon the exiting L4 and descending L5 nerve roots bilaterally; and, there was suspected left foraminal disc protrusion at L2-3 encroaching upon the left exiting L2 nerve root. (PX1; PX3).

Petitioner was next referred to neurosurgeon Dr. DePhillips who not only documented Petitioner's back complaints as a result of her work, but he also noted that Petitioner had not seen any spine surgeons, or had received treatment by way of physical therapy or pain management for her low back since he last saw her in 2003. (PX2). Thereafter, Petitioner's treatment progressed to physical therapy, injections, and pain medication. (T.75). Dr. DePhillips also ordered Petitioner off work beginning March 14, 2012. (PX2).

Petitioner's pain doctor, Dr. Chunduri, also reviewed the MRI of the lumbar spine, considered Petitioner's work duties on February 15, 2012, and opined that Petitioner's lumber spine condition and bilateral radiculitis was the direct result of the February 15, 2012 accident. He further stated that Petitioner's prior fusion was asymptomatic prior to this injury. (PX2). Petitioner eventually had surgery on November 1, 2012 to extend the fusion to L4-5 with discectomy, interbody arthrodesis, and pedicle screw fixation. (PX4).

Subsequently, on September 5, 2013, Dr. Malek removed the L4-S1 posterior segmental internal fixation and performed a revision of the fusion, especially at L5-S1. The cage had been retropulsed. (PX5; PX6). Dr. Malek testified to what he observed during surgery:

> There were very significant findings. Mrs. Michelle Egizio did have an organic and anatomic basis for her pain. The cage at the L5-S1 has moved backward pressing on the nerve roots at the L5-S1 level, both the L5 and S1 nerve root. There was evidence of failure of fusion at the L4 junction, and the cage at the L4-L5 level. And there was some fusion on the side at the L4-L5 level, and on the left at L5-S1 level. So the basis for her pain is not only that the fusion has not taken, but also as a result of the fusion not taking, that cage at the L5-S1 level has moved backward. (PX11, pg. 18).

Dr. Malek stated that Petitioner's pain generator was both the failure of the fusion, and the pressure on the nerves. (PX11, pg. 18). Dr. Malek opined that Petitioner's condition was related

to the fusion that was done in November 2012, which was related to her injury in February 2012. (PX11, pg. 19).

Although Dr. Malek attributes Petitioner's injury to February 16, 2012, and not February 15, 2012, he does attribute Petitioner's condition to her work - specifically, lifting boxes. (PX11, pgs. 32-33). Dr. Malek testified: "The injury of 2/16/12 was an aggravation, acceleration, and precipitation of preexisting silent and asymptomatic conditions rendering that condition symptomatic and in need of the treatment delivered, including the two surgeries." (PX11, pg. 28). During cross-examination, Respondent's counsel asked Dr. Malek how he determined that the 2012 accident had aggravated Petitioner's preexisting spinal condition:

> Mrs. Egizio did have a fusion at the L5-S1 level, I believe, in '99 or 2000. What that did is predispose her to have this accelerated degeneration at the level above, and the spondylolisthesis at the L4-5 level, which is the level next to the fusion. That is a stable but precarious condition. It's like being on the edge of a cliff, so to speak. And so she was able to function. She was able to work because these changes happened over the years, like ten, twelve years. What the injury at work did, unfortunately, it just tip her over. It was the push or the precipitating or aggravating event rendering that condition symptomatic and, unfortunately, in need of treatment and surgery. (PX11, pg. 30).

The Arbitrator did not find Dr. Malek as persuasive as Respondent's Section 12 examiner, Dr. Mather, because Dr. Malek had not considered Petitioner's pre-accident medical records. However, Dr. Malek indeed considered and testified to Petitioner's preexisting history, and in fact relied on that medical history when providing his causal connection opinion.

As to Dr. Mather, he opined that Petitioner sustained a lumbar strain as a result of the February 15, 2012 accident, and that Petitioner's lumbar strain would have resolved by March 15, 2012. He explained that Petitioner's current lumbar spine condition was due to her spondylolisthesis and spinal stenosis which were a natural sequelae of the L5-S1 fusion done in 1999. Dr. Mather further indicated that any treatment after March 15, 2012 was not work-related. (RX1, Deposition Exhibit 2). Notwithstanding causation, Dr. Mather stated that Petitioner would probably require an L4-5 laminectomy and fusion. (RX1, Deposition Exhibit 2).

Finally, despite the Arbitrator's finding that causation could not be established through a chain-of-events analysis because Petitioner was never in "a previous condition of good health," the chain of events actually does demonstrate that Petitioner's current condition is causally related to the February 2012 accident. Our Appellate Court in *Schroeder v. Ill. Workers' Comp. Comm'n*, explained how the chain-of-events analysis worked in preexisting condition claims: "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." 2017 IL App (4th) 160192WC, ¶ 26. Here, as described in this section above, Petitioner although symptomatic in her low back and bilateral lower extremities prior to February 2012, was working full duty, and was not receiving any other treatment other than prescription medication. Following the accident, Petitioner required an MRI

and other diagnostic imaging tests, which revealed findings significant enough to warrant physical therapy, injections, pain medication, a new fusion surgery at the L4-5 level, and later a revision procedure to correct the fusion from L4 to S1. Petitioner was also taken off work. The evidence demonstrates that following the February 2012 injury, Petitioner's low back condition and radicular symptoms indeed deteriorated drastically.

Therefore, based on the evidence in its entirety, I find that Petitioner sustained a compensable injury and Petitioner's current condition as to her low back is causally related to the February 2012 accident. Accordingly, I dissent from the Majority's Decision and Opinion on Review.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EGIZIO, MICHELLE
Employee/Petitioner

Case# **12WC010767**

12WC027235

WAL-MART ASSOCIATES INC
Employer/Respondent

19IWCC0381

On 9/26/2018, 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 2.32% 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:

1658 SAUNDERS CONDON & KENNY
JAMES J KENNEY
111 W WASHINGTON ST SUITE 1001
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BROOKE E TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHELLE EGIZIO
Employee/Petitioner

v.

WAL-MART ASSOCIATES, INC.
Employer/Respondent

Case # **12** WC **10767**

Consolidated cases: **12 WC 27235**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **SEPTEMBER 28, 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. [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 **FEBRUARY 16, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**23,052.66**; the average weekly wage was $**442.13**.

On the date of accident, Petitioner was **60** years of age, ***single*** with **0** dependent children.

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

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

ORDER

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

- The Arbitrator finds the Petitioner failed to prove she suffered a work accident that arose out of and in the course of her employment with the Respondent on February 16, 2012.;
- The Arbitrator finds the Petitioner did not prove a causal connection between her current condition of ill-being and her alleged February 16, 2011 work accident.; and,
- As such, the Arbitrator denies the Petitioner's claim for medical bills, TTD benefits, penalties and attorney's fees, and any further benefits under the Act for the nature and extent of the injury.

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 26, 2018
Date

SEP 26 2018

MICHELLE EGIZIO v. WAL-MART ASSOCIATES, INC.

12 WC 10767 & 12 WC 27235

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on September 28, 2017. The issues in dispute for 12 WC 10767, with a date of accident of February 16, 2012, were accident, causal connection, medical bills, TTD, penalties, and the nature and extent of the injury. (*Arbitrator's Exhibit* 1 & 2B). The issues in dispute for 12 WC 27235, with a date of accident of August 16, 2009, were causal connection and the nature and extent of the injury. (*Arbitrator's Exhibit* (hereinafter, *AX*) 1 & 2A). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act and agreed to receipt of this Arbitration Decision via e-mail. (*AX* 1).

FINDINGS OF FACT

The Petitioner was employed by the Respondent in various capacities from 2007 through 2012. She admitted to a history of a lower back injury and surgery in the form of an L5-S1 fusion in 1998 or 1999. On August 16, 2009, the Petitioner was working as a merchandise supervisor when she fell off a ladder while retrieving for a customer a laptop computer from a lock-up area. She testified she landed on her back and hit her head on the ground. The Petitioner reported she missed six or seven steps on the ladder, fell at least five feet to the ground, and lost consciousness. (*Transcript* at 39, 99). However, according to the ambulance report and Silver Cross Hospital Emergency Department records from the date of accident, the Petitioner missed two steps on the ladder, fell two feet, and did not lose consciousness. (*Petitioner's Exhibit* 10 and *Petitioner's Exhibit* 3).

The Petitioner complained of head, back, and neck pain to the ambulance crew. She then was taken to Silver Cross Hospital where she was diagnosed with a concussion, cervical sprain, lumbosacral sprain, and a left-hand contusion. The Petitioner initiated a physical therapy at Silver Cross Hospital on September 10, 2009, that was to proceed two to three times a week for the next four weeks. She attended three more sessions of therapy and cancelled or no-showed for the following three. The Petitioner ultimately was discharged from physical therapy due to attendance issues.

After this accident, the Petitioner testified she was off work for approximately four weeks. On September 21, 2009, at the Petitioner's request, Dr. Eileen Heffernan released her to full duty work. The Respondent paid the Petitioner's medical bills and TTD benefits through that date and requested her to advise if she intended to seek further medical care after September 21, 2009 for the injury, but she declined. (*Transcript* (hereinafter, *T.*) at 104 and *Respondent's Exhibit* 16).

The Petitioner continued to work as a supervisor after 2009, and then requested to be transferred to a different department responsible for jewelry, handbags, lingerie and shoes. (*T.* at 39-40). In 2012 or 2013, after realizing that this department required more duties and had fewer people to assist, the Petitioner requested to be demoted to an associate position. (*T.* at 40). She reported she continued to see Dr. Heffernan with increasing frequency due to having more aches and pains. She testified she informed Dr. Heffernan that her back was bothering her (*T.* at 41). She also testified she began having more back pain, specifically in the L4 area (*T.* at 43).

Dr. Heffernan's medical records begin on November 11, 2009. There is a mention of a failed back surgery. (*Petitioner's Exhibit* (hereinafter, *PX*) 1). On February 22, 2010, Dr. Heffernan noted the Petitioner reported her back hurt with easy lifting. Due to back pain and neck pain, Dr. Heffernan prescribed Vicodin, Valium and Mobic. On that date, the Petitioner also requested Dr. Heffernan complete paperwork for a handicap sticker for the Petitioner's car. The following month, on March 24, 2010, Dr. Heffernan again reported the Petitioner to have back pain symptoms. She then began prescribing Flexeril for the Petitioner, in addition to her other medications, on April 19, 2010. During an appointment on May 10, 2010, Dr. Heffernan again noted back pain and the Petitioner's failed surgery and refilled her pain medications. (*PX* 1).

The Petitioner was admitted to Silver Cross Hospital on September 10, 2010 due to a primary complaint of chronic abdominal pain. (*Respondent's Exhibit* (hereinafter, *RX*)6 and *RX* 14). These hospital records note complaints of severe back pain, treated with Norco and Dilaudid throughout the Petitioner's stay, as well as bilateral lower extremity pain. (*RX* 14). Her diagnoses at discharge on September 14, 2010, included chronic back pain with lower extremity radiation. (*RX* 6). She was instructed to follow up with her primary care physician who was managing her back issues and pain control and was given an outpatient referral to a Dr. Hurley for her back issues. (*RX* 6 and *RX* 14). Her prescribed medications at discharge included Neurontin and Hydrocodone. (*RX* 6). Upon her return to Dr. Heffernan on September 15, 2010, she again was noted to have back pain and Dr. Heffernan subsequently refilled the Petitioner's chronic pain medications on November 22, 2010. (*Id.*).

The Petitioner next was seen at Hinsdale Orthopedics on December 9, 2010. According to a patient assessment form completed by the Petitioner, her complaints included pain in the knees, bilateral legs, and back. (*RX* 7). She reported her pain radiated down her leg and worsened with standing and walking. As of February 14, 2011, Dr. Heffernan continued to prescribe Neurontin. On April 25, 2011, the Petitioner told Dr. Heffernan she hurt her back at work lifting hundreds of boxes. Dr. Heffernan assessed severe "new" back pain, different from her chronic pain and she referred the Petitioner to a pain clinic and to Dr. George DePhillips. (*RX* 6).

On May 6, 2011, Dr. Heffernan prescribed Relafen and Neurontin and, twelve days later, on May 18, the Petitioner asked Dr. Heffernan to prescribe Soma for her neck and back pain as this had worked in the past. (*RX* 6). During a return visit on July 27, 2011, Dr. Heffernan again noted the Petitioner's chronic back pain complaints and failed surgery before again refilling the Petitioner's medications, including Norco, Valium, Relafen, and Neurontin. A similar appointment then took place on December 16, 2011, and Dr. Heffernan observed the Petitioner had been on the same medication for neck and back pain for years. (*Id.*). Thereafter, on January 18, 2012, the Petitioner again saw Dr. Heffernan for a "recheck for chronic back pain, L4 nerve root." Dr. Heffernan refilled her Norco and diagnosed low back pain and lumbar radiculopathy. She also recommended the Petitioner consider an updated MRI for her back. (*Id.*).

The Petitioner testified she volunteered for an inventory project at another store during the week of February 11, 2012. She reported she would frequently volunteer to help at other stores with grand openings, re-openings, and inventory projects. (*T.* at 47-48). For inventory projects, her duties involved going through products and counting everything, entering the items into a computer system using a handheld scanner, and pushing, pulling, and carrying various items. She testified she worked with items weighing from ounces to pounds to hundreds of pounds. She also used a pallet jack to lift pallets off the floor and then would push or pull the pallet jack around the store depending on where the items were to be placed.

The Petitioner could not recall what she did every day during the week of February 11, 2016, but she did recall working in housewares on the last day, February 16, 2012, putting home goods together for inventory. She testified that on that date, while going through and counting items, loading pallets, and using a pallet jack, she noticed her back beginning to hurt and her right leg becoming numb and achy. (*T.* at 62). The Petitioner reported she spoke with a manager before taking a lunch break and asked if he could find someone to help with the heavy lifting due to her pain. (*T.* at 63). Although she could not recall the name of the manger at first, she later testified the manager was Mr. Scott Scoles. She also advised that her request for assistance went unfulfilled and, after lunch, she continued doing the same activities.

The Petitioner stated she continued to work the rest of the day, but she was in pain and in tears while doing so. At the end of the work day, the Petitioner returned to the Respondent's Lockport store where she normally worked to clock out. She did not recall informing any of her usual supervisors about an accident or the back pain she was experiencing. (*T.* at 68).

Mr. Scott Scoles, the Petitioner's acting manager the week of February 11, 2012, denied the Petitioner ever told him she was having pain performing her duties or that she requested assistance. (*T.* at 134-135). Mr. Scoles also denied the Petitioner ever came to him to report any type of injury to her back. (*T.* at 135). He explained this was a voluntary project, and any associate could request to be removed from the project for any reason and could return to their own store without repercussion. (*T.* at 136). However, he testified the Petitioner did not come to him at any point with this type of request. The Petitioner continued working for two weeks following the alleged accident, through March 2, 2012. (*RX* 13). She then was terminated from her employment with the Respondent, effective March 7, 2012. (*RX* 5). She testified she was terminated for making a politically incorrect comment. (*T.* at 76-77). Following her termination, and after an MRI study that will be discussed below, the Petitioner called the Lockport store to report a work injury. (*T.* at 117). An Associate Statement, Associate Incident Report, and Request for Medical Care were completed on March 10 and March 11 of 2012. (*RX* 2, *RX* 3, and *RX* 4). In each of these documents, petitioner indicated the work injury occurred on February 15, 2012. (*Id.*).

Earlier, on February 29, 2012, the Petitioner returned to Dr. Heffernan and reported sustaining an injury at work lifting hundreds of boxes on February 15, 2012. She complained of severe lower back pain with pain in the right leg. Dr. Heffernan again recommended an MRI. (*PX* 1). On March 7, 2012 the Petitioner underwent a lumbar MRI which revealed a posterior fusion at L5-S1, Grade 1 spondylolisthesis at L4 and L5, a diffuse disc bulge at that level encroaching upon the exiting L4 and descending L5 nerve roots bilaterally, and suspected left foraminal disc protrusion at L2-3 encroaching upon the left L2 nerve root. (*PX* 1).

The Petitioner next returned to Dr. George DePhillips on March 14, 2012. (*PX* 2). Dr. DePhillips noted her history of a prior L5-S1 fusion in 1999 or 2000 and that he had last treated her in 2003. The Petitioner denied having any physical therapy or interventional pain management for her low back since that time. Dr. DePhillips opined the Petitioner was in good health until February 15, 2012, when she was bending forward and lifting boxes from a pallet and felt pain in her lower back. Dr. DePhillips diagnosed symptomatic adjacent segment disease. He stated this was provoked from an asymptomatic condition by the work injury. (*PX* 2). After the Petitioner completing a number of recommended imaging studies, she returned to Dr. DePhillips on March 22, 2012. He observed the Petitioner's pain was in the L4 nerve root

distribution and recommended conservative treatment including flexion distraction treatment and, later, lumbar steroid injections. (*Id.*).

The Petitioner presented to Dr. Krishna Chunduri on June 5, 2012, on referral from Dr. DePhillips for injections. Dr. Chunduri noted the Petitioner was injured at work on February 15, 2012 while lifting heavy pallets and stacking boxes when she suddenly felt pain in her lower back. He recommended an L4-5 lateral transforaminal epidural steroid injection that was administered on June 7, 2012. Subsequently, on June 26, 2012, Dr. Chunduri recommended an L5 transforaminal steroid injection.

The Petitioner participated in a Section 12 examination requested by the Respondent with Dr. Steven Mather on July 19, 2012. (*RX* 1 at *Exhibit* 2). The Petitioner advised Dr. Mather that on February 15, 2012, she injured her back lifting heavy boxes weighing anywhere from five to fifty pounds. She denied any previous problems with her lower back over the last many years. Dr. Mather also noted the Petitioner smokes approximately one-third a pack of cigarettes per day. After reviewing her medical records and conducting a physical examination, Dr. Mather opined the Petitioner sustained a lumbar strain as a result of her alleged February 15, 2012 accident. He noted she had pre-existing back and leg symptoms, as confirmed by the medical records and predating her accident. In his opinion, the Petitioner's lumbar strain resolved within four weeks, or by March 15, 2012, and she was back at baseline. (*RX* 1 at *Exhibit* 2).

On November 1, 2012, the Petitioner underwent surgery under the care of Dr. DePhillips at Morris Hospital involving extension of her fusion to the L4-5 level and revision of the fusion at L5-S1. (*PX* 4).

The Petitioner next came under the care of Dr. Michel Malek on July 17, 2013, on a referral from Dr. DePhillips. The Petitioner told Dr. Malek she sustained an injury at work on February 16, 2012, at approximately 10:00 a.m., after lifting, pulling, twisting, and loading plates. (*PX* 5).[1] She further advised Mr. Malek her low back pain continued into both lower extremities all the way down. Dr. Malek reviewed an April 18, 2013 lumbar MRI noting the fusion at L4-5 and L5-S1 with no significant next level disease. Dr. Malek felt the MRI was unremarkable and showed no compression of the thecal sac. He recommended physical therapy, a lumbar CT, and a bilateral lower extremity EMG. (*PX* 5). During a follow-up visit with Dr. Malek on August 26, 2013, he reviewed an EMG, which revealed a mild chronic L4 and L5 radiculopathy on the right, and a lumbar CT, noting that the cage at L5-S1 had retropulsed into the spinal canal. He felt the only option at that point was exploration with revision of the

[1] The Arbitrator observes Dr. Malek's office visit notes appear to be out of sequential order. (*PX* 5).

fusion. (*PX* 5). Thereafter, on September 5, 2013, Dr. Malek performed a revision fusion at L4-5 and L5-S1. The Petitioner continued to follow up with Dr. Malek post-operatively while participating in a physical therapy program. On April 7, 2014, Dr. Malek stated petitioner had reached maximum medical improvement (MMI). (*Id.*).

The Petitioner continued to follow up with Dr. Heffernan intermittently and reported a variety of complaints, sometimes including back pain. Most recently, the Petitioner was admitted for an inpatient stay at Silver Cross Hospital from February 24 through March 1, 2017. During that hospitalization, one of her complaints was of acute lower back pain radiating into the right lower extremity. (*PX* 1).

Dr. Malek testified that, at the time of his September 5, 2013 surgery on the Petitioner, the operative findings indicated her prior fusion did not take. (*PX* 11 at 18). He stated that this, along with the pressure on the nerve roots from the L5-S1 cage, was causing the Petitioner's pain. (*PX* 11 at 18). He went on to opine these findings were related to the fusion done in November of 2012, which he then related to the injury in February of 2012. (*Id.* at 19). Specifically, he opined the February 16, 2012 accident aggravated the Petitioner's preexisting spinal degeneration, rendering it symptomatic and in need of treatment. (*Id.* at 30). He explained the accident was a "single precipitating event" and not a repetitive injury, stating "[s]he lifted just one box, and that produced the pain." (*Id.* at 33-34). Dr. Malek did not know the weight of the box the Petitioner lifted, but that factor did not matter because it was the "the bending forward" element that caused the injury. (*Id.* at 34, 36). He explained that due to her preexisting lumbar degeneration, an incident that would be very minor in another person would have been more than enough to precipitate her condition. (*Id.* at 36). Dr. Malek described her preexisting condition as "very precarious – like on the edge of a cliff type situation," and that the injury "tipped her over." (*Id.* at 40-41).

Dr. Malek could not recall if he reviewed Dr. Heffernan's records. (*Id.* at 31-32, 44). His understanding was that the Petitioner was not under active medical care for her back prior to the accident, and that she may have been taking medication intermittently, but this could have been for her neck. (*Id.* at 44-45). He stated it would not affect his causation opinion if he learned that prior to the accident she had been taking medication for back pain, had been directed back to Dr. DePhillips care, or had been recommended to undergo an MRI. (*Id.* at 46-50).

Dr. Mather testified examined the Petitioner on July 19, 2012, at which time she provided a history of injuring her back on February 15, 2012, after lifting heavy boxes. (*RX* 1 at 7). Aside from her surgery in 1999, the Petitioner denied any problems with her back over the last few years. (*RX* 1 at 8). Dr. Mather reviewed lumbar X-rays, CT scans, and the March 7, 2012 MRI films during his examination, as well as medical records dating from 2010 through June of

2012. (*Id.* at 10-11 and *Exhibit* 2). He noted the CT scan showed the screws from her prior fusion at L5-S1 were violating the joint at L4-5, which can cause early adjacent segment degeneration. (*Id.* at 11). He also reviewed her prescription history through the Illinois Prescription Monitoring Service and reported the Petitioner had been taking Hydrocodone 10 starting on January 18, 2012 or before, and Valium on a regular basis for approximately one year before the accident. (*Id.* at 12). Dr. Mather opined that additional records reviewed later showed the Petitioner's medication intake increasing in the year before the accident, with the addition of Neurontin for nerve pain, and Soma, a muscle relaxant. (*Id.* at 19).

In Dr. Mather's opinion, the accident did not aggravate the Petitioner's adjacent level degeneration in any way. (*Id.* at 15). He stated most people have approximately a 30% chance of requiring surgery ten years after a lumbar fusion, but between the Petitioner's smoking history, BMI, and screws impinging her facet joints, she had multiple factors accelerating her adjacent segment degeneration, making the need for surgery more likely. (*Id.* at 11, 14).

CONCLUSIONS OF LAW

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

12 WC 10767 – Alleged Date of Accident: February 16, 2012

Issue C: *Accident*

The Arbitrator finds the evidence does not support the occurrence of a specific accident on February 16, 2012. The Petitioner did not testify to a single, identifiable event precipitating her condition on February 16, 2012 but, instead, alleged her cumulative duties over the course of one day gradually resulted in back and leg pain. The Petitioner testified she volunteered to do inventory and store openings "all the time," so the duties associated with this job were not new to her. (*T.* at 45). Furthermore, the duties the Petitioner was tasked with on February 16, 2012 were not significantly different or more physically strenuous than her normal duties as an associate. (*T.* at 134). She claims her pain developed while performing these activities but did not pinpoint an inciting event.

The Petitioner also did not report the accident at the time it allegedly occurred. She admitted she did not tell her acting manager, Mr. Scott Scoles, that she sustained an accident, only that she "hurt" and asked for help with her duties. (*T.* at 123). Mr. Scoles denied this conversation altogether, stating the Petitioner never came to him to report back pain, difficulty with her duties, or to request assistance. (*T.* at 135). He testified that had she approached him

and said any of those things, he would have followed protocol for documenting a work accident or incident and would have asked if she wanted to seek medical care. (*T.* at 128-29, 135). Mr. Scoles testified he could be terminated for failing to follow protocol had he been made aware of an injury. (*T.* at 153).

According to the documentary evidence in the record, including the Associate Statement, Associate Incident Report, and Request for Medical Care, as well as petitioner's own testimony, the accident was reported no earlier than March 8, 2012. This is almost one month after it allegedly occurred and, notably, several days after the Petitioner was terminated. The Petitioner acknowledged she was aware of the Respondent's protocol requiring that work injuries be reported to a salaried manager immediately. (*T.* at 97-98). She immediately reported her prior work accident in 2009, and the required accident forms were completed within one week of that injury. (*T.* at 100 and *RX* 15). The Petitioner's failure to report the alleged 2012 accident for approximately one month after it occurred is suspect considering her testimony as to the severity of her back pain on February 16, 2012, and her apparent certainty that her work duties were the cause.

Furthermore, while the Petitioner testified and further claimed an injury occurred on February 16, 2012 (*T.* at 45 and *AX* 1), documentary and medical evidence contained in the record do not support this date of accident. The Associate Statement (*RX* 2), Associate Incident Report (*RX* 3), and Request for Medical Care (*RX* 4), all identify an accident date of ***February 15, 2012***, as do the medical records of Dr. Heffernan (*PX* 1), Dr. DePhillips (*PX* 2), and Dr. Chunduri, and Dr. Mather's IME report (*RX* 1 at *Exhibit* 2). At no point did the Petitioner allege during her testimony that February 15, 2012, could be the appropriate date of accident. She testified she did different activities throughout the week of February 11, 2012 and could not recall what she was doing on any other day but February 16. (*T.* 58, 105). The Arbitrator cannot overlook the fact that the Petitioner's testimony as to the date of accident is inconsistent with nearly all other evidence in the record.

Based on the entire record, the Arbitrator does not find the Petitioner established an acute work accident. The Petitioner did not identify a precipitating event or a specific activity that caused her pain, but instead, she attributed her injury to all of her work activities on February 16, 2012. More is required to prove a specific accident. Furthermore, the Arbitrator finds petitioner's testimony is not credible considering the multiple inconsistencies with all other evidence in the record as well as the testimony of Mr. Scoles.

Although it is not clear that repetitive trauma is being alleged, the Arbitrator would further find the Petitioner also did not meet her burden in this regard. She did not testify to a repetitive job task, either over the course of her employment or on the specific date of injury alleged. Her job duties were varied in many respects, with no clear consistency in the type of

work performed, the amount of time spent on particular activities, or the frequency of performance of specific activities. No repetitive job task has been conclusively established, which distinguishes this case from cases where a repetitive trauma injury has been deemed compensable. (*Williams v. Industrial Comm'n*, 244 Ill. App. 3d 2014, 211 (1st Dist. 1993)).

Furthermore, the medical testimony does not support a repetitive trauma theory. Dr. Malek testified the Petitioner's condition resulted from a specific incident of bending down to lift a single box. He offered explicit testimony was that this was "not a repetitive injury" but "a single precipitating event." (*PX* 11 at 33). Medical testimony is very important in repetitive trauma cases, and typically required to establish causal connection. (*Darling v. Industrial Com.*, 176 Ill. App. 3d 186, 193 (1st Dist. 1988) and *Nunn v. Industrial Comm'n*, 157 Ill. App. Ed 470, 577 (1987)). The Petitioner's failure to testify to a repetitive job duty and the lack of a medical opinion supporting repetitive trauma defeat any claim in this regard.

Based upon these factors discussed above, the Arbitrator finds the Petitioner failed to prove she suffered a work accident that arose out of and in the course of her employment with the Respondent on February 16, 2012.

Issue F: *Causal connection*

The Arbitrator is compelled to further find the Petitioner did not establish a causal connection between her current condition of ill-being and her alleged February 16, 2012 accident. The Petitioners' medical records indicate her back was severely symptomatic prior to February 16, 2012. Dr. Heffernan's records predating the accident repeatedly document back pain, a failed fusion, and, within a month of the injury, radicular pain in an L4 distribution, for which she suggested an updated lumbar MRI. (*PX* 1). The Silver Cross Hospital records from September of 2010 document severe lumbar and bilateral lower extremity symptoms, contradicting petitioner's testimony that leg pain only started after the alleged accident. (*PX* 3). Petitioner had been referred to specialists for her back condition on at least two occasions prior to the alleged accident, first on September 10, 2010, to Dr. Hurley, and then on April 5, 2011, to Dr. DePhillips. Additionally, as noted in the medical records of Dr. Heffernan and medical testimony of Dr. Mather, the Petitioner's chronic pain medication was steadily increasing in the months leading up to the accident, suggesting a progressively worsening of her symptoms. As such, the Arbitrator does not find that the alleged February 16, 2012 accident caused a material aggravation of the Petitioner's degenerative low back condition beyond its normal progression.

Furthermore, the Arbitrator finds the opinion of Dr. Mather more persuasive than that of Dr. Malek. Dr. Mather considered the Petitioner's pre-accident medical records and her prescription history in formulating his opinion, while Dr. Malek did not. He also evaluated the Petitioner in July of 2012, approximately five months after the accident, while Dr. Malek did not

see the Petitioner until July of 2013, nearly one and one-half years after the accident. Dr. Mather's opinion as to the source and onset of the Petitioner's pain, considering his review of pertinent pre-accident reports and more contemporaneous examination, renders his opinion more credible than of Dr. Malek.

The Arbitrator also would note that a chain of events analysis also would not suggest causation between the Petitioner's work accident and her condition of ill-being. A causal connection between work duties and a condition may be established by a chain of events including the worker's ability to perform certain duties before the date of accident and inability to perform the same duties following that date. (*Pulliam Masonry v. Industrial Comm'n*, 77 Ill. 23 469 (1979)). Here, the Petitioner cannot show she was in a state of good health prior to the work accident, since the records are replete with evidence that she was not. Further, the alleged February 16, 2012 accident did not render her unable to perform her work duties, as she continued working full duty for the next two weeks following the accident. (*T.* at 111 and *RX* 13).

Based upon all these factors, the Arbitrator further finds the Petitioner did not prove a causal connection between her current condition of ill-being and her alleged February 16, 2012 work accident.

Issue J: *Medical bills*

Based upon the Arbitrator's findings and conclusions of law regarding **Issues C and F** above, the Arbitrator denies the Petitioner's request that the Respondent be held liable for unpaid medical bills. (*AX* 1 and 3).

Issue K: *TTD*

Based upon the Arbitrator's findings and conclusions of law regarding **Issues C and F** above, the Arbitrator denies the Petitioner's claim for TTD benefits.

Issue L: Nature and extent of injury

Based upon the Arbitrator's findings and conclusions of law regarding **Issues C and F** above, the Arbitrator denies the Petitioner's claim for any benefits under the Act for the nature and extent of the injury.

Issue M: *Penalties and attorney's fees*

On August 3, 2012, the Petitioner filed a Petition for Penalties and Attorney's Fees for Application 12 WC 10767. (*PX* 30). Based upon the Findings of Fact and Conclusions of Law above, the Respondent had a reasonable basis to dispute this claim due to the circumstances surrounding the reporting of the incident, as well as the medical opinions of Dr. Mather. The Arbitrator specifically notes the timing of the Petitioner's termination and the reporting of her injury, as well as Mr. Scoles' testimony that he was not made aware of any incident or injury occurring on the date alleged. The Respondent further had a basis to deny medical and TTD benefits due to Dr. Mather's opinions. Accordingly, the Petitioner's Petition for Penalties and Attorney's Fees is denied.

12 WC 27235 – Alleged Date of Accident: August 16, 2009

Issue F: *Causal connection*

The Arbitrator finds the evidence does not establish that the Petitioner's condition was materially aggravated by her August 16, 2009 injury. It is important to note the records relating to this 2009 injury are very limited. The Petitioner treated on the date of accident at Silver Cross Hospital and then underwent four sessions of physical therapy before being discharged because she stopped attending those sessions. Furthermore, the Petitioner testified that Dr. Heffernan released her to full duty on September 21, 2009, at her own request. (*T.* at 101). Although the Petitioner testified she treated with Dr. Heffernan following the accident, the earliest medical record from Dr. Heffernan in evidence is from November 11, 2009. This record does not reference the August 16, 2009 injury, nor do virtually any medical records thereafter from any provider. No medical testimony was offered to suggest the Petitioner's treatment after September 21, 2009 was related to the August 2009 work accident, and, in fact, it is not clear Dr. Malek even was aware of this injury.

The Arbitrator finds the Petitioner reached MMI for her August 16, 2009 accident no later than September 21, 2009. The Arbitrator further finds she has not proven that her condition of ill-being at the time of trial is related to her August 16, 2009 work accident.

Issue L: *Nature and extent of injury*[2]

The Petitioner established a work-related accident occurred on August 16, 2009. However, she failed to prove that her condition of ill-being with respect to her back is causally related to that injury. Furthermore, the limited medical records fail to substantiate any permanent partial disability related to that injury. Therefore, the Arbitrator declines to award any benefits in this regard for the August 16, 2009 injury.

Signature of Arbitrator

SEPTEMBER 26, 2018
Date

[2] As Petitioner's accident date (August 16, 2009) precedes the June 28, 2011 effective date of 820 ILCS 305/8.1b, this Arbitration Decision ***will not*** utilize the factors set forth in Section 8.1b in determining the nature and extent of the Petitioner's injury, if any.

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

REGINALD CAMPER,

Petitioner,

vs. NO: 17 WC 16359

CITY OF CHICAGO,

19IWCC0382

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation of the cervical spine condition of ill-being, medical expenses, temporary disability, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following corrections:

1 – The Commission corrects the caption to reflect Petitioner's name is "Reginald Camper"; and

2 – The prospective medical award contained in the body of the decision is hereby incorporated into the Order.

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 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2018, with the above corrections, is hereby affirmed and adopted.

19IWCC0382

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $953.67 per week for a period of 51 5/7 weeks, representing May 22, 2017 through May 18, 2018, 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 reasonable and necessary medical expenses in the sum of $175.00 as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for prospective medical treatment as recommended by Dr. Trombly as provided in §8(a) of the Act.

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

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

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

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: JUL 25 2019

L. Elizabeth Coppoletti

LEC/mck

O: 7/17/19

43

Stephen Mathis

D. Douglas McCarthy

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

CAMPERM REGINALD
Employee/Petitioner

Case# **17WC016359**

CITY OF CHICAGO
Employer/Respondent

19IWCC0382

On 6/25/2018, 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:

0222 GOLDBERG WEISMAN & CAIRO LTD
JAMES J NAWROCKI
ONE E WACKER DR 39TH FL
CHICAGO, IL 60601

0464 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

REGINALD CAMPER
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **17** WC **16359**

Consolidated cases: _____

19IWCC0382

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **5/18/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] 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, **5/19/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**74,386.21**; the average weekly wage was $**1,430.50**.

On the date of accident, Petitioner was **49** 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 $**21,662.84** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,662.84**.

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 $953.66/week for 51 6/7 weeks, commencing 5/22/2017 through 5/18/2018 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $21,662.84 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $175.00, as provided in Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

June 21, 2018
Date

ICArbDec19(b)

JUN 25 2018

19IWCC0382

STATE OF ILLINOIS)
)
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

REGINALD CAMPER,	)	
	)	
Petitioner,	)	
	)	Case #17 WC 16359
	)	
CITY OF CHICAGO,	)	
	)	
Respondent.	)	

This case proceeded to trial under Rule 19(b) on the issues of causal connection, TTD, medical, and future medical on May 18, 2018 before Arbitrator Charles M. Watts in Chicago.

The parties agreed that in the event the arbitrator did not find the cervical condition to be causally connected to the May 19, 2017 accident, the arbitrator could find Petitioner was at MMI and make a permanency award.

FACTS

On Friday, May 19, 2017, Petitioner was a 49 year old employed by Respondent City of Chicago's Department of Streets and Sanitation. Petitioner testified that years before he had been involved in a motor vehicle accident, in which he sustained minor low back symptoms that had completely resolved well before May 19, 2017. Petitioner was not treating for any back or neck condition on or just before May 19, 2017.

On May 19, 2017, while working on a garbage truck, Petitioner encountered a garbage cart full of heavy bricks. Petitioner testified that he attached the garbage cart to the hydraulic lift on the back of the truck in order to have the machine lift and dump its contents into the garbage truck. Petitioner testified that the hydraulic lift could not raise the garbage cart because it was

too heavy. Petitioner testified that in order to dump the bricks into the truck, he had to lift the bricks out of the garbage bin and throw them into the back of the garbage truck himself. Petitioner testified that while doing so he experienced the onset of both lower back and neck pain. Petitioner finished his shift and later that afternoon, an accident report, written by Petitioner's supervisor, Theresa Hardy, and signed by Petitioner was submitted. (Px 1). Only low back pain was noted on the report (Px 1).

Petitioner was then treated at Mercy Works on May 22, 2017and May 26, 2017. (Px 2) Petitioner testified that low back pain was his primary complaint at both of these exams. Dr. Steven Anderson noted that Petitioner had "midline tenderness from T10 to L5." (Px 2, May 22, 2017 note) On May 25, 2017, Dr. Anderson recorded that Petitioner claimed to be experiencing 8 out of 10 pain in his low back. (Px 2, May 26, 2017 note) Only low back complaints were noted in the two chart notes by Dr. Anderson. (Px 2) Petitioner testified that he did complain of neck pain to both his supervisor and to the staff at Mercy Works.

Dr. Ryan Trombley, M.D., a neurosurgeon, initially examined Petitioner on June 8, 2017 (Px 3). Petitioner testified that this was the first time someone took a lot of time to take a detailed history of accident from him.

Dr. Trombley's chart notes the following:

History of Present Illness

Garbage worker picked up bucket of bricks on May 19 and felt back pain and neck pain and right shoulder pain and imbalance in right leg. Right hand is throbbing since then. Right handed garbage worker never had prior arm or hand problems prior. Since then he has taken ibuprofen and flexeril. Overall patient is worsening with back pain since the injury. Arm pain at night is bad and patient cannot sleep. Patient has been off work for 3 weeks. Incontinence with pain on bowel movement.

Assessment

1. **Radicular pain in right arm (729.2) M79.2)**
2. **Acute bilateral back pain, unspecified back location (724.5) M54.9)**

Discussions/Summary

Impression/Plan:
Acute cervical myelopathy likely from disk herniation and cord compression needs MRI cervical and Xray and Xray and CT lumbar to evaluate cervical myelopathy and right arm pain and back pain. In meantime oral Medrol dosepak and continued out of work status are medically necessary.

(Px 3, June 8, 2017 note)

Diagnostic testing was performed on both the cervical and low back on June 13, 2017 (Px 3)

At the follow-up visit on 7/11/2017 Dr. Trombley's chart notes the following:

History of Present Illness

Sanitary worker lifted heavy garbage can and has had severe pain in neck and dominant right arm since then; recent MRI confirms stenosis most severe C45 and moderate Cat C34 and C56 with myelomalacia most pronounced on the right side; patient has diffuse weakness in the right arm and hand and spasticity on exam consistent with myelopathy.

Patient tried oral Medrol dospak with minimal benefit

Overall feels he is deteriorating and MRI confirms cord compression with myelomalacia needs posterior cervical decompression after medical clearance and will need at least 3 months after surgery to recover from myelopathy.

Assessment

1. **Radicular pain in right arm (729.2) (M79.2)**
2. **Acute bilateral back pain, unspecified back location (724.5) M54.9)**
3. **Cervical spondylosis with myelopathy and radiculopathy (721.1) M47.12, M47.22)**

Impression/Plan:
Cervical spondylosis with myelopathy and weakness indominant right arm; given active cord compression patient cannot engage in work until surgical decompression is achieved; given degree of myelopathy patient will need 3 months after surgery to recover before return to work.

(Px 3, July 11, 2017 note)

Dr. Trombley also wrote the following in a letter:

Additional Comments: To whom it may concern,

Reginald Camper is unable to work at this time. He has cervical stenosis with myelopathy and arm weakness which will require corrective surgery in the new future, date for surgery to be determined, if you have any questions, please feel free to call our office . . .

(Px 3, last page in exhibit)

After receiving Dr. Trombley's surgical recommendation, Respondent exercised its rights to have Petitioner examined, pursuant to Section 12, by Dr. Jesse Butler on August 23, 2017 (Rx 1). Dr. Butler concurred with Dr. Trombley's recommendation that Petitioner undergo cervical surgery (an anterior cervical discectomy and fusion at C4-C5), but opined that this condition was unrelated to the May 19, 2017 work accident because the Mercy Works medical records only describe a history of low back pain, and given that history, Dr. Butler diagnosed that only a lumbar sprain was sustained on May 19, 2017. (Rx 1) Dr. Butler also wrote the following in his report:

The patient is capable of working in a full duty capacity as it relates to the lumbar strain sustained as a result of the work injury. The patient has not temporary or permanent restrictions in that regard. The patient's cervical condition does require consideration of surgical care. As previously stated, if he is contemplating surgery on the cervical spine, he may remain off of work pending completion of that surgery. The patient will

return to regular duty work by six months post surgical treatment.

(Rx 1)

Based on Dr. Butler's report, Respondent terminated all TTD and medical benefits on October 27, 2017. (Px 4)

Petitioner was examined by Dr. Trombley one last time on January 2, 2018 and his medical opinions remained unchanged. (Px 3, January 2, 2018 note) In the discussion/summary section of that day's chart note, Dr. Trombley wrote:

> **Assessment**
> **1. Cervical spondylosis with myelopathy and radiculopathy (M47.12, M47.22)**
>
> **Discussion/Summary**
>
> **Impression/Plan:**
> **Progressive myelopathy since work related injury May 2017, had been doing work prior to incident so within a reasonable degree of medical certainty the work injury is the major contributing cause of the cord injury and the need for surgical intervention.**
>
> **Dynamic Xrays confirm spondylolisthesis and therefore the proposed surgery is medically necessary in order to prevent further neurologic deterioration**
>
> **Currently cannot engage in normal duties because of requirements for heavy lifting and therefore surgical decompression is medically necessary in order to promote full recovery and return to work.**

(Px 3, January 2, 2018 note)

Petitioner has not been working since May 22, 2017. Petitioner testified that currently his neck hurts and has tingling in his right arm. Petitioner also testified that his low back still hurts and that he sometimes experiences a limited range of motion.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision regarding (F), whether Petitioner's current condition of ill-being is causally related to the injury, the arbitrator finds the following:

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). An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955). 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). Thus, if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Id.*

"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 arbitrator is aware that the dispute in this case is not the cervical injury, but rather whether it was sustained at work on May 19, 2017. The arbitrator finds that the Petitioner testified credibly when he explained that the first person to take a detailed medical history from

him was Dr. Trombley. The arbitrator finds it persuasive that during the initial week of treatment, the primary diagnosis was low back strain which mirrored Petitioner's testimony that, during the initial days after the accident, the primary source of pain was his low back and that this changed over time. Regardless, the arbitrator also finds it significant that Dr. Trombly examined Petitioner within three weeks of the accident, and subsequent to diagnostic testing led him to recommend surgery, a conclusion to which Respondent's IME physician agrees. (Px 3, Rx 1) The arbitrator finds Dr. Trombley's opinion persuasive on causation in that Petitioner sustained progressive myelopathy since the work accident, as he had been doing work prior to the incident. (Px 3, January 2, 2018 note) Moreover, there is no other evidence of any other injury between May 19, 2017 and June 8, 2017.

Alternatively, Respondent's IME Dr. Butler's secondary diagnosis was cervical stenosis at C4-C5 and degenerative disease from C4 through C7 and he opined that Petitioner is a "reasonable candidate for an anterior cervical discectomy and fusion at C4-C5." (Rx 1) Dr. Butler also found Petitioner at MMI only for lumbar strain, not cervical injury. (Rx 1) Thus, Respondent's own evidence posits a pre-existing condition, under which Petitioner worked without any issue or restriction, that was exacerbated by an accident at work. Petitioner was working without any cervical issues on and before May 19, 2017, was injured at work, and now it is recommended that he have surgery to his cervical spine. Consistent with the holdings in *Schroeder, Sisbro* and *International Harvester*, the arbitrator finds the circumstantial portion of the evidence very persuasive.

Accordingly, the arbitrator finds that on May 19, 2017 Petitioner sustained a lumbar strain and also injury to his cervical spine which now requires surgery.

In support of the Arbitrator's decision regarding (J), whether Respondent has paid all necessary and reasonable medical charges, the Arbitrator finds the following:

At trial Petitioner introduced the $175.00 bill still owing to Mercyworks Occupational Medicine for diagnostic testing conducted on 7/06/2017 (see Px 2). As the CT scan of the lumbar spine was $175.00, and given the arbitrator's previous findings on causation, the arbitrator finds Petitioner is entitled to have and received from Respondent:

Unpaid Medical Bill & Fee Schedule

Mercyworks Occupational Medicine

Date of Service	Procedure Code	Amount Charged	Fee Schedule	Amount owed
7/06/2017	72131	$175.00	$979.70	$175.00

In support of the Arbitrator's decision regarding (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

In (F) the arbitrator found that Petitioner's cervical injury was caused by his May 19, 2017 work injury. Both Dr. Trombley and Dr. Butler agree that Petitioner should have anterior cervical discectomy and fusion at C4-C5. Accordingly, Respondent is ordered to authorize this procedure with Dr. Trombley, including any reasonable aftercare such as medical follow-up and physical and rehabilitative therapy.

In support of the Arbitrator's decision regarding (L), what temporary benefits are in dispute, the Arbitrator finds the following:

In (F), the arbitrator found that Petitioner sustained a compensable work injury, and that injury is the proximate cause of his current condition of ill-being. There is not dispute that Petitioner has not worked since May 22, 2017 and has been taken off of work by his treating doctors (Px 2, May 22 and 26, 2017 notes; Px 3, June 8, 2017 and January 2, 2018 notes). Therefore, Petitioner is entitled to receive from Respondent the sum of $953.66 per week for 51 6/7 weeks (May 22, 2017 – May 18, 2018). Respondent is entitled to a credit for $21,662.84 in TTD benefits previously paid.

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 Permanent Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT HOFFMAN,

Petitioner,

vs. NO: 18 WC 8356

STATE OF ILLINOIS,
MENARD CORRECTIONAL CENTER,

19IWCC0383

Respondents.

DECISION AND OPINION ON REVIEW

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

Initially, the Commission observes the Arbitrator's decision erroneously references a February 9, 2018 accident date. The Commission corrects this to reflect a February 19, 2018 date of accident.

Turning to the substance of the issue on review, the Commission views the evidence differently with respect to Section 8.1b(b) factor (iii) - the age of the employee at the time of the injury. The Arbitrator noted Petitioner was 29 years old on the date of accident and, "Because of the Petitioner's age," concluded this factor should be afforded no weight. The Commission disagrees. The Commission finds Petitioner's young age means he will endure the pain and physical deficits resulting from his accidental injury for an extended period. We find this factor weighs in favor of increased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds Petitioner sustained a 17.5% loss of use of the person as a whole under Section 8(d)2.

19IWCC0383

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 7, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $582.38 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 17.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that 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), this decision is not subject to judicial review.

DATED: JUL 25 2019

L. Elizabeth Coppoletti

LEC/mck

O: 7/3/19

43

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOFFMAN, ROBERT
Employee/Petitioner

Case# **18WC008356**

STATE OF ILLINOIS/ MENARD C C
Employer/Respondent

19IWCC0383

On 1/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% 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
KENTON J 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

JAN -7 2019

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ROBERT HOFFMAN
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD C.C.
Employer/Respondent

Case # **18** WC **8356**

Consolidated cases:

19IWCC0383

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 **Herrin**, on **November 14, 2018**. By stipulation, the parties agree:

On the date of accident, **2/9/18**, 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 $**50,473.16**, and the average weekly wage was $**970.64**.

At the time of injury, Petitioner was **29** years of age, ***married*** with **2** dependent children.

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

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

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

ORDER

With regard to subsection (i) of §8.1b(b), the Arbitrator notes no AMA report was submitted by the parties. No weight will be given to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an Correctional Officer at the time of the accident; that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner was able to return to his normal duties without restrictions. Therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 29 years old at the time of the accident. Because of Petitioner's age, the Arbitrator therefore gives *no* 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 that Petitioner's earning capacity was affected by this injury. Because there was no evidence that Petitioner's earning capacity was affected by this injury, 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 Petitioner treated with Dr. Kevin Rutz for his cervical disc injury consisting of disc replacement at C4-5 on July 18, 2018. On August 21, 2018 Dr. Rutz returned Petitioner to work full duty without restrictions. At this visit it was noted that Petitioner was doing well and had no permanent restrictions. Therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **15% loss use of the Man as Whole** pursuant to §8(d)2 of the Act.

Respondent shall pay Petitioner the sum of **$582.38**/week for a further period of **75** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **15% loss use of the Man as a Whole.**

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act directly to the providers. Respondent shall have a credit for all amounts previously paid.

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.

Edward Lee
Signature of Arbitrator

12/30/18
Date

JAN 7 - 2019

The Arbitrator finds the following facts:

19IWCC0383

The issue in this case nature and extent of injury.

At the time of the injury, Petitioner was a 29 year old employee of the State of Illinois at the Menard Correctional Center working as a Correctional Officer (Arb. Ex. 1, 2, Rx. 1)

On February 19, 2018, Petitioner sustained an injury when he was restraining an inmate. (Rx. 1, pg.4)

Following the incident, Petitioner was examined Dr. Matthew Bradley. (Px. 3) It was recommended that Petitioner treat with a spine specialist. (Id.)

On April 26, 2018 Petitioner began treating with Dr. Kevin Rutz for neck pain. (Px. 7) Petitioner was diagnosed as having neck pain. (Id.) Petitioner was referred to Physical Therapy and nerve root injections. (Id.) Following conservative treatment, Petitioner had cervical disc replacement surgery with Dr. Rutz on July 13, 2018 at C4-5. (Id.)

Following surgery, Petitioner continued to treat with Dr. Rutz. (Id.) Petitioner saw Dr. Rutz on July 24, 2018. (Id.) At this visit, it was noted that Petitioner had no radicular complaints. (Id.) Petitioner was to remain off work for an additional three weeks and then return to work full duty. (Id.)

Petitioner last saw Dr. Rutz on August 21, 2018. (Id.) At that time, it was noted that Petitioner was doing well. (Id.) It was noted that Petitioner was placed at MMI and told to follow up as needed. (Id.)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes no AMA report was submitted by the parties. No weight will be given to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an Correctional Officer at the time of the accident; that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner was able to return to his normal duties without restrictions. Therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 29 years old at the time of the accident. Because of Petitioner's age, the Arbitrator therefore gives *no* 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 that Petitioner's earning capacity was affected by this injury. Because there was no evidence that Petitioner's earning capacity was affected by this injury, 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 Petitioner treated with Dr. Kevin Rutz for his cervical disc injury consisting of disc replacement at C4-5 on July 18, 2018. On August 21, 2018 Dr. Rutz returned Petitioner to work full duty without restrictions. At this visit it was noted that Petitioner was doing well and had no permanent restrictions. Therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **15% loss use of the Man as Whole** pursuant to §8(d)2 of the Act.

In reaching this decision the Arbitrator has relied to a major extent upon the factor set forth in 5) above.

Therefore, the Arbitrator concludes:

1. Respondent shall pay Petitioner the sum of $582.38/week for a further period of 75 weeks, as provided in Section 8(d)2 of the Act, because the injuries caused 15% loss of use of the Man as a Whole.

2. Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit #1 directly to the providers and pursuant to the fee schedule.

3. Respondent shall have a credit for all amounts paid.

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

JIMMY MUNRO,

Petitioner,

vs. NO: 12 WC 20336

U.S. STEEL CORP.,

Respondent.

19IWCC0384

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, temporary disability, and permanent disability, and being advised of the facts and law, affirms the finding that Petitioner's current condition of ill-being is not causally related to his April 30, 2011 work accident but applies different reasoning to reach its conclusion.

Initially, the Commission observes the Arbitrator erroneously referenced the activities of daily living exception. Specifically, the Arbitrator noted "based on medical testimony, any ordinary, everyday activity would result in an aggravation or acceleration of the significant pre-existing arthritic condition, described as 'bone-on-bone' well in advance of the April 30, 2011, incident. Petitioner confirmed at trial that any use of the left wrist, whether at work or in daily activities of living, resulted in symptoms." Our review of the evidence reveals Petitioner repeatedly testified that he had no symptoms in his wrist prior to the undisputed April 30, 2011 work injury. The Commission notes Petitioner's testimony was clear and unrebutted. Therefore, the reference to the activities of daily living exception is contrary to the record and is hereby stricken.

The Commission's view of the medical expert opinions differs as well. The Commission analyzed the medical opinions from Dr. Kraemer and Dr. Rotman, and we find neither one is particularly persuasive. Certainly, Dr. Rotman's assertion that the popping incident followed by

"obvious edema" was a mere coincidence is not convincing. The Commission also observes Dr. Rotman based his opinion, at least in part, on the job analysis video. Notably, the video was not admitted into evidence, so the Commission was deprived of the opportunity to review it. Moreover, the record reflects Petitioner took issue with the video and, in fact, explained to Dr. Rotman the jobs depicted thereon were not representative of his actual work activities. Given these facts, we have reservations regarding the reliability of Dr. Rotman's opinions. See, *e.g.*, *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶36, 14 N.E.3d 16 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.) Our estimation of Dr. Kraemer's credibility does not fare any better. Initially, the Commission is unimpressed by Dr. Kraemer's casual use of profanity during his deposition. We further note his testimony is indecipherable at times, with several statements not making any sense at all. Accordingly, we afford little weight to either doctor's opinions and instead find the medical records themselves are the most reliable evidence of the status of Petitioner's condition.

Following his injury, Petitioner's supervisor sent him to Veeder Health Center where he was seen by Michael Lemp, RN. Petitioner provided a history of "pulling on wrench when he felt something pop in his left wrist" and complained of 10/10 pain with any movement of his wrist. On examination, Nurse Lemp noted Petitioner was in obvious pain; specific examination findings included obvious edema and erythema to the left wrist, marked reduction in range of motion, point tenderness at midline of posterior wrist in the carpal margin, weak hand grip, and audible popping with wrist movement. Diagnosing a strain or sprain of the left wrist, Nurse Lemp consulted with Dr. Parker via telephone, placed Petitioner's wrist in a splint, and sent him for x-rays. PX2.

The x-rays were performed off-site, after which Petitioner returned to Veeder; at that time, Petitioner was evaluated by Dr. Parker. Dr. Parker memorialized Petitioner was turning a wrench when he felt a pop, then acute pain in his left wrist and developed swelling shortly thereafter; Dr. Parker also documented Petitioner had no wrist symptoms prior to the incident, and though his initial pain was 10/10, it had diminished to 5/10. Examination findings included swelling and diffuse tenderness at the radial-ulnar junction; Dr. Parker noted the x-ray revealed degenerative changes with mild narrowing of the intercarpal joints without evidence of fracture. Dr. Parker recommended an MRI as the rapid swelling and pop was suspicious for ligament/tendon damage, but he did not order the test as Petitioner "does not tolerate booth." Instead, Dr. Parker referred Petitioner for an orthopedic evaluation and imposed restrictions of no use of the left hand. PX2.

On May 2, 2011, Petitioner presented to Dr. James Sola at Illinois SW Orthopedics. Dr. Sola documented Petitioner's description of the wrist injury and noted his pain was toward the dorsum of the wrist. On examination, the doctor noted restricted wrist motion, tenderness over the dorsum of the carpus with moderate swelling to the hand, and some weakness in finger grip; Dr. Sola reviewed the x-rays and observed some degenerative changes in the carpus, mainly at the STT joint. Concluding Petitioner aggravated the degenerative changes in his wrist, Dr. Sola recommended conservative care with a Medrol Dosepak, anti-inflammatory, and wrist brace, and restricted Petitioner to light duty, office position only. PX3. Later on May 2, 2011, Petitioner returned to Veeder and provided Dr. Parker with Dr. Sola's treatment recommendations. PX2.

On May 17, 2011, Petitioner was re-evaluated by Dr. Sola. The record reflects Petitioner reported the discomfort in his wrist was "markedly improved...states now he just has slight discomfort with extremes of motion." Dr. Sola's physical examination revealed no discrete point tenderness, wrist motion was good and essentially equal to the opposite side, and good strength with finger grip. Reiterating his conclusion that Petitioner strained his arthritic wrist, Dr. Sola noted Petitioner's symptoms had improved markedly; Dr. Sola directed Petitioner to discontinue the wrist brace and released him to return to work full duty with the caveat that should he have problems with certain activities, he may need to be placed on certain restrictions. PX3, RX2.

When Petitioner presented to Dr. Parker later that day, he indicated his symptoms had eased to a mild ache. Petitioner advised Dr. Parker he had been informed he has advanced arthritis in the wrist and can expect to have pain intermittently. Dr. Parker's examination findings were benign, with full range of motion and strength. Dr. Parker's assessment was wrist pain in patient with advanced arthritis, which he memorialized was a "chronic non occupational illness in which Petitioner can expect to have symptoms intermittently with normal activities." In an "attempt to protect the employee from manifesting symptoms at work," Dr. Parker limited Petitioner's forceful pushing/pulling to 40 pounds with the left hand. PX2, RX3.

On June 9, 2011, Petitioner was re-evaluated by Dr. Parker. Dr. Parker's notes reflect Petitioner stated he was doing well, had no pain, and no problem performing his modified job. Noting Petitioner had wrist pain secondary to arthritis, Dr. Parker concluded no further treatment was necessary and continued the "permanent restriction written to prevent symptoms of patient's arthritis from manifesting at work." PX2, RX3.

The next medical record in the transcript is a February 22, 2012 visit with Dr. Dolores Cantrell. The handwritten report indicates Petitioner's appointment was to discuss test results, a nodule on his right hand, and "left hand has shooting pains to ulnar nerve pattern from elbow into $4^{th}/5^{th}$ digits." Petitioner was referred to Dr. Beatty and an EMG of the left upper extremity was ordered. PX24. The Commission notes Petitioner's complaints as of February 22, 2012 are nerve related and thus different from Petitioner's prior complaints which were confined solely to reports of wrist pain. We further emphasize there is no mention of the April 30, 2011 work injury.

The Commission finds the eight-month gap in treatment evidences Petitioner's work-related condition reached maximum medical improvement as of June 9, 2011. While Petitioner testified he had ongoing complaints following his injury, the Commission observes there is no support for such in the medical records. Similarly, no witness evidence was presented either from coworkers or others who could corroborate his ongoing complaints.

Based on the above, the Commission finds the preponderance of the credible evidence establishes Petitioner's current condition of ill-being is not causally related to his April 30, 2011 work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2018, as modified above, is hereby affirmed.

19IWCC0384

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 10.25 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses for treatment of Petitioner's left wrist incurred through June 9, 2011 as provided in §8(a) and §8.2 of the Act. Respondent shall have credit for all amounts 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 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: JUL 25 2019

L. Elizabeth Coppoletti

LEC/mck

O: 6/4/19

43

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MUNRO, JIMMY
Employee/Petitioner

Case# **12WC020336**

US STEEL CORPORATION
Employer/Respondent

19IWCC0384

On 4/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
NATHAN A BECKER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0299 KEEFE & DePAULI PC
ANDREW J KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

JIMMY MUNRO
Employee/Petitioner

v.

U.S. STEEL CORPORATION
Employer/Respondent

Case # **12** WC **20336**

Consolidated cases: _____

19IWCC0384

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 23, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 30, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**80,682.03**; the average weekly wage was $**1,551.58**.

On the date of accident, Petitioner was **57** 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 $**30,827.00** for other benefits, for a total credit of $**30,827.00**.

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

ORDER

As explained in the Arbitration Decision, Petitioner's current condition of ill-being with regard to his left wrist/hand is not causally related to the accident at work on April 30, 2011. Petitioner reached maximum medical improvement on June 9, 2011.

Respondent has paid all reasonable and necessary medical services and shall receive credit for same. Petitioner is not entitled to temporary total disability. Petitioner did not exceed his choice of two physicians.

Respondent shall pay Petitioner the sum of **$669.64 per week** (the statutory maximum applicable rate) for a period of **10.25 weeks**, as provided in **Section 8(e)**, because the injuries sustained caused a **5% loss of use of the left hand/wrist**.

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

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

Signature of Arbitrator

March 23, 2018
Date

APR 2 - 2018

STATE OF ILLINOIS)
) ss
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JIMMY MUNRO
Employee/Petitioner

v. Case #: **12 WC 20336**

U.S. STEEL CORPORATION
Employer/Respondent

19IWCC0384

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that on April 30, 2011, Petitioner sustained an accident which arose out of and in the course of his employment with Respondent, resulting in injury to his left wrist/hand. The issues at trial were causal connection, medical bills, temporary total disability, nature and extent of the injury, and whether Petitioner exceeded his choice of two physicians.

On the date of accident, Petitioner was 57 years old, single, and had no dependent children. He was employed by Respondent as a Machinist and had been so employed since 1984. He retired in January 2015. Petitioner testified that on April 30, 2011, he was torqueing a T-wrench to loosen a bolt and felt a pop in his left wrist. Shortly thereafter he noticed pain and swelling in his left wrist and hand. He demonstrated the motion required to torque the T-wrench by moving his arms and shoulders. It did not appear wrist movement was required. He testified that he completed his shift and subsequently presented to Veeder Clinic, Respondent's onsite medical facility.

On April 30, 2011, Petitioner presented to Veeder Clinic and complained of swelling, lack of movement, and pain traveling from the left hand up to the left elbow. He rated the pain at 10/10. He was initially evaluated by Nurse Michael Lemp, who noted left wrist edema and erythema. Diagnosis was a strain or sprain injury. PX2. Petitioner was referred for x-rays, which showed degenerative changes with mild narrowing of the inter-carpal joints with no evidence of fracture. PX7. He returned to Veeder Clinic and was evaluated Dr. Parker; he reported his pain was now 5/10. Petitioner was instructed not to use his left hand and was referred to Dr. James Sola. PX2.

Petitioner presented to Dr. Sola on May 2, 2011. Dr. Sola documented pain toward the dorsum of the left wrist. Petitioner denied numbness or tingling in his hand. It was noted he was a diabetic and had smoked cigarettes for the past 35 years. Dr. Sola performed a physical examination and reviewed x-rays. He recommended a Medrol Dosepak, anti-inflammatory medication, and a wrist brace. Petitioner was placed on office duty restrictions and instructed to return in a week. PX3. Petitioner's restrictions were accommodated.

On May 17, 2011, Petitioner returned to Dr. Sola, who documented that his wrist discomfort had markedly improved. Petitioner confirmed at trial that Dr. Sola's report was accurate. On examination, Petitioner had slight discomfort with extremes of motion. He had no numbness or tingling and no area of discrete point tenderness. He had good wrist motion that was equal to that on the right side, and good strength and sensation. Updated x-rays revealed degenerative changes at the scaphotrapeziotrapezoid (hereinafter "STT") articulation, but no acute changes. Petitioner was allowed to discontinue use of the wrist brace and return to work full duty. Dr. Sola suggested that restrictions could be imposed if work activities caused problems. He opined that Petitioner had sustained a strain of an arthritic wrist. PX3.

Petitioner presented the work slip to Dr. Parker and reported that his symptoms had been reduced to a mild ache. He reported that he was diagnosed with advanced arthritis in the wrist and could expect to have pain intermittently. Physical examination revealed full range of motion and strength. Dr. Parker diagnosed left wrist pain with advanced arthritis. He opined the condition was a chronic, non-occupational illness that would cause intermittent symptoms with normal activities. He recommended a restriction of 40 pound pushing and pulling with the left hand to protect Petitioner from manifesting symptoms while working. PX2. Petitioner's restrictions were accommodated.

Petitioner returned to Dr. Parker on June 9, 2011, and reported he was doing well. Dr. Parker documented he had no pain and no problems performing his job activities with the restrictions imposed. He opined that no further treatment would be necessary and Petitioner was released from care at that time. PX2. Petitioner testified at trial that he did not specifically recall the evaluation and could not dispute the accuracy of the report.

Petitioner testified he gradually increased his work load following release by Dr. Parker.

On October 18, 2011, Petitioner presented to Dr. Dolores Cantrell, his primary care physician. There is no documentation of ongoing left wrist complaints and there is no reference to the incident on April 30, 2011. PX24.

Petitioner returned to Dr. Cantrell on February 22, 2012, and reported symptoms in both his right and left hands. Dr. Cantrell recommended an EMG/NCS study and referred Petitioner to Dr. Michael Beatty. There is no reference to the April 30, 2011 incident. PX24.

Petitioner underwent an EMG/NCS study on March 1, 2012. Dr. Cantrell interpreted the study to reveal mild left ulnar neuropathy and significant left carpal tunnel syndrome. PX9.

On March 13, 2012, Petitioner presented to Dr. Michael Beatty. He reported having issues with a ring finger palmer nodule on his dominant right hand with associated pitting *over the past 2 years*. Dr. Beatty diagnosed Dupuytren's disease with respect to the right hand. Petitioner also reported that he had *left wrist pain for 2 years*. Dr. Beatty reviewed the results of the EMG/NCS studies and noted left ulnar neuropathy and significant left carpal tunnel syndrome, which he opined may account for some of Petitioner's symptoms. He further opined there was a possible relationship to Petitioner's work activity. Surgery was recommended. There was no reference to the work accident of April 30, 2011. PX4.

On May 15, 2012, Petitioner underwent a left carpal release, with no documented complication. PX10. He followed up with Dr. Beatty on May 21, 2012, and reported he was doing well. Sutures were removed on May 30, 2012. PX4.

On May 30, 2012, Petitioner presented to Veeder Clinic and reported having numbness and tingling in his left hand. The Arbitrator notes that *Petitioner had not presented to Veeder Clinic between June 9, 2011, and May 30, 2012.* Petitioner reported he felt the symptoms were related to 28 years of repetitive job duties. He reported having undergone a carpal tunnel release two weeks prior. He was restricted to office work with no use of the left hand. PX2. Petitioner's restrictions were not accommodated and a first report of injury was filed. PX1.

Petitioner returned to Dr. Beatty on June 14, 2012, and reported that the numbness and tingling in his left hand were gone. Dr. Beatty documented a positive Finkelstein's test on the left hand. Petitioner also reported having pain in the right carpal area. Dr. Beatty advised he wanted to proceed with a fasciectomy on the right hand. PX4.

On June 29, 2012, Petitioner underwent a left wrist MRI. Radiologist Stanton documented that Petitioner had chronic wrist pain and had undergone carpal tunnel surgery one year ago. The Arbitrator notes the carpal tunnel release was performed the prior month. The MRI was interpreted to reveal evidence of the carpal tunnel surgery, bone marrow edema and abnormal enhancement predominantly involving the volar aspect of the lunate, possible microtrabecular fracture (Kienbock's disease), arthritis most pronounced in the lateral carpus and base of the thumb. There was also evidence of an old avulsion ulnar styloid fracture. PX11.

Petitioner underwent a right hand regional palmar fasciectomy on July 18, 2012, with no documented complications. PX13. He followed up with Dr. Beatty on July 23, 2012, who noted that the surgical area looked excellent. Sutures would be removed the following week. PX4.

On July 25, 2012, Petitioner underwent a left wrist MR arthrogram. It revealed moderate to severe left wrist de Quervain's disease, Kienbock's disease of the lunate, tear of the central fibers of the left lunotriquetral ligament, severe triscaphe osteoarthritis, and mild first carpometacarpal joint osteoarthritis. Petitioner also underwent a bone scintigraphy, which revealed intense activity in the distal scaphoid region, possible involvement of the scapho-trapezium joint and minimally greater activity in the radiocarpal region. PX12.

Petitioner returned to Dr. Beatty on July 30, 2012, and discussed the results of recent radiographic studies. He received a Kenalog injection for the diagnosed de Quervain's tenosynovitis on the left. He subsequently called Dr. Beatty on August 14, 2012, and reported no relief from the injection. Surgery was scheduled. PX4.

On September 11, 2012, Petitioner underwent a de Quervain's tenosynovitis release on the left wrist without complication. PX14. He followed up with Dr. Beatty on September 18, 2012. It was noted he was doing well and sutures were removed. PX4.

Dr. Beatty's note of October 8, 2012, indicates that Petitioner was now having pain above the first compartment area in the distal radial region. He did not believe it was a neurologic condition and he recommended an evaluation with Dr. Robert Russell. PX4.

On October 23, 2012, Petitioner presented to Dr. Russell, who documented that Petitioner had chronic left wrist pain with unknown etiology. He recommended wrist arthroscopy. PX25.

On October 15, 2012, Petitioner was evaluated by Dr. Mitchell Rotman, Respondent's Section 12 examiner. Dr. Rotman opined that Petitioner was doing very well from his left carpal tunnel release and his right Dupuytren's excision. Petitioner denied any complications from his left de Quervain's release. Dr. Rotman did not believe those conditions were causally related to Petitioner's work activities. He did not find any work risk factors for carpal tunnel syndrome or de Quervain's tenosynovitis and did not find any evidence of an acute work injury occurring on April 30, 2011. He opined that the incident may have triggered some left wrist discomfort at the time and further opined that the pop in the wrist was from preexisting significant arthritis. He did not believe the incident of April 30, 2011, caused the STT joint arthritis nor made it any worse, as Petitioner was already bone-on-bone at the level of the STT joint at the time of the original x-rays taken immediately after the incident. RX1, PX5.

Dr. Rotman opined that Petitioner had several obvious risk factors for carpal tunnel syndrome, including diabetes, age, and obesity. He opined that Petitioner's arthritis was secondary to two wrist fractures sustained when he was younger. He noted that the MRI was suggestive of Stage I Kienbock's, and opined that it might be responsible for the clicking noted at the radiocarpal joint in the area of the lunate. He suggested injections might be indicated and did not rule out arthroscopy. He did not believe the need for additional treatment was work related. RX1, PX5.

On November 15, 2012, Dr. Beatty referred Petitioner to Dr. Bruce Kraemer at St. Louis University Hospital. PX4. Petitioner presented to Dr. Kraemer on December 10, 2012. It was noted that he had a *"2 year history of persistent left wrist pain"*. The Arbitrator notes there is *no reference to the April 30, 2011, work incident.* The resident physician and Dr. Kraemer diagnosed arthritis of the left hand, de Quervain's disease and degenerative arthritis of the left wrist. Petitioner received a Kenalog injection into the STT joint, which reduced his pain from 10 to 2. Petitioner was instructed to return in two weeks. PX6.

Petitioner returned to Dr. Kraemer on December 17, 2012, and reported temporary relief from the injection. Dr. Kraemer reviewed the bone scan and opined there was no indication of Kienbock's disease. Petitioner received an injection into the left first dorsal extensor compartment without complication and was provided a splint. PX6.

On January 7, 2013, Petitioner returned to Dr. Kraemer, at which time surgery was discussed. Dr. Kraemer indicated surgery would consist of an STT fusion and exploration of the left wrist first dorsal extensor compartment. Dr. Kraemer noted, *"He understands that it will be challenging to show it is all work-related. He will discuss this with his lawyer."* PX6.

On January 17, 2013, Petitioner underwent surgery by Dr. Kraemer. It consisted of (1) partial wrist fusion using iliac bone graft and K-wire fixation; (2) radial styloidectomy; and (3)

injection into the flexi carpi radialis and first dorsal extensor compartment regions. Post-operative diagnosis was STT arthritis, de Quervain's tenosynovitis and flexor carpi radialis tendinitis. PX16.

Petitioner followed up with Dr. Kraemer on January 28, 2013. X-rays revealed hardware was intact. There was some soft tissue swelling at the wrist and the old styloid fracture was evident. The radiologist noted diffuse narrowing of the DIP joints with small marginal osteophytes. Diffuse distal interphalangeal degenerative change continued to be evident. PX8. Petitioner was instructed to continue wearing a sling and keep his hand and wrist immobile. PX6.

He returned on February 11, 2013, and reported left hand swelling but improved pain. There were no signs of infection. A pin and sutures on the dorsum side of the hand were removed. Petitioner returned on February 25, 2013. X-rays revealed progressive healing. Left wrist swelling had improved, but remained tender. Petitioner was provided a thumb spica. He followed up again on March 11, 2013 and the record documents similar improvement at that time. PX6.

On April 8, 2013, Petitioner returned to Dr. Kraemer and reported shooting pains up his left arm. Pins were removed and he was instructed to continue wearing his splint. X-rays revealed no interval changes in osseous alignment. Dr. Kraemer counseled Petitioner on the STT arthritis, advising it should now be a lesser concern. He did not rule out treatment of other entities. PX6.

Petitioner followed up on April 29, 2013, and reported shooting pain on the palmar surface of the wrist. X-rays revealed advanced degenerative changes in the thumb basal joint and triscaphe joint. Severe osteopenia was noted. PX8. Dr. Kraemer attributed Petitioner's symptoms to flexor carpi radialis (FCR) tendinitis and administered an injection. He recommended Petitioner wean out of the splint and begin wrist exercises. PX6.

Petitioner returned to Dr. Kraemer on May 20, 2013, and reported ongoing left wrist pain. Dr. Kraemer documented that the pain was "different from the pain he had previously" and that the previous pain distribution was different. The Arbitrator notes that *Petitioner had not been working for over a year.* Dr. Kraemer noted that Petitioner had occasional crepitance of his wrist, which he believed was the scaphoid rubbing abnormally and the radial scaphoid fossa. Petitioner was diagnosed with minimal residual pain from arthritis and STT arthritis. Dr. Kraemer continued to believe there was a significant component of flexor carpi radialis tendinitis, and administered an injection into the flexor carpi radialis tendon. PX6.

On June 5, 2013, Petitioner underwent a left wrist MRI without contrast. The radiologist interpreted the study to reveal flexor carpi radialis tendinosis with progressive thickening and signal alteration towards the distal insertion and additional chronic findings. PX17. Petitioner followed up with Dr. Kraemer on June 10, 2013, and the MRI was reviewed. Based on the results, surgery was recommended, to consist of exploration and release. PX6.

On June 19, 2013, Petitioner underwent tenosynovectomy to address the left flexor carpi radialis tenosynovitis. Tissue was sent for culture to identify possible infection. PX18. He followed up with Dr. Kraemer on June 24, 2013, and reported that his pain relief was the best he had in the last two years. There was no sign of infection. He was provided a splint and instructed to avoid heavy use of the hand. He returned on July 8, 2013, and sutures were removed. Examination revealed continued swelling of the flexor carpi radialis. Petitioner reported a

crunching of the wrist bones when flexing the wrist. He was instructed to avoid maximal flexion and extension of the wrist. He followed up on August 5, 2013, and reported he was doing much better. It was noted that his swelling had settled down and was much better. Dr. Kraemer referred him to physical therapy for gentle range of motion, which began on August 27, 2013. PX6, PX21.

Petitioner returned to Dr. Kraemer on September 6, 2013. X-rays that day revealed dense degenerative disease at the triscaphe joint and first metacarpal joint. There were subchondral cysts and joint space narrowing at the first MCP joint. The radiologist again noted diffuse osteopenia in the wrist. PX8. Examination revealed that marked swelling had returned to the flexor carpi radialis tendon region. Dr. Kraemer noted that, given the marked swelling, there was possibly a fungal infection. He recommended additional surgery for exploration and culture. PX6.

On September 18, 2013, Petitioner underwent an extensive tenosynovectomy of the flexi carpi radialis region. Tissue was again taken for culture but no infection was discovered. PX19. He followed up with Dr. Kraemer on September 23, 2013, who noted that he was doing very well and had minimal pain. The left wrist excision was healing with was no sign of infection, and swelling had been reduced. Sutures were removed on September 30, 2013, and Petitioner was provided a custom splint. He returned on October 18, 2013, and reported he was doing well with "no pain whatsoever". On examination, there was a slight bit of swelling. Petitioner was instructed to begin range of motion exercises. PX6.

Petitioner followed up with Dr. Kraemer on November 18, 2013, and reported the least pain he had had in over three years. He had some numbness from the mid-forearm on the radial side, extending to the radial side of the distal thumb. He was instructed to continue in physical therapy. He followed up on November 22, 2013, and reported he was doing very well with no complaints. He was released to return to regular duty work effective December 1, 2013. PX6.

Petitioner returned to Dr. Kraemer on January 3, 2014. He reported "new swelling over the left wrist on the dorsum". On examination, there was no swelling or tenderness around the incision or near the FCR tendon, and range of motion was normal and pain free. There was "rather thick stable swelling over the dorsum of the wrist", which was noted to cause no pain or problems. Petitioner was provided a compression sleeve for his wrist and was instructed to return on an as needed basis. PX6.

On April 21, 2014, Petitioner returned to Dr. Kraemer on April 21, 2014. He reported he was back working but had quite a bit of swelling on the dorsal and volar surfaces of the radial sided forearm. He reported that the symptoms worsened with work. X-rays revealed severe degenerative changes in the wrist, but otherwise stable from prior radiographic studies. Petitioner reported he was applying for disability. Dr. Kraemer indicated that he needed to consider a lighter duty/less physically demanding line of work and recommended he return to no use of the left hand and wrist. PX6, PX8. The Arbitrator notes this is the last treatment record from Dr. Kraemer.

On April 21, 2014, Petitioner underwent a second evaluation by Dr. Rotman, Respondent's Section 12 examiner. He reported continued left wrist pain and discomfort and advised he was having severe difficulty with home activities and chores. He further advised he had difficulty with most recreational activities, including golfing, bowling, and playing the horn. Dr. Rotman reviewed medical records post-dating his previous October 15, 2012, examination. X-rays of the

left wrist were obtained and interpreted to reveal a non-union of the attempted STT fusion site with lucency at the old STT joint and motion between the radial and ulnar sides. Dr. Rotman noted that a very limited radial styloidectomy had been performed. He opined that the surgery was not enough to prevent symptoms in the area. RX1, PX5.

Dr. Rotman opined that Petitioner had done poorly following a series of failed surgeries. He diagnosed non-union of the STT joint fusion, possibility of infection, and rupture of the FCR tendon. He noted that the FCR tendon rupture commonly occurred in individuals having significant STT arthritis. He recommended debridement of the volar side of the wrist and a repeat attempt to fuse the STT joint. He also had concern that a neuroma of the radial sensory nerve likely developed at the time of the attempted fusion. Dr. Rotman opined that Petitioner was much worse than at the time of his previous examination. He reiterated that he did not believe Petitioner's condition and need for ongoing treatment was work related. He offered to treat Petitioner through his private health insurance. Petitioner was permitted to work with a left wrist brace as his symptoms would tolerate. RX1, PX5.

Petitioner opted to treat with Dr. Rotman, who performed surgery on July 2, 2014. The procedures consisted of left wrist STT fusion, left radial styloidectomy, and neuroma excision from the radial sensory nerve with reconstruction. PX20. Petitioner followed up with Dr. Rotman on July 10, 2014, and reported he was doing very well. X-rays confirmed perfect alignment of the fusion and wires. He was given a thumb spica cast. Dr. Rotman noted that Petitioner had retired. Petitioner returned on July 31, 2014, and reported he was doing well except for some pain from the hip where the bone graft had been harvested. A new thumb spica cast was applied. RX1, PX5.

Petitioner followed up on August 21, 2014, and reported he was doing well. X-rays revealed early healing of the STT fusion. Petitioner was prescribed a thumb spica shell brace. He returned on September 16, 2016, and pins were removed at that time. On October 16, 2014, he reported he was doing well. X-rays showed evidence of a solid fusion, but on examination his wrist remained slightly tender and swollen. He was instructed to finish therapy. RX1, PX5.

Petitioner returned to Dr. Rotman on November 25, 2014, and reported he was doing well. On examination, he had some reduced motion and grip strength but was able to make a full fist. There was much less wrist swelling. There was very slight sensitivity over the radial sensory nerve repair site, but noted to be much better. There was slight pain over the volar radial wrist. X-rays showed a solid fusion. Dr. Rotman noted Petitioner had "done extremely well from his left STT fusion" and released him to full duty, effective December 8, 2014. Petitioner was discharged from care at that time. RX1, PX5. The Arbitrator notes this is the final treatment record.

At trial, Petitioner testified he returned to work for approximately one month and then retired. Regarding the left hand/wrist, he testified he had weaker grip strength on the left, pain with excessive movement, and occasional pain and numbness from his forearm to his thumb.

Dr. Kraemer testified by way of deposition on January 24, 2017. He is a Board Certified Plastic Surgeon with additional certification for surgery of the hand. He testified consistent with his treating records. PX22.

On direct examination, Dr. Kraemer testified, "So the injury or whatever—if it was—you know, that event with the pop didn't cause him to have arthritis." Regarding the initial STT fusion recommendation, he testified that Petitioner "had severe arthritis and it was causing some chronic pain and a lot of his pain got better with that, so whether it was work related or not, or whatever, he needed that problem treated." PX22.

Petitioner's counsel offered a hypothetical over Respondent's objection and inquired as to the causation or aggravation for Petitioner's left wrist. Dr. Kraemer testified:

> "I think that it's no question he had underlying STT arthritis, that didn't just happen magically at the time of injury. I think that it's potential with that torqueing thing he may have had some critical ligaments, which were giving some support to the joint, which has minimal movement normally, that there was more movement which potentially led to the clicking or popping. And on the palmer side of this STT joint, this FCR tendon had a lot of—had some inflammation. So, I can't say as to why the pop, but this history of his unusual nature of what's happened with it, and how he progressed, how he went, has a lot to do with flexor carpi radialis tendon deep in the wrist, as well as the underlying STT arthritis, which I think he had." PX22.

As to whether the STT fusion caused additional issues with the FCR tendon, he testified:

> "I think the injury itself stresses this area such that the tendon had an injury, perhaps deep that was unappreciated due to other problems, which were more readily diagnosable. And that it was potentially what the pop was that after you treated the other things you can get down to it. But he had—for all the people I've taken care of over the years with this, one of the most reacting FCR tendons. And then—so I have no other explanation other than the operation itself I don't think caused it, and if anything, that's subsequently looks like from the records I've seen the STT fusion wasn't so solid. So the fusion I don't think caused it. He had problems in the joint area, and whether something internally caused a partial rupture of that tendon or led to the ongoing inflammation. The STT joint was what drove a lot of the problems, but I think that's—the FCR tendon ultimately seemed to be his biggest wrist pain causing problem." PX22.

On cross-examination, Dr. Kraemer testified that STT arthritis is poorly understood. He confirmed it is a progressive disease and that Petitioner's condition was well advanced at the time that he had the episode. He testified that bone fractures and unsuspected ligament injuries can lead to osteoarthritis. He acknowledged that body habitus had an impact on the wrist, as did "diabetes and the other stuff that goes along, if you have tendonitis and things with it." He acknowledged smoking would impact healing. PX22

Regarding the diagnosis of significant arthritis and degeneration, Dr. Kraemer testified, "I've seen this process enough, I know he had to have—as advanced as his was—had it years. The process he had, I would venture, was there three to five years prior to all of his." He testified that Petitioner had both a *destructive* and a *productive* osteoarthritis, "meaning that it destroys things, but it also made some bone. So these little bone spurs that were forming and doing could very well have made, like, little sharp edges which eroded through that (ligament)." He noted that "Productive and destructive osteoarthritis could lead to bone spurs and things rubbing and tendonitis of different areas. And that whole part of his body had the problem. He testified that

arthritis was inflammation and that inflammation leads to a manifestation of pain and that, "classically, it's bone rubbing bone." He testified that arthritis can make tendonitis worse. PX22.

Dr. Kraemer testified he did not know that Petitioner had returned to work on May 18, 2011, and that he had worked for approximately a year before coming under the care of Dr. Beatty. He testified that the history he secured "wasn't month by month or whatever, it's just that list was never reliable." PX22.

Dr. Kraemer testified the July 25, 2012, bone scan did not reveal an acute injury or an acute ligament rupture. Based on his review of the July 25, 2012, MRI report, he did not identify an acute injury. PX22.

Dr. Kraemer was asked about his office note of January 7, 2013. He testified, *"I was just saying to him that there's no way in hell the work thing caused your STT arthritis.* I'm trying to make that very, very clear, so we can move on with it (STT fusion). But did it cause some of the other stuff with it, all possible." He testified "when you have tendonitis, the more one uses the tendon, the worse it gets and it gets inflamed until you can figure out what's going on with it. Did golf exacerbate it, I mean you can say wiping your butt could cause it. Anything could possibly cause a tendonitis problem to be flaring." PX22.

Dr. Kraemer agreed that even without any sort of incident on April 30, 3011, Petitioner would have required a fusion at the STT joint. He confirmed that he had no idea what Petitioner was doing on April 30, 2011. He did not know whether moving the wrench popped a ligament or tendon. PX22.

Dr. Kraemer agreed that Petitioner's arthritic condition and symptoms advanced even after remaining off work in May 2012. He stated, "that's just doing whatever you do, just sitting here picking up this stack of papers could." PX22.

Dr. Kraemer testified that this case was an "unusual story and trying to put it together somehow of how—do many weird random things happen, or is there a unifying theory—how the hell does any of this make any sense? Is this just random weird shit happening—or is there—so that makes some sense in terms of how this could actually have ever played out. *Now did the injury cause it or do it, I don't know."* PX22.

Dr. Rotman testified by way of deposition on February 23, 2017. He is a Board Certified Orthopedic Surgeon with additional certification for surgery of the hand. RX1.

On direct examination, Dr. Rotman testified it was important to note that the May 17, 2011, x-rays revealed "previous history of wrist fractures several years previously". He testified that the x-rays "[S]howed complete loss of the scaphotrapezial joint in the wrist, and some moderate arthritis at the base of the left thumb, and pointing of the radial styloid, and evidence of this old fracture of the distal radius. He had a deformity there from the old fracture with a tilt of five degrees. He had an old ulnar styloid fracture with a fibrous union. So, the main issues here are the complete loss of joint space with bone on bone at the STT joint. That's on the thumb side of the wrist and at the base of the thumb. So he's got arthritis of two areas of the radial side of the wrist, which are in the same area of this tendon that he had released" by Dr. Beatty. RX1.

Dr. Rotman testified the June 19, 2012, MRI did not reveal any acute pathology, and that there was no distinction between the x-rays of October 15, 2012, and those of May 17, 2011. RX1.

Regarding his diagnosis following the October 15, 2012, evaluation, Dr. Rotman opined that Petitioner was status post left carpal release and doing well. He continued having pain from the de Quervain's release, which was right over the arthritic area. Dr. Rotman opined that all of Petitioner's pain was coming from the arthritis and not tendinitis. He testified that Petitioner's age, obesity, and diabetes were co-morbid factors for carpal tunnel syndrome. He further testified that the prior wrist fractures would cause or contribute to arthritis and that playing golf would trigger discomfort from the arthritis. RX1.

Dr. Rotman testified that Petitioner's incident on April 30, 2011, did not cause or contribute to his condition of ill-being, nor did his job activities. Regarding the reported "popping" from the April 30, 2011, incident, Dr. Rotman testified, "[H]e's got bone on bone arthritis. And that's coming from the wrist joint. It's not coming from a tendon. It's not coming from something loose in there. You can get a pop in your wrist if you get bones rubbing against one another. When asked about Dr. Kraemer's testimony regarding a tendon possibly popping at the time of the incident, he testified, "He did have a tendon pop when I saw him later [April 21, 2014], that was the flexor carpi radialis, but that wasn't what was popping when I saw him [October 15, 2012]." Dr. Rotman testified that the April 30, 2011, incident did not make Petitioner's underlying wrist condition any worse nor advance the pre-existing disease process. He testified, "Well, you can't get that arthritis any worse at the STT joint, because that's already bone on bone, but there was no change in the x-rays from the two that I looked at." RX1.

Dr. Rotman testified that as of October 15, 2012, when he first examined Petitioner, he could not say that the de Quervain's procedure was appropriate because Petitioner "didn't get better from it." Other than that, he did not see a problem with the treatment. He testified, however, that treatment was not causally related to the April 30, 2011, incident. RX1.

Dr. Rotman testified that Petitioner continued having "a "lot of troubles with his wrist" at the time of his April 21, 2014, examination, and that he had not improved since October of 2012. Dr. Rotman testified that the flexor carpi radialis tendon had since ruptured and that the STT joint had not fused. He opined that treatment to date had been appropriate but unsuccessful. He recommended Petitioner undergo a debridement, a re-fusion and a repair of the radial sensory nerve. He did not believe Petitioner's condition and need for subsequent treatment was work related. Dr. Rotman testified the treatment he provided, including surgery, had no relationship to the April 30, 2011, incident or to Petitioner's work activities. RX1.

On cross-examination, Dr. Rotman confirmed that he did not believe Petitioner's left carpal tunnel condition was related to the April 30, 2011, incident. He testified that the pop and swelling were directly related to the underlying arthritis. He stated the popping sensation or noise was coming from the STT joint and that the joint collapse had occurred over the course of the previous 10 or 15 years. He testified that, even assuming Petitioner testified he had no pain with the STT arthritis until April 2011, he still would not attribute the need for treatment to the incident because Petitioner was already bone on bone. He testified, "For a trauma to cause advancing arthritis, you need to injure the joint in a way to cause injury to the cartilage, which would involve a fracture.

And if it heals improperly, that could advance the arthritic condition." He testified that Petitioner had no cartilage as of the April 30, 2011, incident. Dr. Rotman did not believe the restrictions imposed by Dr. Parker in May 2011 were necessarily reasonable. RX1.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the above Findings of Fact, and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After review of the evidence and due deliberations, the Arbitrator finds on the issues presented at trial as follows.

In support of the Arbitrator's decision relating to issue (F), whether Petitioner's current condition of ill-being is related to the injury, the Arbitrator finds the following:

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.551, 553 (1st Dist. 1994). 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).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being is causally related to his work accident of April 30, 2011. The Arbitrator further finds that Petitioner reached maximum medical improvement on June 9, 2011. Petitioner's condition and treatment thereafter were based on non-occupational systemic health conditions, including severe pre-existing arthritis, diabetes, hypertension, prior wrist fracture, and body mass index (BMI). The Arbitrator notes that, based on medical testimony, any ordinary, everyday activity would result in an aggravation or acceleration of the significant pre-existing arthritic condition, described as "bone on bone" well in advance of the April 30, 2011, incident. Petitioner confirmed at trial that any use of the left wrist, whether at work or in daily activities of living, resulted in symptoms.

The parties do not dispute that Petitioner sustained an accident on April 30, 2011, while torqueing a T-wrench to loosen a bolt. Although the Arbitrator notes from Petitioner's demonstration that little wrist activity was involved with torqueing the T-wrench, he nonetheless reported left wrist symptoms to his employer following his shift. Records from Veeder Clinic document that he reported pain of 10/10, and left wrist edema and erythema were noted. He was diagnosed with a strain/sprain injury. Subsequent left wrist x-rays were interpreted to reveal degenerative changes with mild narrowing of the inter-carpal joints with no evidence of fracture. Petitioner returned to Veeder Clinic and was evaluated by Dr. Parker. He reported that his pain was now 5/10. He was instructed not to use his left hand and was referred to Dr. James Sola.

Petitioner presented to Dr. Sola on May 2, 2011. Dr. Sola documented pain towards the dorsum of the left wrist; Petitioner denied numbness or tingling in his hand. It was noted that he was diabetic and had smoked cigarettes for the past 35 years. Dr. Sola diagnosed wrist pain and recommended a Medrol Dosepak, anti-inflammatory medication, and a wrist brace. Petitioner was placed on office duty restrictions and instructed to return in a week.

Petitioner returned to Dr. Sola on May 17, 2011, and it was noted that his wrist discomfort was "markedly improve". Petitioner confirmed at trial that Dr. Sola's report was accurate. He had only slight discomfort with extremes of motion, and had no numbness or tingling. There was no area of discrete point tenderness, range of motion was equal to that on the right, and there was good strength and sensation. Updated x-rays showed degenerative changes at the STT articulation with no acute changes. Dr. Sola allowed Petitioner to discontinue use of the wrist brace and to return to work full duty. He did not propose additional treatment, but suggested that restrictions could be imposed if work activities caused problems. Dr. Sola felt Petitioner suffered from a strain that had resolved, and he released him on a prn basis.

Petitioner presented the work slip to Dr. Parker, and reported that his symptoms had been reduced to a mild ache. He further reported that he was diagnosed with advanced arthritis in the wrist and could expect to have pain intermittently. Examination that day revealed full range of motion and normal strength. Dr. Parker diagnosed left wrist pain with advanced arthritis and opined that the condition was a chronic non-occupational illness that would cause intermittent symptoms with normal activities. He recommended a 40-pound pushing and pulling left hand restriction to protect Petitioner from manifesting symptoms while working.

Petitioner returned to Dr. Parker on June 9, 2011, and reported he was doing well. He had no pain and no problems performing his job activities with restrictions imposed. Dr. Parker opined that no further treatment would be necessary and Petitioner was released from care.

Based on the medical records, the Arbitrator finds that as of June 9, 2011, Petitioner's left wrist sprain/strain had resolved, following rest and conservative treatment. His condition and treatment thereafter was not established to be causally related to the April 30, 2011, work incident.

The Arbitrator finds significant that Petitioner presented to his primary care physician on October 18, 2011, and reported no ongoing left wrist complaints. The Arbitrator further notes there is no documentation that Petitioner reported left wrist complaints to Veeder Clinic between June 9, 2011, and May 30, 2012. Even when he reported to the Veeder Clinic on May 30, 2012, he reported a belief his symptoms were associated with excessive use.

Petitioner reported to his primary care physician on February 22, 2012, that he had *right and* left hand symptoms. He did not attribute those symptoms to the April 30, 2011, work incident. An EMG/NCS study was ordered, and Petitioner was thereafter referred to Dr. Beatty in March 2012. Dr. Beatty's records do not reference the April 30, 2011, incident at any point. In fact, Dr. Beatty documented that Petitioner had an onset of left wrist pain two years prior, well in advance of the April 30, 2011, incident.

It is therefore reasonable to conclude that Petitioner's symptoms, as related to the incident on April 30, 2011, were only temporary and had long since resolved prior to Petitioner presenting to Dr. Beatty. No credible evidence was presented to establish that the conditions Dr. Beatty diagnosed and treated were causally related to the April 30, 2011, work incident.

Additionally, the treatment records and testimony of Dr. Kraemer do not support a causal connection between Petitioner's current condition of ill-being and the April 30, 2011, work incident. Dr. Kraemer's treatment consisted of a failed partial wrist STT fusion and two

tenosynovectomies. Dr. Kraemer's testimony, as documented in the Findings of Facts, was equivocal as to whether he believed the diagnosed conditions and need for treatment were related to the April 30, 2011, incident. He could not state to a reasonable degree of medical certainty that there was a causal relationship. Specifically, he stated, "I do not know."

Dr. Kraemer conceded that he had no idea what Petitioner was doing on April 30, 2011. He acknowledged that there was a significant lapse in time and treatment between May 17, 2011, and March 2012. He acknowledged that even without any sort of incident on April 30, 3011, Petitioner would have required a fusion at the STT joint. He acknowledged that Petitioner had several co-morbidities that caused or contributed to his condition of ill-being. He conceded that, in light of the severity of Petitioner's arthritic condition, any activity of daily living could cause or contribute to his symptoms and need for treatment.

Conversely, Dr. Rotman, who managed to remedy the previously failed surgical attempts, unequivocally stated there was no causal relationship between Petitioner's condition of ill-being after his release of May 17, 2011, and the work incident of April 30, 2011. In fact, he stated that the restrictions imposed by Dr. Parker were not necessary. Dr. Rotman acknowledged that the April 30, 2011, incident may have triggered some left wrist discomfort at the time, but noted that it had resolved after limited conservative treatment and rest. He opined that the reported pop in the wrist was from pre-existing significant arthritis. He did not believe that the April 30, 2011, incident caused the STT joint arthritis nor would it have made it any worse, since Petitioner was already bone-on-bone at the level of the STT joint at the time of the original x-rays. Dr. Rotman believed that all of Petitioner's symptoms stemmed from his underlying arthritic condition and noted that any activity of daily living might cause or contribute to his symptoms. He did not believe that any treatment following the May 17, 2011, release was causally connected to the incident of April 30, 2011. Dr. Rotman's credibility is further strengthened by his offer for and subsequent treatment of Petitioner through his group health insurance coverage.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to meet his burden of proof on the issue of causal connection. The Arbitrator finds that Petitioner suffered a temporary sprain/strain of his left wrist on April 30, 2011, that completely resolved as of June 9, 2011, and that he reached maximum medical improvement at that time.

In support of the Arbitrator's decision relating to issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

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

In light of the Arbitrator's findings with respect to issue (F), the Arbitrator finds that medical services rendered through June 9, 2011, were reasonable and necessary in Petitioner's care and treatment relative to his accident of April 30, 2011. Based on Petitioner's Exhibit 23, it

appears Respondent has paid all appropriate charges for all reasonable, necessary, and related medical expenses. The Arbitrator finds that any treatment and associated charges after June 9, 2011, are not causally related to the work injury and Respondent is not liable for same.

In support of the Arbitrator's decision relating to issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The record reflects that Petitioner did not miss any work between April 30, 2011, the date of the incident, and June 9, 2011, the date of MMI. As such, and in light of the Arbitrator's findings with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to temporary total disability benefits. The parties stipulated and the Arbitrator finds that Respondent paid non-occupational benefits in the amount of $30,827.00 and is entitled to credit for same.

In support of the Arbitrator's decision relating to issue (O), whether Petitioner exceeded his choice of two physicians, the Arbitrator finds the following:

Respondent asserted that Dr. Rotman constituted Petitioner's third choice of physicians. In light of the Arbitrator's findings with respect to issue (F), and in light of the fact that Petitioner did not begin treating with Dr. Rotman until long after June 9, 2011, the Arbitrator finds this issue to be moot. However, the Arbitrator nevertheless finds that Petitioner did not exceed his choice of two physicians. Dr. Parker is the onsite company doctor and is not counted as one of Petitioner's choices. The referral to Dr. Sola was from the company doctor chain and also does not count as one of Petitioner's choices. Petitioner's primary care doctor, Dr. Cantrell, was his first choice of physicians. Dr. Cantrell referred him to Dr. Beatty, and Dr. Beatty referred him to Dr. Kraemer. These doctors represent Petitioner's first chain of doctors. Petitioner subsequently decided to treat with Dr. Rotman, which constituted his second choice of physicians. As an aside, the Arbitrator notes that Dr. Rotman's bills were paid under Petitioner's group health insurance coverage.

In support of the Arbitrator's decision relating to issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

The Arbitrator notes that Petitioner's accident occurred prior to September 1, 2011, thus Section 8.1b of the Act does not apply.

As a result of his work injury of April 30, 2011, Petitioner sustained a temporary sprain/strain to his left wrist. He treated conservatively until June 9, 2011, at which time he reached maximum medical improvement. The Arbitrator finds that Petitioner sustained 5% loss of use of the left hand (10.25 weeks) pursuant to Section 8(e) of the Act. The parties stipulated that Petitioner's average weekly wage was $1,551.58. The Arbitrator finds that his permanent partial disability rate is $669.64, the statutory maximum rate in effect on the date of his accident.

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

MAYTE GONZALEZ,
Petitioner,
vs.

NO: 10WC 37254

TOYS 'R' US,
Respondent.

19IWCC0385

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, permanent partial disability, 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 December 6, 2017, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $49,000.00. 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: JUL 25 2019

L.Elizabeth.Coppoletti

Thomas J. Tyrrell

Maria Portela

o072319
LEC/jrc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GONZALEZ, MAYTE
Employee/Petitioner

Case# **10WC037254**

TOYS "R" US
Employer/Respondent

19IWCC0385

On 12/6/2017, 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 1.45% 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:

1427 BERG & BERG
STEPHEN W WAUCK
2100 W 35TH ST
CHICAGO, IL 60609

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mayte Gonzalez
Employee/Petitioner

v.

Toys 'R' Us
Employer/Respondent

Case # **10** WC **37254**

Consolidated cases: **N/A**

19IWCC0385

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 harris**, Arbitrator of the Commission, in the city of **New Lenox**, on **October 11, 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. [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. [x] Other **"two doctor provider" referral chain rule**

FINDINGS

On **May 10, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,945.76**; the average weekly wage was $**325.88**.

On the date of accident, Petitioner was **27** 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 $**8,358.82** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**8,358.82**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $309.33/week for a period of 78-5/7 weeks, commencing August 4, 2010, through February 5, 2012, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $8,358.82 for temporary total disability benefits that have been paid.

Medical Benefits

Respondent shall pay causally related and reasonable and necessary medical services as set forth in Petitioner's Exhibit #11, and as provided in Sections 8(a) and 8.2 of the Act, with the proviso that no bills incurred outside of the first two chains of medical provider referrals need be paid by Respondent (see full Decision). Respondent shall hold Petitioner harmless and shall reimburse the union for all compensable medical charges it has paid, pursuant to the medical fee schedule or any negotiated rate, after demand by the union for such reimbursement, if any.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $309.33/week for a total of 106 weeks, because the injuries sustained caused the 20% loss of use of the right leg (43 weeks) as provided in Section 8(e)12 of the Act; the 20% loss of use of the left leg (43 weeks) as provided in Section 8(e)12 of the Act; and the 4% loss of the person as a whole (20 weeks), as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner all compensation that has accrued from May 10, 2010, through October 11, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall receive credit for all amounts it has paid to or on account of this claim, including credit for all medical bills paid as reflected in Res. Ex. # 11.

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

December 6, 2017
Date

DEC 6 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MAYTE GONZALEZ, Petitioner/Employee,	)	
v.	)	~~10 WC 37254~~
	)	**Setting: New Lenox**
TOYS 'R' US, Respondent/Employer.	)	**Arb. Harris**

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

In support of the Arbitrator's decision, the Arbitrator hereby makes the following findings of fact:

The disputed issues in this case are: (1) causal connection; (2) the "two-provider" rule as found in Section 8(a)(3) of the Act; (3) medical bills; (4) temporary total disability benefits; and (5) the nature and extent of Petitioner's injury. The Arbitrator notes that this claim presents complicated medical issues with competing and conflicting medical evidence.

Petitioner's Accident on May 10, 2010

It is undisputed that on May 10, 2010, Petitioner Mayte Gonzalez was an employee of Respondent working in one of its warehouse facilities. She originally worked for Respondent in the processing department. This job required Petitioner to lift packages weighing up to 50 lbs. and throw them on a conveyor belt. By May 2010, however, Petitioner was in training to work as a picker, which required her to wear a safety harness and taking down packages from elevated shelves, which were then to be taken to the processing department.

On May 10, 2010, Petitioner was working as a picker. She had to take down two recliner-ottoman sets. While taking down the second set, she twisted and felt pain on the right side of her body, including her lower back, right leg, and groin. Petitioner testified that she felt a "pop" and a "sharp pain" at the time of the accident. Petitioner tried to continue working for a short time but then went to her supervisor and reported that she had had an accident.

Petitioner's Medical Treatment

Petitioner was sent by Respondent the next day to see Dr. Hickombottom at MedWorks Occupational Health. At her initial consultation, Petitioner stated that she "developed pain on the right side of the back" after she "twisted to place the box on a shelf"; when she "bent down and lifted a second box," she twisted and "felt a pull on the right side of the back" (Pet. Ex. No. 2, pp. 525). Dr. Hickombottom's physical examination focused on the thoracic spine, as he found "mild to moderate tenderness…in the area of T5-6, T6-7 and the right paraspinal muscle group, specifically the latissimus muscle group" (Id.). According to Dr. Hickombottom, Petitioner

"denie[d] any pain in the lower lumbar spine" (Pet. Ex. No. 2, p. 526). He then recommended that she work on restricted duty (no lifting greater than 10 lbs.) and begin physical therapy at Brightmore Physical Therapy (id.), which she began on May 12, 2010 (Pet. Ex. No. 2, p. 528). By May 25, 2010, Petitioner was discharged from MedWorks and told that she had a "resolved thoracic latissimus dorsi strain" (Pet. Ex. No. 2, p. 533).

However, on June 30, 2010, Petitioner returned to Dr. Hickombottom for a "recurrence of a thoracic right latissimus dorsi strain" (Pet. Ex. No. 2, p. 535). Soon thereafter, on July 7, 2010, Dr. Hickombottom diagnosed Petitioner with a "suspected right rib injury with underlying displacement" (Pet. Ex. No. 2, p. 541). Petitioner complained of "pain primarily on the right rib cage area primarily on the side" which was "aggravated with twisting and bending" (Id.). By July 29, 2010, Petitioner was reporting "thoracic lumbar back pain" which was not improving and was "always a 5 to 6" (Pet. Ex. No. 2, p. 549). Dr. Hickombottom noted muscle spasms "along her lower back, T11 down to L3" (Id.). He discussed getting a bone scan and continued to restrict Petitioner's work duties (Id.). Petitioner stopped going to MedWorks after this appointment.

Petitioner testified that she decided on her own to consult Dr. Mukund Komanduri of MK Orthopaedics in Joliet, an orthopaedic surgeon who concentrates in hip, knee, and shoulder injuries (Pet. Ex. No. 1, p. 6). Petitioner first saw Dr. Komanduri on August 4, 2010. Dr. Komanduri testified in his evidence deposition on August 27, 2015 (Pet. Ex. No.1).

At this initial consultation Dr. Komanduri noted that upon physical examination, Petitioner had "...paraspinal muscular spasm throughout the lumbar spine from about L2-L5, mostly on the right side" (Pet. Ex. No. 1, p. 80). However, he also noticed that "internal rotation of the right hip reproduced some modest pain" and that "internal rotation and adduction cause[d] severe groin pain and anterior thigh pain and hip pain" (Id.). An X-ray of Petitioner's hip also showed "a dysplastic femoral head" and "some evidence for a femoral acetabular impingement" (Pet. Ex. No.1, pp. 80, 81). Dr. Komanduri concluded that Petitioner had a "...probable labral tear in the affected right hip with some radiation of pain into the back, buttock, thigh, and groin" and perhaps also a disc herniation in the lumbar spine (Pet. Ex. No.1, p. 81). Dr. Komanduri recommended physical therapy and further diagnostic testing in order to determine Petitioner's exact diagnosis.

Dr. Komanduri testified that the tests he performed at this initial evaluation were "particularly important in trying to distinguish hip pain from back" because "hip pain and back are insidious, they overlap, they look almost the same" (Pet. Ex. No.1, p. 11). Because it is easy to confuse hip and back pain, "the average time for a hip labral tear to come to an orthopaedic surgeon's exam is somewhere around two and a half years" (Pet. Ex. No.1, p. 12). According to Dr. Komanduri, Petitioner's groin pain was a sign that she very likely had a hip problem (Id.).

Dr. Komanduri therefore recommended further diagnostic testing in order to determine what her exact diagnosis should be. Dr. Komanduri "sent her for a right hip MRI arthrogram, which is a study specifically designed to identify labral tears in the hip" (Pet. Ex. No.1, pp. 12-13). He also "ordered a lumbar MRI because there was a lot of muscular spasm around her low back and [he] wanted to make sure there was no back pathology" (Pet. Ex. No.1, p. 13). He also ordered physical therapy and gave Petitioner work restrictions (Pet. Ex. No.1, p. 81).

At the next visits, Dr. Komanduri diagnosed Petitioner with an L5-S1 disc bulge and lumbar sprain as the "primary diagnosis" (Pet. Ex. No. 1, p. 82). The hip MRI came back negative (id.). Petitioner reported that physical therapy was helping, and Dr. Komanduri concluded that "she does not have a correctable surgical condition" (Pet. Ex. No.1, p. 83). Petitioner also complained of left hip pain, even though there was "clinically nothing wrong with the left hip on examination" (Id.).

Dr. Komanduri explained in his evidence deposition that he believed Petitioner had "FAI or femoroacetabular impingement" (Pet. Ex. No. 1, p. 13). This is a "pre-existing congenital condition" consisting of a "deformity of the femoral head and neck junction as well as the hip socket (Pet. Ex. No. 1, p. 14). In a person with FAI, the hip socket "instead of being a half circle has an overhang of bone or pincer, so to speak, or a finger of bone that rubs and chafes against that egg-shaped femoral head" (Id.). Dr. Komanduri explained also that FAI can lead to labral tears: "labral tears are a consequence of stressful FAI where repetitive squatting, repetitive lifting and carrying cause the labrum to tear" (Pet. Ex. No.1, p. 15). In Dr. Komanduri's judgment, it would be "pretty unusual...a rare occurrence" for a young woman to have a torn labrum purely as a result of FAI, without some sort of aggravation (Id.).

In his office visit notes from October 29, 2010, Dr. Komanduri wrote that Petitioner was not improving with conservative care and that he "strongly believed this is femoral acetabular impingement in her right hip" (Pet. Ex. No.1, p. 84). However, her radicular pain needed to be evaluated by a spine surgeon. Dr. Komanduri therefore recommended that she consult Dr. Templin a spine specialist at Hinsdale Orthopaedics (Pet. Ex. No.1, p. 16).

Dr. Templin examined Petitioner on November 6, 2010, and reviewed her MRI. She concluded that there was no "structural cause" for her back pain and did not recommend any spine surgery (Pet. Ex. No.3, p. 554).

At a follow-up appointment on November 12, 2010, Dr. Komanduri pointed out that Petitioner's "right hip pain is substantial and persistent" (Pet. Ex. No.1, p. 85). At about this time, Petitioner's pain was "skyrocketing" and "it was starting to become clear that the hip was 90 percent of her pain" (Pet. Ex. No.1, p. 16). Dr. Komanduri suggested that due to Petitioner's "persistent femoral acetabular impingement" work conditioning would be a waste of money and that the better course of treatment would be a "right hip arthroscopy, labral repair versus debridement, and decompression of any femoral and acetabular osteophytes" (Pet. Ex. No.1, p. 85).

Respondent's IME did not approve the right hip arthroscopy and Dr. Komanduri decided to obtain a Functional Capacity Evaluation (FCE) for Petitioner to determine whether she could return to work (Pet. Ex. No. 1, p. 17). Petitioner was cleared to return to regular work, but she only "passed the FCE" because she was taking 1200 milligram of ibuprofen and was experiencing 5 out of 10 pain (Pet. Ex. No.1, p. 17; see also Pet. Ex. No.1, p. 89). Petitioner even "required a colonoscopy because of severe abdominal pain" (Pet. Ex. No.1, p. 89). Dr. Komanduri stated that it is "not acceptable to return someone to work in chronic pain" (Id.). Petitioner testified that working for Respondent, even in a light duty capacity in May and June 2010, was too painful for

her; she felt hip pain and stiffness in her lower back, and had a hard time walking up to six hours a day in the warehouse.

During the period when Dr. Komanduri was trying to obtain approval for a right hip arthroscopy, at her December 15, 2010 visit, Petitioner was "having pain on the opposite hip and the left hip [sic]" (Pet. Ex. No.1, p. 87). Dr. Komanduri thought this was "primarily due to overuse and shifting her body weight" (Id.). Dr. Komanduri hoped this problem would resolve by itself after the right hip surgery (Id.). Dr. Komanduri also noted that Petitioner's physical examination of her right hip remained "abnormal" (Pet. Ex. No. 1, p. 89). However, by April 20, 2011, Petitioner reported to Dr. Komanduri that her pain had subsided somewhat and she had increased flexibility (Pet. Ex. No. 1, p. 92). Petitioner continued to have positive femoral acetabular impingement signs in the right hip. She was starting to have some good days," whereas she had only had "bad days" when she first started going to Dr. Komanduri's office (Id.). Dr. Komanduri concluded that "it would seem inappropriate to do anything invasive while she is improving" and therefore released her to return to work (Id.). Dr. Komanduri considered Petitioner at MMI with low back chronic discomfort and hip pathology. He acknowledged that the hip pathology "is not at this time known as she has never been evaluated arthroscopically."

After this release, Petitioner continued to seek treatment for her pain. On April 11, 2011, Petitioner consulted with Dr. Howard Freedberg of Suburban Orthopaedics. At her initial consultation with Dr. Freedberg, she gave a history of injuring herself while lifting heavy boxes on May 10, 2010 (Pet. Ex. No. 6, p. 610). Petitioner recounted that the company doctor told her "she had a strain in right side back [sic]", but then she developed pain in her buttocks, which was worse on the right side—and then being told by another doctor that she had hip impingement (Id.). Petitioner had not gained any pain relief and even "got gastritis from the ibuprofen she was taking" (id.). Petitioner finally then went to Dr. Freedberg "to discuss getting epidural injections" (Id.). Dr. Freedberg did a physical examination of Petitioner's right hip and found "no evidence of labral pathology on provocative maneuvers (Pet. Ex. No. 6, p. 611). Dr. Freedberg diagnosed Petitioner with left leg radiculopathy and recommended an EMG and then, depending on the results of the EMG, an epidural steroid injection for the lumbar spine (Pet. Ex. No. 6, pp. 613, 614). After some delay, the EMG was carried out at Grandview Health Partners, Ltd., by Dr. Gregory Thurston on August 30, 2011. The final impression was of "left L5-S1 radiculopathy with proximal and distal axonopathy/denervation" (Pet. Ex. No.6, p. 630).

After the EMG, Dr. Freedberg referred Petitioner to Dr. Christopher Morgan of Chicago Pain and Orthopedic Institute. At the first appointment with Dr. Morgan on October 4, 2011, Petitioner discussed left L5-S1 and S1 transforaminal epidural steroid injections "to address her persistent left lower extremity radicular symptoms" (Pet. Ex. No. 7, p. 655). The first injection was then carried out by Dr. Neeraj Jain at Accredited Ambulatory Care on October 18, 2011 (Pet. Ex. No. 7, pp. 658, 659). At the follow-up with Dr. Freedberg following the first epidural steroid injection, Petitioner noted that the pain in her leg was "less intense" (Pet. Ex. No. 6, p. 632). The second epidural steroid injection was carried out on November 15, 2011 (Pet. Ex. No. 7, X7, pp. 664-665). At the next follow-up with Dr. Freedberg, Petitioner reported "40% relief" and so Dr. Freedberg recommended a third injection (PX6, p. 643). Petitioner held off for a while on the third epidural injection due to pain complaints after the second epidural (Pet. Ex. No. 7, p. 670), but

later had it done on January 24, 2012 (Pet. Ex. No. 7, pp. 674-675). Dr. Freedberg then released her at MMI on February 15, 2012 (Pet. Ex. No. 6, p. 651).

However, because of her persistent pain, Petitioner also went to her personal obstetrician/gynecologist, Dr. Gamilah Pierre of Partners in Obstetrics and Women's Health, in New Lenox. Beginning on February 4, 2011, Petitioner began complaining of "pain on the LLQ" and Dr. Pierre eventually "recommended sending her to Pelvic Pain clinic at Rush" (Pet. Ex. No. 4, p. 585). Petitioner went to Rush for the first time on June 25, 2012, she reported a "history of LBP related to lifting at work" (Pet. Ex. No. 9, p. 701). Petitioner also said that "after several months of PT she began having LLQ pain with recent referral to her right side" (id.). Petitioner was seeking an evaluation "for pelvic floor" (Id.). Dr. Sheila Dugan of Rush prescribed physical therapy for her pelvic floor muscles (Pet. Ex. No.9, p. 704). Petitioner began this course of physical therapy at the Kirk Center for Healthy Living on June 29, 2012 (Pet. Ex. No. 10, p. 732). After beginning the therapy, Dr. Dugan gave Petitioner a lidocaine injection to aid rehabilitation (Pet. Ex. No.9, p. 718). This was repeated on August 27, 2012, which was Petitioner's last appointment with Dr. Dugan (Pet. Ex. No. 9, p. 728). Petitioner also continued with therapy at the Kirk Center for Healthy Living through October 26, 2012. The therapist noted that Petitioner had "made good progress towards goals but remains limited due to labral in left hip that is affecting pelvic floor muscle and function" (Pet. Ex. No.10, p. 748).

Finally, Petitioner decided to return to Dr. Komanduri on September 19, 2012 (her prior last visit with him was on April 11, 2011). At this visit, Petitioner stated, "She has left hip pain for two years' duration. She has been hurting ever since her previous Workmen's Compensation claim. At this point she is very painful. She has been seeing multiple therapists. She saw specialists at Rush for pelvic pain, none of this has helped her." (Pet. Ex. No. 1, p. 93). Dr. Komanduri's physical examination revealed "an obvious hip flexor strain in the left hip" and "positive femoral acetabular impingement" (Pet. Ex. No. 1, p. 95). Dr. Komanduri recommended an MRI arthrogram of the left hip (Id.).

Dr. Komanduri explained that Petitioner began to experience more pain in her left because "FAI is present in both hips in 50 percent of patients" (Pet. Ex. No. 1, p. 19). Dr. Komanduri also believed that Petitioner was "offloading a painful hip," that is, putting "more of your weight on the...less painful side" (Id.). Dr. Komanduri felt that Petitioner had "the same problem" as when he had originally treated soon after the accident (Pet. Ex. No.1, p. 20).

Dr. Komanduri reviewed the MRI arthrogram (Pet. Ex. No.1, p. 184) at the next appointment on September 28, 2012. Dr. Komanduri's reading of the imaging was that Petitioner had pincer impingement and "clear evidence of an anterior labral tear" (Pet. Ex. No.1, p. 96). He specifically disagreed with the radiologist's original reading of the imaging (Id.). At that point Dr. Komanduri recommended left hip arthroscopy, labral repair, acetabular osteoplasty, and femoral osteoplasty, and Petitioner agreed with this recommendation (Id.).

Dr. Komanduri performed this left hip arthroscopy on October 30, 2012, at Provena St. Joseph Medical Center in Joliet (Pet. Ex. No. 1, pp. 163-164). At the post-operative follow-up, Dr. Komanduri noted that her "labrum was not salvageable and was severely damaged" (Pet. Ex. No. 1, p. 99). Petitioner also experienced more right hip pain after the surgery (Id.). Dr. Komanduri

interpreted this as a sign that after the surgery the left hip was less inflamed, and so now the right hip's inflammation became more noticeable (Pet. Ex. No. 1, p. 23). He suspected a labral tear in the right hip as well (Pet. Ex. No. 1, p. 99). Petitioner then began physical therapy at MK Orthopaedics and slowly began to improve (Pet. Ex. No.1, pp. 24-25). Petitioner first increased her flexibility and range of motion, and then began working on her strength and endurance (Pet. Ex. No.1, p. 25). Her pain scales came down "to about a 2 to 4/10" (Pet. Ex. No.1, p. 106), and by February 4, 2013, her left hip was feeling "80% better on good days" (Pet. Ex. No.1, p. 109).

Nevertheless, Petitioner continued to have right hip pain, and so Dr. Komanduri decided "to move ahead with the right hip arthroscopy, labral repair, acetabular osteoplasty, and femoral osteoplasty" (Id.). Dr. Komanduri performed the right hip surgery on April 23, 2013, again at Provena St. Joseph Medical Center (Pet. Ex. No.1, pp. 165-166). At the same time as he did the surgery on the right hip, Dr. Komanduri also gave Petitioner's left hip a steroid injection (Id.). At the post-operative follow-ups, Petitioner reported pain in her right leg, but her right hip pain generally improved (Pet. Ex. No.1, p. 115). By June 5, 2013, Petitioner's pain was "much diminished" and she had made "good progress in terms of flexibility and range of motion" (Pet. Ex. No. 1, p. 118).

By July 7, 2013, Petitioner's right hip had improved significantly, so that her pain there was "minimal" and her strength was "better" (Pet. Ex. No.1, p. 121). However, Petitioner continued "to have persistent left hip pain over the psoas and instability associated with her missing labrum" (Id.). Dr. Komanduri testified in his evidence deposition that "the psoas tendon runs over the hip socket along the inside of the hip socket. Sometimes its snaps, grinds or pops because it gets irritated along the lip of the hip socket. And that's more common in patients with FAI" (Pet. Ex. No.1, p. 27). It is possible relieve pain in the psoas by partially lengthening or cutting it; however, "it's not a perfect surgery" because of an associated "loss of strength with hip flexion" (Id.). Nevertheless, if a patient of his has persistent pain, he will consider a psoas release (Id.).

At the next appointment on July 31, 2013, Dr. Komanduri recommended a left hip psoas release and acetabular reconstruction (Pet. Ex. No.1, p. 124). Petitioner agreed with this treatment recommendation because her pain along the psoas was "unbearable" (id.). Petitioner had this surgery on September 3, 2013 (Pet. Ex. No.1, pp. 167-168). During this surgery, Dr. Komanduri not only had to perform a psoas release, but he also had to "make a new labrum" (Pet. Ex. No.1, p. 28). A new labrum in Petitioner's left hip was necessary in order to "create a lip of tissue that helps maintain a vacuum in the hip socket" and thus "allow the ball of the hip to maximally get sucked into the joint" (Pet. Ex. No.1, p. 29).

After this third and final surgery, Petitioner went through more physical therapy and had "fairly good function in both hips" (Pet. Ex. No.1, p. 139). At the final check-up for her hips on January 8, 2014, Petitioner did still have some inflammation and "low grade aches and pains in both hips" at times, but she was "able to manage her activities of daily living," so Dr. Komanduri released her on as-needed basis (Id.). She does have some labral pain. Today Petitioner is not regularly taking any pain medication for her hips. There was no indication of any restrictions.

She testified that originally she "never thought she'd be pain free," but after her treatment with Dr. Komanduri she "felt like me again."

Respondent's IMEs

Respondent sent Petitioner to several Section 12 examinations. The first was with Dr. John Andreshak on November 8, 2010 (Resp. Ex. No. 6). During the physical examination, Dr. Andreshak focused on Petitioner's lumbar spine but did note that Petitioner had "decreased internal rotation with some mild reproduction of groin pain" in her right hip (Resp. Ex. No. 6, p. 3). In his conclusions, though, Dr. Andreshak opined that Petitioner had work-related "back pain, likely a muscle strain" (id.). Dr. Andreshak expected Petitioner to be able to return to work full duty after completing a work conditioning/hardening program and an FCE (Id.). Dr. Andreshak opined that the MRI of the lumbar spine showed no disc herniation and no annular tear (Id.).

Petitioner's second IME was with Dr. Aaron Bare on December 20, 2010 (Resp. Ex. No.5, 5). Dr. Bare's examination focused on Petitioner's right hip. Dr. Bare did note that Petitioner had some pain with flexion and external rotation, but concluded that she had no impingement (Resp. Ex. No. 5, p. 3). Dr. Bare agreed that Petitioner had sustained a right hip and low back injury in her work accident, but thought that "her subjective complaints [did] not match her objective findings" as she had not improved within "a couple of months" (Resp. Ex. No. 5, p. 4). Dr. Bare agreed with Dr. Andreshak's recommendations for a work conditioning program followed by an FCE (Id.).

A few months later, Respondent asked both Dr. Andreshak and Dr. Bare to complete addendum reports. Dr. Andreshak denied the need for the injections to Petitioner's lumbar spine that Dr. Komanduri was requesting and further stated that Petitioner had reached MMI and could return to work without any restrictions (RX3). Dr. Bare also rejected Dr. Komanduri's request. While he agreed that Petitioner had "pain that may be legitimate" and did not displays any symptom magnification, Dr. Bare did not want to recommend injections because Petitioner's MRI was "normal" and a previous injection was not helpful (Resp. Ex. No.2, p. 1). Dr. Bare therefore recommended that Petitioner return to work at full duty (Resp. Ex. No.2 p. 2).

Neither Dr. Andreshak nor Dr. Bare were deposed.

Petitioner's third and final IME took place with Dr. Thomas Gleason on February 3, 2015. Dr. Gleason noted that Petitioner felt "better than she was at any time after the injury on May 10, 2010, and up to before the surgeries were performed (Resp. Ex. No. 1, Dep. Ex. No.2, p. 2). Dr. Gleason wrote that Petitioner's surgeries were "warranted" and not "excessive or unreasonable," but he believed they were "related to an intrinsic process unrelated to her job duties or any alleged work accident" (Resp. Ex. No.1, Dep. Ex.No.2, p. 6).

At his evidence deposition taken on September 29, 2015, Dr. Gleason repeated his opinion that Petitioner's surgeries were not related to her work accident (Resp. Ex. No. 1, p. 17). However, Dr. Gleason did testify that he opined Petitioner's surgeries were warranted "based upon the complaints as reflected in the records of Dr. Komanduri and in conjunction with the records as a whole and the diagnostic studies" (Resp. Ex. No.1, p. 21). Dr. Gleason noted Dr. Komanduri's finding in left hip arthroscopy of October 30, 2012, that Petitioner had an "anterolateral labral tear from 9:00 o'clock to 12:00 o'clock," which was a finding that was extensive enough to "justify the procedure" (Resp. Ex. No.1, p. 23). With regard to causal connection, Dr. Gleason conceded

that this finding was consistent with a possible traumatic event and that that Petitioner had no record of any hip or back complaints before 2010 (Resp. Ex. No.1, p. 24). Dr. Gleason also admitted that not many women as young as Petitioner come to him for hip surgery for causes "related solely to natural aging processes" (Resp. Ex. No.1, p. 24). Dr. Gleason agreed with Dr. Komanduri that "somebody with FAI would be predisposed to labral tears in the hips" (Resp. Ex. No.1, p. 25). Finally, Dr. Gleason conceded that in order for someone with FAI to tear a hip labrum, it would not require "super heavy work necessarily" (Resp. Ex. No.1, p. 26).

Lastly, in his evidence deposition testimony, Dr. Gleason offered no testimony or opinions regarding Dr. Komanduri's August 27, 2015 evidence deposition, nor did Dr. Gleason offer any testimony that he reviewed Dr. Komanduri's deposition.

CONCLUSIONS OF LAW

Regarding the Arbitrator's decision on disputed issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds and concludes the following:

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that her current condition of ill-being (and the need for all medical treatment incurred) is causally related to the stipulated injury sustained on May 10, 2010.

Specifically, the Arbitrator finds that Petitioner sustained a bulging disc at L5-S1 as a result of the work accident and she sustained "bilateral hip labral tears in both hips" and other hip pathology (Pet. Ex. No.1, p. 523, Dr. Komanduri's March 17, 2014 narrative report). After a careful review of the evidence deposition transcripts, the Arbitrator finds and concludes that the opinions of treating physician and surgeon Dr. Komanduri merit greater weight and credibility than the opinions of Respondent's Section 12 examiner Dr. Gleason. Accordingly, the Arbitrator agrees with and adopts the opinions of Dr. Komanduri.

To be compensable under the Act, the work 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." *Sisbro, Inc. v. Indus. Comm'n.*, 207 Ill.2d 193, 205 (2003). It is long-settled law in Illinois that the "aggravation or acceleration of a pre-existing disease is an injury which is compensable under the statute." *Quaker Oats Co. v. Indus. Comm'n.*, 414 Ill. 326, 330 (1953). Employers take their employees as they find them. *O'Fallen School Dist. No. 90 v. Indus. Comm'n.*, 313 Ill.App.3d 413, 417 (5th Dist. 2000). When determining whether an injury is causally connected to an accident, the Commission should consider various factors, such as whether a new accident affected a "claimant's symptomatic and clinical presentation" and whether it "resulted in a recommendation for a different type" of surgery. *National Freight v. Workers' Compensation Comm'n.*, 2013 IL App (5th) 120043WC, ¶ 27. "A chain of events which demonstrates a previous good condition of health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Indus. Comm'n.*, 93 Ill.2d 59, 63-64 (1982).

Most significant in determining this claim is the Arbitrator's consideration of all the trial evidence with special emphasis placed on the conclusion that Dr. Komanduri was far better informed regarding the facts (and the truly pertinent facts) of the claim than Respondent's expert Dr. Gleason. Dr. Komanduri also offered credible and articulated explanations regarding Petitioner's complicated medical history, course of treatment, diagnoses and causation. Only Dr. Komanduri offered comprehensive, credible and articulate testimony on all of the issues this claim presents. It is also very significant that in his evidence deposition testimony, ***Dr. Gleason offered no testimony or opinions regarding Dr. Komanduri's August 27, 2015 evidence deposition testimony or opinions***, nor was there any testimony that Dr. Gleason even reviewed Dr. Komanduri's deposition. Dr. Komanduri's testimony offers clear and persuasive opinions and explanations regarding the complex medical issues involved and presented in this claim.

Dr. Gleason did testify that he reviewed Dr. Komanduri's narrative letter dated March 17, 2014; however, it is also very important to highlight that Dr. Gleason did ***not*** offer any testimony regarding Dr. Komanduri's statements and opinions found in both his narrative letter and his deposition regarding the key issue of the meaning and significance of the diagnostic MRI arthrograms – that is, regarding the left MRI arthrogram performed on September 26, 2012 (see Pet. Ex. No. 2, pp. 184-186) Dr. Komanduri wrote, ***"I had spoke to the reading radiologist who had confirmed that there was an anterior labral tear and an FAI and the read was under read."*** (Pet. Ex. No. 1, p 57; Pet. Ex. No. 3, p. 523, emphasis added). The Arbitrator emphasizes that Dr. Gleason did ***not*** comment on this statement whatsoever, nor did he dispute or challenge this comment or the history it reports, in any way. Therefore, Dr. Komanduri's testimony and statement remains unrebutted and the Arbitrator adopts and places reliance upon this statement.

Further, Dr. Komanduri testified that he originally opined that the left MRI arthrogram performed on September 26, 2012 ***did show a labral tear*** and the study was "substantially more abnormal in the sense that she was seen by a musculoskeletal radiologist who identified her alpha angle at 57 degrees…" which is abnormal (Pet. Ex. No. 1, p. 20-21). Dr. Komanduri further testified "At this point the read was that there was impingement without a complete tear of the labrum, but there is evidence on the images that I saw of a cleft in the labral on multiple images consistent with a tear. Dr. Shafaie was the radiologist initially thought there was no labral tear. I spoke to him personally and went through the images that I thought were abnormal. And as you can see, my note documents that ***he agreed with me that there was a labral tear.***" (Pet. Ex. No. 1, p. 21). ***Of course, a month later, when the left hip surgery was performed, the surgery clearly revealed the labral tear, thereby conclusively confirming Dr. Komanduri's prior opinions. In fact, the hip anatomy was shown to be in very bad shape: a severely lacerated labrum, severely torn, repetitively torn, multiple tears, per Dr. Komanduri's testimony.*** (Pet. Ex. No. 1, pp. 22-23).

The Arbitrator notes that Dr. Shafaie was not called to testify and apparently he was not deposed; therefore, again, Dr. Komanduri's testimony and statement regarding his conversation with Dr. Shafaie remains both unrebutted and credible.

The Arbitrator notes that in this claim, as in *International Harvester*, there is seen a clear "chain of events which demonstrates a previous good condition of health, an accident, and a

subsequent injury resulting in disability." Before May 10, 2010, Petitioner was working without restrictions for Respondent. She was in good health and had never received any treatment for low back or hip pain. However, after her lifting accident, Petitioner has been in continuous pain. The Arbitrator notes especially that until after receiving relief from her surgeries with Dr. Komanduri, Petitioner was engaged in a long and difficult quest to find the cause of her pain and a treatment for it. After Dr. Komanduri initially discharged her, Petitioner sought treatment with Dr. Freedberg for a possible lumbar spine problem, and then to Dr. Pierre for a possible pelvic floor problem. Before her surgeries, Petitioner was taking so much ibuprofen that she developed gastritis. All this treatment came at a great deal of personal expense to Petitioner as well, both financially and emotionally. Petitioner had to begin using her own private health insurance and was not paid TTD benefits while she underwent surgery. Petitioner also dealt with a lot of frustration and was even counseled by Dr. Komanduri to see a psychologist for help dealing with her depression (Pet. Ex. No.1, p. 106). Petitioner's determination to relieve her pain shows that something traumatic happened to her on May 10, 2010.

Second, the Arbitrator notes that Dr. Gleason actually did not dispute several key points in Dr. Komanduri's testimony regarding the causal connection between Petitioner's accident and the need for surgery. Dr. Gleason ***agreed*** that Petitioner had FAI, which is a pre-existing congenital deformity of the hip socket that predisposes patients to have labral tears, that Petitioner in fact had labral tears that warranted surgical repair, and that it was unusual for a woman in her 20's to be experiencing age-related degenerative labral tears. (Resp. Ex. No. 1, pp. 25-26). According to Dr. Komanduri, these points all point to the conclusion that Petitioner's FAI was aggravated by her lifting accident, thus necessitating years of medical treatment. Dr. Komanduri testified that "...the left hip was severely torn and macerated. That's just unlikely to occur without significant trauma." Dr. Komanduri further testified that, "...we have a 27-year-old with bilateral labral tears identified at arthroscopy. And the likelihood that those occurred spontaneously is zero. It didn't happen. Something happened to stress those hips." (Pet. Ex. No. 1, p. 49, 43).

Third, the Arbitrator finds that there are sound reasons to give greater weight and credibility to the opinions of Petitioner's treating physician and surgeon Dr. Komanduri - that the work accident has contributed to her current condition of ill-being - rather than the opinion of Respondent's Section 12 examiner Dr. Gleason. ("The Commission is free to give more weight to [the] testimony of a treating physician." *Edward Hines Precision Components v. Indus. Comm'n.*, 356 Ill.App.3d 186, 196 (2d Dist. 2005). The most salient point in Petitioner's long course of medical treatment is ***that Dr. Komanduri was eventually proven correct regarding the cause of Petitioner's pain from very early on***; at Petitioner's initial consultation he started to investigate her right hip as the main source of her pain. While it was very difficult at times for Petitioner's doctors to distinguish between her hip pain and her back pain, Dr. Komanduri understood that it was her groin pain that told him that he needed to examine her hip (Pet. Ex. No. 1, p. 11). While other doctors admitted that Petitioner's pain complaints were probably legitimate yet opined she could work at full duty (see, Resp. Ex. No.2, p. 1), Dr. Komanduri investigated persistently, reviewed the MRI arthrograms carefully, and confirmed the correct origin of Petitioner's pain.

Further, Dr. Komanduri wrote that, ***"...the labral tears would not have occurred without the work injury."*** (Pet. Ex. No. 1, p. 523, Dr. Komanduri's March 17, 2014 narrative report). The Arbitrator places great weight and reliance on this opinion.

The issue is raised that less weight should be afforded to Dr. Komanduri's opinion on causation because he acknowledged that it would be "difficult" to offer "an absolute causation opinion." (Pet. Ex. No. 1, p. 524). However, this isolated language was offered prior to his extensive deposition testimony, which testimony clearly and credibly explained the bases for his causation opinions. Further, the standard of proof is not one of "absolute" medical certainty but rather a "reasonable" degree of medical certainty, or more likely than not, which is unquestionably a far lesser standard of proof than "absolute." This is therefore a non-issue. Also, Dr. Komanduri's multiple stated opinions, taken as a whole, clearly show that his opinions were based on a reasonable degree of medical certainty, easily meeting (and indeed exceeding) the required standard of evidentiary proof. The same cannot be said regarding Dr. Gleason's opinions.

The further issue is raised that the opinions of five (5) doctors cannot be over-looked; that is, Petitioner was found to not be a surgical candidate by Dr. Freedberg, Dr. Templin, Dr. Gleason, Dr. Bare and Dr. Andershak and even Dr. Komanduri had ruled out surgery and found Petitioner to be at MMI for her work injury by April 20, 2011.

The Arbitrator finds this argument non-persuasive. The threshold issue on causation is whether the labral tears/hip conditions are related to the stipulated accident. The opinions of Drs. Gleason and Komanduri regarding these issues have been thoroughly discussed. Dr. Andreshak's IME of November 8, 2010 concerns ***only*** mid-back/low back pain and issues (which he found were work-related; RX 6). Dr. Andershak offered no discussion or opinions regarding the hips; therefore, this IME does not support Dr. Gleason and correspondingly does not rebut Dr. Komanduri regarding Petitioner's hip conditions. Further, Dr. Andreshak's IME addendum report dated March 22, 2011 also does not dispute or rebut causation of the hips (RX 3). Dr. Bare's IME of December 20, 2010 focused on Petitioner's low back and hip pain and issues (RX 5). ***Dr. Bare diagnosed low back and hip pain and specifically found causation:*** "There is a correlation and causal connection between her condition as it relates to her work injury. This is based on the fact that she did not have pain prior to her injury...The degree of disability is due to the injury sustained on 5-10-2010 or secondary to the change in occupation to a new position at work. ***Either way, her work appears to have contributed to her current condition."*** Dr. Bare's IME addendum dated March 22, 2011 reported his opinion that there was no hip impingement or labral pathology; however, the later evidence found at the time of the actual surgeries and other corroborating evidence unmistakably reveals that there was serious hip pathology present that required surgical repairs – and regarding which no credible argument for its etiology other than a work accident was presented. ***Also, it is significant to note that in his addendum report, Dr. Bare did not change his prior causation opinions. Lastly, it is also very significant to note that neither Dr. Andreshak nor Dr. Bare offered any additional opinions after March of 2011, thereby offering no recent opinions to rebut Dr. Komanduri's later narrative report and deposition testimony opinions.***

The Arbitrator therefore concludes on the basis of a review of all the evidence introduced at trial, and after affording greater weight and credibility to the opinions of Petitioner's treating physician and surgeon Dr. Komanduri, that Petitioner has proven by a preponderance of the

evidence that her current condition of ill-being is causally connected to her work accident of May 10, 2010.

Regarding the Arbitrator's decision on disputed issue (J), whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, and issue (O), whether these medical services are Respondent's responsibility under the "two provider rule," the Arbitrator finds and concludes the following:

The Arbitrator adopts and incorporates his findings and conclusions found in the Section above regarding causation. The Arbitrator concludes that the medical services provided to Petitioner were reasonable and necessary, and that Respondent has not paid all the appropriate charges.

The Arbitrator places significant weight on the fact that Respondent's Section 12 examiner Dr. Gleason opined that Petitioner's surgeries were "warranted" and not "excessive or unreasonable." (Resp. Ex. No.1, Dep. Ex.No.2, p. 6). Further, in his evidence deposition, Dr. Gleason testified that he opined Petitioner's surgeries were warranted "based upon the complaints as reflected in the records of Dr. Komanduri and in conjunction with the records as a whole and the diagnostic studies" (Resp. Ex. No.1, p. 21). Dr. Gleason noted Dr. Komanduri's finding in left hip arthroscopy of October 30, 2012, that Petitioner had an "anterolateral labral tear from 9:00 o'clock to 12:00 o'clock," which was a finding that was extensive enough to "justify the procedure" (Resp. Ex. No. 1, p. 23). Further, Dr. Komanduri testified that, "We took her from constant pain and made her a functional person." (Pet. Ex. No. 1, p. 33). This testimony also supports the conclusion that Dr. Komanduri's treatment was reasonable and necessary and served to relieve her of her debilitating symptoms.

A disputed issue is whether Petitioner exceeded the number of doctors allowed under Section 8(a). Section 8(a) of the Act directs employers to pay for employees' reasonable and necessary medical treatment, including (1) first aid emergency treatment; (2) medical, surgical and hospital services provide by a physician of the employee's choice, and by any physicians with the chain of referrals from this physician; and (3) medical, surgical and hospital services provided by a physician of the employee's second choice, and by any physicians within the chain of referrals from this physician. Whether an employee's physician falls within one of the two chains of referrals allowed for under Section 8(a) is a question of fact for the Commission. *Absolute Cleaning/SVMBL v. Workers' Compensation Comm'n.*, 409 Ill.App.3d 463, 468 (4th Dist. 2011).

In the present case, it is clear that Petitioner's treatment at MedWorks is not affected by the "two provider" rule, since Respondent sent Petitioner to that provider. Petitioner's first choice of physician was Dr. Komanduri, whom she began seeing after she had been discharged from MedWorks. While still being treated by Dr. Komanduri in 2011, Petitioner also began to see Dr. Freedberg, her second choice of physician. The records show that Dr. Freedberg referred Petitioner to Dr. Thurston for an EMG and Dr. Morgan for epidural steroid injections.

Independently of these two chains, on her own initiative, Petitioner began to consult her gynecologist, Dr. Pierre, regarding the pelvis as the possible cause of her pain. The referrals subsequently flowing from Dr. Pierre, therefore, constitute a third (and non-covered) chain of medical providers.

Petitioner's course of medical treatment may be summarized as follows:

Respondent's choice: MedWorks

Petitioner's choice #1: Dr. Komanduri

Petitioner's choice #2: Dr. Freedberg → Dr. Thurston
→ Dr. Morgan

Petitioner's choice #3: Dr. Pierre → Rush Pelvic Pain Clinic → Kirk Center for Health Living

As to the substance of the bills, the Arbitrator finds that Petitioner's medical treatment thus far has been causally related, reasonable and necessary, and should be paid by Respondent, with the exception of any bills that fall within Petitioner's third chain of providers.

As explained above in relation to issue (F), the Arbitrator finds that Petitioner did sustain an injury that eventually required three surgeries to alleviate the effects of her injury and return her to a normal functioning state. The Arbitrator further notes that Dr. Gleason, Respondent's third IME physician, said Petitioner's medical treatment and surgeries was "warranted." The Arbitrator therefore concludes that there is no valid dispute as to the reasonableness and necessity of Petitioner's medical treatment with and surgeries performed by Dr. Komanduri.

The Arbitrator also notes that Respondent's first two IME physicians diagnosed Petitioner with lumbar strains/sprains. However, as Petitioner had "true radicular symptoms" (Pet. Ex. No. 6, p. 614), it was reasonable for Petitioner to consult with Dr. Freedberg and to have epidural steroid injections while under his care.

Finally, the Arbitrator notes that Petitioner paid for most of her medical treatment with her husband's health insurance, which was provided through Laborers' Pension Fund and Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity. Their payment records were introduced into evidence as Pet. Ex. No. 11, pp. 772 – 787. While some of the payments were made to providers such as the Kirk Center for Healthy Living for charges that are not compensable under the "two provider rule" all of Petitioner's operative and post-operative care at MK Orthopaedics and St. Joseph Medical Center was paid for by this union. Respondent shall hold Petitioner harmless and shall reimburse the union for all compensable medical charges it has paid, pursuant to the medical fee schedule or any negotiated rate, after demand by the union for such reimbursement, if any.

The Arbitrator therefore concludes that the medical services provided to Petitioner were reasonable and necessary. Respondent, however, has not paid all appropriate charges. Respondent

shall pay Petitioner these bills, provided they do not run afoul of the "two provider rule," as contained in Petitioner's Exhibit #11, pursuant to Sections 8(a) and 8.2 of the Act.

Regarding the Arbitrator's decision on the disputed issue of (K), whether TTD is owed to Petitioner, the Arbitrator finds and concludes the following:

The Arbitrator concludes that Petitioner is entitled to 78-5/7 weeks of TTD benefits.

Section 8(b) of the Act provides that the employer shall pay weekly compensation to an injured worker during the period of temporary total disability; if "the temporary total incapacity for work continues for a period of 14 days or more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). "The employer's obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and he has reached maximum medical improvement." *Interstate Scaffolding, Inc. v. Workers' Compensation Comm'n.*, 236 Ill.2d 132, 135 (2010). This rule is in accord with the "fundamental purpose of the Act," which "is to provide injured workers with financial protection until they can return to the work force." Id. at 146.

Petitioner testified that she performed light-duty work for Respondent in the initial period after the accident; this work involved walking around six hours a day in a warehouse, which Petitioner found difficult because of the low back stiffness and hip pain that she developed. Respondent stipulated that Petitioner was temporarily totally disabled from August 4, 2010, through March 29, 2011, a total of 34 weeks (AX1). Respondent paid TTD benefits in the total amount of $8,358.82 (AX1). After being taken off work in August 2010, Petitioner never worked for Respondent again. The following is a list of the off-work notes contained in Petitioner's medical records after March 29, 2011:

April 11, 2011 (PX6, p. 614 – off duty until follow up)
August 15, 2011 (PX6, p. 620 – medically unable to work)
September 26, 2011 (PX6, p. 631 – medically unbale to work)
November 3, 2011 (PX6, p. 638 – medically unbale to work)
December 5, 2011 (PX6, p. 646 – medically unbale to work)

Petitioner was cleared to return to work by Dr. Freedberg on February 5, 2012 (PX6, p. 653 – patient may return to work without restrictions).

Petitioner returned to Dr. Komanduri on September 9, 2012. Beginning on this date, Dr. Komanduri states that Petitioner does sedentary office work from home (e.g., Pet. Ex. No. 1, p. 94); Petitioner testified that she helped take care of a few simple office tasks for her husband's landscaping business. Apparently, because he was billing Petitioner's health insurance, Dr. Komanduri stopped stating in his records whether Petitioner had any kind of work restrictions.

The Arbitrator concludes that, in addition to the stipulated 34 weeks of temporary total disability, Petitioner was also temporarily totally disabled from March 30, 2011, through February 5, 2012, a period of 44-5/7 weeks, for a total TTD period of 78-5/7 weeks. At Petitioner's average

weekly wage of $325.88 and minimum TTD rate of $309.33, she should have received $24,348.69 in TTD benefits, but she only received $8,358.82, a difference of $15,989.87. Respondent shall therefore pay Petitioner the difference of $15,989.87 in TTD benefits.

Regarding the Arbitrator's decision on disputed issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds and concludes the following:

The date of accident is before the 2011 amendments to the Act (prior to Section 8.1b).

Petitioner sustained bilateral hip labral tears, as well as a bulging disc at L5-S1. She underwent three separate arthroscopies and extensive physical therapy for her hip, as well as three epidural steroid injections and extensive physical therapy for her lumbar spine.

The surgeries performed were:

10/30/12: diagnostic left hip arthroscopy; femoral osteoplasty with debridement of pincer impingement; arthroscopic labral repair of the left hip; femoral osteoplasty to debride cam lesion.

04/23/13: injection of the left hip with steroid; diagnostic right hip arthroscopy; arthroscopic right hip acetabular osteoplasty; arthroscopic right hip femoral osteoplasty; arthroscopic right hip labral repair; arthroscopic suture capsulorrhaphy of the right hip and repair of the capsule.

09/03/13: diagnostic left hip arthroscopy; left hip trochanteric bursectomy arthroscopically; left hip revision femoral osteoplasty; left hip revision acetabular osteoplasty; harvest of the iliotibial band through a separate incision for autograft; reconstruction of iliotibial band autograft into a labral transplant; arthroscopic suture capsulorrhaphy for capsular closure at the end of the case; iliotibial band resection arthroscopically.

Since the surgeries Petitioner generally feels much better and has not returned for medical treatment since 2014. The Arbitrator finds this fact very significant in determining permanent disability. Petitioner has made a very good recovery. Dr. Komanduri testified that he did not think that Petitioner is going to need any further medical treatment (Pet. Ex. No. 1, p. 51; 524).

Dr. Komanduri also testified that he believed Petitioner could return to work without any restrictions and further testified that when he last saw her (on January 8, 2014) "I felt she probably could return to any activity without restrictions." (Pet. Ex. No. 1, p, 31, 50). A review of his office visit records also indicate that no restrictions were imposed. However, this deposition opinion testimony (and medical records) appears different than what he opined in his earlier narrative letter of March 17, 2014, when he wrote that Petitioner "...most likely should not perform heavy repetitive squatting or kneeling activities. I would arbitrarily place her on light-to-medium duty with about a 30-pound weight limit. No repetitive squatting and no heavy lifting." (Pet. Ex. No. 1, p. 524). The Arbitrator resolves this apparent discrepancy and finds that Dr. Komanduri's office visit notes and his deposition testimony opinions are consistent with each other and shall be adopted, rather than his opinions as found in his March 17, 2014 opinion letter. That is, he opines that no restrictions are imposed. The Arbitrator finds this fact very significant in determining permanent disability.

Dr. Komanduri further acknowledged that as a result of her hip surgeries, Petitioner has no permanent loss of motion; she has full hip flexion, full extension, full range. She does have some discomfort on occasion with long-term activities or extensive endurance related activities. (Pet. Ex. No. 1, p. 31.)

The Arbitrator therefore finds and concludes that Petitioner has sustained the permanent partial loss of use of her left leg/hip to the extent of 20% under Section 8(e)12 of the Act (43 weeks X $309.33), the permanent partial loss of use of her right leg/hip to the extent of 20% under Section 8(e)12 (43 weeks X $309.33) and the permanent disability to the person as a whole to the extent of 4% under Section 8(d)2 of the Act (20 weeks X $309.33).

Robert M. Harris

Robert M. Harris, Arbitrator

December 6, 2017

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 Doering,

Petitioner,

vs. NO: 14 WC 6899

The American Coal Co.,

19IWCC0386

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitration Decision Form so that it conforms with the remainder of the Decision of the Arbitrator as stated below. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the Arbitrator's conclusion that Petitioner did not sustain an injury arising out of and in the course of his employment. The Arbitrator provided a detailed recitation of the facts and well-reasoned conclusions in support of a denial of all benefits. The Commission solely seeks to correct clerical errors in the findings listed on the Arbitration Decision Form. The Arbitrator mistakenly indicated that Petitioner **did** sustain an accident that arose out of and in the course of his employment. The Arbitrator also mistakenly indicated that Petitioner's current condition of ill-being **is** causally related to the accident. These errors directly contradict the Arbitrator's conclusion that Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment. The Commission thus modifies the two findings to read as follows:

> On this date, Petitioner **did not** sustain an accident that arose out of and in the course of employment.
>
> Petitioner's current condition of ill-being **is not** causally related to the accident.

19IWCC0386

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 March 5, 2018, is modified as stated herein.

~~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: JUL 26 2019

o: 6/11/19
TJT/jds
51

Maria Elena Portela

Maria E. Portela

Deborah L. Simpson

Deborah L. Simpson

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Arbitrator's Decision. After considering the totality of the evidence, I believe Petitioner met his burden of proving that he sustained an occupational disease arising out of and in the course of his employment as an underground coal miner with Respondent. The evidence supports a finding that Petitioner suffers from coal workers' pneumoconiosis ("CWP") and/or a mild restrictive lung condition and that his current condition of ill-being is causally related to his sustained exposure to coal dust and other proven irritants.

Petitioner worked in coal mines for approximately 26 years. Respondent does not dispute that Petitioner spent around 25 of those years working underground. During those 25 years, he was continuously exposed to irritants such as coal dust, silica dust, rock dust, roof bolting glue fumes, and diesel fumes. Petitioner testified that he first noticed breathing problems while working as a coal miner for Respondent. Since leaving the mining industry, his breathing has noticeably worsened. He testified that he can only walk three to four blocks before becoming short of breath. He can only walk up one flight of stairs before needing to rest. He is also unable to work on a Corvette he is restoring for prolonged periods due to shortness of breath.

The majority places great weight on the opinions of Respondent's experts and Petitioner's lack of treatment and documented respiratory complaints. The majority also gives Petitioner's unrelated health problems undue weight in support of its denial of benefits. After a careful review, I interpret the evidence much differently than the majority. Here, Petitioner's three experts opined that Petitioner developed CWP due to his sustained exposure to coal dust and other irritants. Dr. Smith, a board-certified radiologist and B-reader interpreted the May 2, 2013, chest x-ray as positive for simple CWP with small opacities throughout. Dr. Alexander also interpreted the chest

x-ray as showing small round opacities bilaterally, consistent with pneumoconiosis. Finally, Dr. Paul, a specialist in allergy and pulmonary disease, interpreted the May 2, 2013, chest x-ray as revealing fibronodular lesions throughout both lung fields. He further determined that Petitioner's pulmonary studies revealed a moderate amount of restrictive lung disease. After considering all the diagnostic evidence, Dr. Paul diagnosed Petitioner with simple CWP. His diagnosis is supported by both Petitioner's extensive exposure to known irritants while working underground in a coal mine for over two decades, and his interpretation of Petitioner's x-rays and respiratory tests. Even Respondent's experts admit that a chest x-ray that is negative for CWP does not necessarily mean Petitioner does not have the condition. Instead, only a pathological study of Petitioner's lung tissue can definitively rule out the presence of CWP.

The fact that Petitioner's CWP is not yet severe enough to require medication is not determinative of whether Petitioner suffers from the disease. Both parties' experts agree that CWP is a progressive disease. Likewise, Petitioner's history of illness relating to his diagnoses of Crohn's disease and kidney disease does not foreclose a finding that Petitioner suffers from an occupational disease due to his sustained exposure to known irritants while working as a coal miner. At a minimum, Petitioner met his burden of proving he suffers from a restrictive lung condition due to his decades of underground work in coal mines. Both Dr. Paul and Dr. Lockey, one of Respondent's experts, agree that Petitioner's February 2013, July 2013, and May 2014 pulmonary function tests demonstrated a mild restrictive pattern. There is no evidence that this restrictive lung condition is related to any of Petitioner's unrelated chronic health problems. After carefully weighing the totality of the evidence, including the positive diagnostic tests, Petitioner's credible testimony, and his undisputed history of sustained underground mining work, I believe Petitioner unquestionably met the burden of proving an injury pursuant to §1(d)-(f) of the Occupational Diseases Act.

For the forgoing reasons, I would reverse the Arbitrator's Decision in its entirety.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOERING, DAVID
Employee/Petitioner

Case# **14WC006899**

THE AMERICAN COAL COMPANY
Employer/Respondent

19IWCC0386

On 3/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% 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

19IWCC0386

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 DOERING
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **14** WC **06899**

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 **Herrin**, on **June 14, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 13, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $; the average weekly wage was $**974.25**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Petitioner has not claimed any causally related medical expenses or temporary total disability benefits.

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

The Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment due to an environmental exposure while working for the Respondent. The Petitioner failed to prove that he developed the condition of coal miner's pneumoconiosis (CWP). The Petitioner failed to prove that he sustained any other respiratory or pulmonary condition that is causally related to his employment with Respondent.

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

March 1, 2018
Date

MAR 5 – 2018

19IWCC0386

STATEMENT OF FACTS

Petitioner lives in Herrin, Illinois. He was 61 years old at the time of arbitration and was married to Ramona. He graduated from Johnston City High School. He has approximately 90 credit hours from different junior colleges. He does not have any degrees or certifications. Petitioner worked 26 years in coal mining with about 25 years being underground. In addition to regularly being exposed to coal dust, he was exposed to silica dust, rock dust, roof bolting glue fumes and diesel fumes.

Petitioner started his coal mining career with Old Ben Coal Company in 1977. He worked for them as an outby and on the long wall as a shear operator. He also did some belt maintenance work. Petitioner testified that the long wall consists of a shear which slices the coal back and forth across the face in 25 foot wide sections. He testified he did this for seven or eight years and it was a dusty job. He also ran a continuous miner, which cuts the coal out of the face, and is also a dusty job. Petitioner worked for Old Ben until 12/30/95, when he was laid off. Petitioner then took a non-mining job at Sam's Club, first as a stockman and eventually in the tire shop. He also worked at Maytag as a press operator and setup man before returning to the mines for Respondent on 2/22/05.

With the Respondent, Petitioner testified he started out working on a scoop on a coal loader on the continuous miner unit. He then became a mine examiner who was responsible for traveling to various places in the mine to obtain air ratings and to check the faces and roofs for safety. He also worked in a supervisor's job as an outby foreman. In this job, he was underground working with the miners. Petitioner testified that the outby position included working in the returns, setting timbers, laying waterlines and rock dusting. He next obtained a mine foreman's position. He testified that there were diesel machines in the coal mine, and he was exposed to diesel fumes. As a supervisor, he would observe the roofbolters and would be present where they were inserting the roof pins and occasionally those pins would break, which would emit a strong odor from the glue.

Petitioner was laid off by Respondent on 11/8/12, but returned to work for Respondent on 9/1/13 as a surface crane operator. He testified that he ended up destroying pallets due to a right cataract, and ended up coming to an agreement with his supervisor that he would be laid off. He last worked for Respondent on 9/13/13 at the New Future mine, indicating he was 57 years old at that time and that this was the last day he worked in coal mining. Petitioner testified that he was exposed to coal dust on his last day of employment with Respondent. He began working at Herrin Hospital in July 2014 in housekeeping cleaning rooms and changing out the specialty mattresses, noting he works 12 to 18 hours per week and earns $9.68 per hour.

Petitioner testified that he noticed breathing problems while he was still working in the mine and that it became worse both while he was still working in the mine as well as after he left. He testified that he noticed shortness of breath, but could not recall specifically anything he was doing that caused it to occur. Petitioner testified that he could walk three or four blocks on level ground at a normal pace before becoming short of breath. He could climb one flight of stairs before having to stop and rest. Petitioner testified that he lives in a two-story house with a full basement and he becomes really exerted after going up and down to the basement or upstairs. He finds himself short of breath doing anything outside. If he is doing some work, he usually has to take a break to catch his breath. He testified that he has a Corvette that he is restoring, but cannot stay out there and work on it for very long. Petitioner testified that he talked to his family doctor, Dr. Martin, regarding his breathing difficulties. Petitioner was not using breathing medications at the time of hearing. He testified he has never smoked. In addition to breathing difficulties, Petitioner has had Crohn's Disease since 1977, and testified that he has had two bowel resections, numerous operations for anal fistulas and a temporary colostomy and finally a

permanent one. He is also slightly diabetic and was on dialysis for about four months before his kidney function improved.

After he was laid off in November 2012, he determined to file a black lung claim against Respondent. He had a chest x-ray performed at Central Illinois Allergy and Respiratory Service in Springfield on 5/2/13 and returned to the same facility and was examined by Dr. Paul on 7/18/13. Petitioner testified that he had completed an Application for Adjustment of Claim against Respondent for black lung that was in the process of being filed at the time he returned to work as a crane operator for Respondent. After he went back to work that claim was dismissed. The current claim was filed after he returned to work and agreed to the lay-off. After he left Respondent the last time, he collected unemployment benefits for six months before finding employment at Herrin Hospital.

Petitioner testified that from time to time during the years that he was employed as a coal miner, he underwent x-ray screening for black lung via the National Institute for Occupational Safety and Health (NIOSH). The reports that were generated from those examinations were sent to Petitioner, but he did not provide those at hearing. When the Petitioner had a flare up of his Crohn's Disease he would have abdominal pain, nausea and diarrhea. He has also suffered from anemia due to this disease. Petitioner testified that his colostomy does not cause any problems with lifting or bending. He also testified that he does not need to remain close to a restroom. Petitioner testified that he discussed with Dr. Martin his separation from Respondent shortly after it occurred and was honest in what he told Dr. Martin.

The deposition of Dr. Paul was obtained by the parties on 5/4/15. Dr. Paul is the Director of St. John's Respiratory Therapy and Clinical Assistant Professor of Medicine at SIU Medical School. He is also the senior physician at the Central Illinois Allergy & Respiratory Clinic, whose physicians specialize in allergy and pulmonary diseases. They take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. Dr. Paul reads 15 to 20 chest x-rays per day, and testified that he interprets about the same number of pulmonary function tests. He is board certified in internal medicine, allergy, immunology and asthma, but is not board certified in pulmonology and is not an x-ray B reader. Dr. Paul testified that at the time he did his fellowship in 1970 to 1972 there were not any pulmonary fellowships developed. He testified it was strictly in allergy, asthma and respiratory disease. (Px1).

Dr. Paul examined Petitioner on 7/18/13. Dr. Paul has seen hundreds of individuals for Petitioner's counsel and has seen as many as 50 individuals a year for him. Dr. Paul testified that Petitioner talked about shortness of breath walking up four flights of stairs along with coughing and wheezing. His physical examination of Petitioner's chest was normal. Dr. Paul testified that the pulmonary function testing he performed showed a moderate mild restrictive lung disease with a decreased carbon monoxide diffusing capacity, but no change after bronchodilators. A methacholine challenge test was negative for asthma. (Px1).

Dr. Paul testified that coal workers' pneumoconiosis (CWP) is a fibronodular lesion throughout the lungs that sometimes becomes fibrosis and interferes with the transfer of gas across the alveoli, resulting in a decreased carbon monoxide diffusing capacity. The fibrosis through the lungs causes restriction on the pulmonary function study. Dr. Paul opined that, taking all the data he had available into consideration, the Petitioner had CWP caused by coal dust in the mine environment. He further opined that Petitioner also had a restrictive lung disease caused by coal dust in the mines. Dr. Paul testified that Petitioner had a reduced diffusing capacity caused by the fibrosis which results from coal workers' pneumoconiosis. Based on these CWP, restrictive ventilatory defect and reduced diffusing capacity diagnoses, Dr. Paul testified that Petitioner could have no further exposure to the environment of a coal mine without endangering his health. Dr. Paul testified that Petitioner had x-ray evidence that was consistent with radiographically apparent pulmonary impairment caused

by his coal mine dust exposure, as well as physiologically significant pulmonary impairment, which medically precluded Petitioner from working as a coal miner. Dr. Paul testified that if reading an x-ray as not indicative of CWP does not rule out the presence of CWP, as it could still show up in a pathology study. Dr. Paul testified that CWP lung scarring restricts the normal function of healthy lung tissue, and thus by definition someone who has CWP has some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (Px1).

Petitioner complained to Dr. Paul of dyspnea on exertion. Dr. Paul agreed that this is a non-specific complaint and can be due to causes other than respiratory diseases. He was not aware of whether Petitioner was using any respiratory medications or if the Petitioner told him he had taken any breathing medications in the past. Petitioner related to Dr. Paul that he had depression and anxiety in addition to his Crohn's Disease. Dr. Paul did not review any medical records regarding Petitioner. Petitioner did not tell Dr. Paul why he left coal mine work when he did. Dr. Paul testified that simple CWP is more likely not to progress once the exposure ceases. Dr. Paul did not know the date of the film he reviewed or what opacity type was present on the film, and he did not opine to a profusion rating. He only gave it a rating of positive for CWP. (Px1).

Dr. Smith, a board-certified radiologist and B-reader, interpreted Petitioner's 5/2/13 chest x-ray as positive for pneumoconiosis with a 1/0 profusion rate with P/S-type opacities in all lung zones. (Px2). Dr. Alexander, also a board-certified radiologist and B-reader, also interpreted the 5/2/13 chest x-ray as positive for CWP with a 1/0 profusion rate and P/P opacities in all lung zones. (Px3).

Records from NIOSH were admitted into evidence. An A-reader interpreted a chest x-ray of 2/15/79 as showing a profusion 1/1 with P opacities in all lung zones, but stated that the findings were probably all old histoplasmosis. A B-reader interpreted Petitioner's 3/28/84 x-ray as negative. An A-reader interpreted the same film as having small calcifications in the bases and the right mid lung consistent with granulomas. An A-reader and a B-reader interpreted the chest x-ray of 2/25/88 as negative. Two B-readers interpreted Petitioner's 4/29/94 chest x-ray as negative. Two A-readers and a B-reader interpreted the chest x-ray of 2/16/05 as having no abnormalities consistent with CWP. The chest x-ray of 4/3/13 was interpreted by two B-readers as having no abnormalities consistent with CWP. (Rx4).

At the request of Respondent's counsel, Dr. Meyer reviewed the 5/2/13 chest x-ray of Petitioner, and provided his deposition on 8/15/14. Dr. Meyer found the film to be quality 2 due to overexposure, which results in the x-ray looking darker and can make the parenchymal markings slightly less evident. Dr. Meyer testified that this film revealed that the lungs were clear and that there were no CWP findings. Dr. Meyer testified that it would be exceedingly unlikely for a coal miner with more than 20 years of exposure to go from a film that is completely negative to one revealing a category 1 profusion involving all lung zones in one month's time. (Rx1).

Dr. Meyer has been board certified in radiology since 1992 and a B-reader since 1999. Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot, and he has recently been asked to have a more active academic role with the B-reader program. Dr. Meyer testified that radiologists have about 10% higher pass rate on the B-reading exam than other medical specialties. In Dr. Meyer's opinion, radiologists have a better sense of what the variation of normal is. He testified that one of the most important parts of the B-reading training and examination is making the distinction between a 0/1 and 1/0 film. (Rx1).

Dr. Meyer testified that the B-reader looks at the lung 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. Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. CWP

characteristically is described by small round opacities. The distribution of opacities is also described because different pneumoconioses are seen in different regions in the lung. Dr. Meyer testified that CWP is typically an upper zone predominant process. The last component of the interpretation is the extent of the lung involvement, or the profusion rate, which rates the density of the small opacities in the lung. (Rx1).

Dr. Meyer did agree that people with a 1/0 CWP profusion rating may not even know they have the disease unless it is indicated on an x-ray, and that CWP generally would first appear on x-ray before the person who has it noticed any pulmonary or clinical abnormalities. A person can have CWP at a level that does not show up on x-ray. He agreed that he is most often retained for legal opinions by the defense. Dr. Meyer agreed that as many as 50% of coal miners who underwent autopsy in at least one study have evidence of CWP. Dr. Meyer testified that COPD (chronic obstructive pulmonary disease) and/or emphysema can be visualized on x-ray or CT scan, via lung destruction, hyperinflation and a flattened diaphragm. The Petitioner had no evidence of bullae, hyperinflation or progressive fibrosis. (Rx1).

The Respondent obtained a medical record review from Dr. Lockey. He testified via deposition (7/20/15) that he reviewed numerous medical records and chest x-rays regarding Petitioner. Dr. Lockey is a physician at the University of Cincinnati Medical Center. He completed his pulmonary fellowship in 1978, and is board certified in internal medicine with certifications in pulmonary medicine and occupational medicine. Dr. Lockey testified that the board certification in pulmonary medicine was first recognized in the late 1940s. He also has been a B-reader continuously since 1988. Dr. Lockey is presently on the American College of Radiology Task Force for redoing the B-reading training program using the ILO system. Dr. Lockey practiced in Utah from 1980 to 1986 at the University of Utah. He ran the occupational medicine residency training program and the occupational medicine clinic. He was recruited to run the division of occupational/environmental medicine at the University of Cincinnati starting in 1986 and has been heavily involved with research in occupational lung disease. He has treated patients with pneumoconiosis. (Rx2).

Dr. Lockey reviewed chest x-rays taken of Petitioner on 1/23/13, 5/2/13 and 11/15/13, testifying that he did not find any changes consistent with CWP on these films. Dr. Lockey noted that Petitioner had a number of significant medical problems including a history of significant Crohn's Disease since 1979 with small and large bowel colitis. He testified that from a pulmonary perspective, the medical records he reviewed did not reveal a consistent history of chronic cough or chronic sputum production or wheezing. There were times where he had symptoms compatible with shortness of breath on exercise, but this was while he was undergoing acute care for his Crohn's Disease. Dr. Lockey testified that Petitioner's pulmonary function tests from 2/11/13, 7/18/13 and 5/22/14 demonstrated a mild restrictive pattern. He testified that the most recent diffusion capacity performed on 5/22/14, when corrected for alveolar volume, was within normal limits. (Rx2).

Dr. Lockey testified that based on the information available to him, Petitioner did not have a finding of a pulmonary disorder or impairment as a result of his previous occupational exposures within the coal mining industry. The Petitioner's medical records did not mention any chronic pulmonary symptoms such as chronic cough with sputum production or progressive dyspnea on exertion, and no abnormalities were noted on chest auscultation. Petitioner did have a mild restrictive pattern on his most recent pulmonary function tests and a normal diffusion capacity when corrected for alveolar volume. Dr. Lockey testified that in view of the lack of any chest x-ray findings consistent with either simple or complicated CWP, the mild restrictive pattern on spirometry was most likely normal for Petitioner or potentially a partial reflection of his increased BMI. Dr. Lockey opined that Petitioner had no pulmonary impairment related to his past coal mine employment. (Rx2).

Dr. Lockey testified that Petitioner suffered from Crohn's Disease and chronic kidney disease, significant medical problems that can result in anemia, malnutrition and metabolic disorders. Dr. Lockey testified that

anemia would give one feelings of lethargy, decreased energy and shortness of breath on exertion. He testified that renal disease can be associated with low hemoglobin concentration which is associated with reduction in diffusion capacity if one has a low red blood cell count. If the diffusing capacity is not corrected for hemoglobin, it can lower the diffusing capacity results. Dr. Lockey testified that if an individual suffers a restriction on pulmonary function or a reduction in his diffusion capacity as a sequelae of dust exposure and scarring of the lungs, it will result in a permanent reduction. (Rx2).

Dr. Lockey testified that on the pulmonary function test of 2/11/13, while Petitioner had a mild restrictive pattern on his spirometry test, his lung volumes and diffusing capacities were normal, and his residual volume was actually somewhat increased. Dr. Lockey testified that both lung volumes and spirometry are used to determine whether a restrictive abnormality is present. In this case, spirometry showed a mild restrictive pattern but lung volumes and diffusing capacity were normal. Petitioner's total lung capacity was 99.8% which is not consistent with restrictive pattern. Dr. Lockey testified that there was a significant change from the testing performed at Memorial Hospital of Carbondale in February 2013 to the testing performed by Dr. Paul just four months later. There was no way for him to determine whether the test results from the spirometry and diffusing capacity performed in the summer 2013 by Dr. Paul were valid. Dr. Lockey testified that the diffusion test is not an easy test to do and the variability on diffusion tests is fairly high. He testified that the pulmonary function testing performed in May 2014 revealed a diffusion capacity when adjusted for alveolar volume of 88%, which would be considered normal. Dr. Lockey testified that when a patient has a restrictive impairment in relationship to coal and silica exposure, the person has obvious changes on chest x-ray. While he has occasionally seen mild airway obstruction in persons who have been exposed to coal dust with normal chest x-rays, he does not see restrictive changes unless there are obvious changes on chest x-ray. In this case, he testified that there was no evidence of airway obstruction in Petitioner. (Rx2).

Dr. Lockey testified that the Petitioner had undergone cardiopulmonary exercise testing, which he identified as the gold standard for determination of whether an individual's breathing impairment was due to a pulmonary disease versus a cardiac condition versus deconditioning. Petitioner had a normal response to exercise. Dr. Lockey testified that based upon the exercise testing, from a ventilatory standpoint, Petitioner was capable of heavy manual labor at least at the level of MET 7. On cross exam, Dr. Lockey testified that if a person has a testing MET level of 7, then he can do light to moderate work with some episodes of heavy manual labor during the day. He also noted that Petitioner's deconditioning and his age should be taken into account. He testified that at times Petitioner would have to rest as most people his age would have to rest with moderate to heavy activity. (Rx2).

Dr. Lockey testified that in the records he reviewed he did not see any pathologic evidence of CWP in Petitioner, and they did not support a diagnosis of either chronic bronchitis or COPD. Dr. Lockey testified that in most individuals, simple CWP does not typically progress once the exposure ceases. When he reviews a film for the presence of CWP, he identifies the opacity type, of which there are two basic types: round and irregular. CWP usually involves round opacities initially located in the upper lung fields. These round opacities - P, Q and R - are usually associated with coal or silica. (Rx2).

Dr. Lockey agreed that when a miner develops CWP, the initial manifestation would most likely be at the pathologic level, and that pathological results would be the gold standard for CWP diagnosis. If a person has a chest x-ray that is normal and has worked in the mines for a number of years, he could have pathological evidence of CWP that is not evident on the chest x-ray. Dr. Lockey testified that the abnormality of CWP, in layman's terms, would be a deposition of coal mine dust (coal macule) wrapped in scar tissue with a halo of peribronchiolar emphysema. He acknowledged that in the peribronchiolar area, at the site of the CWP

macule/nodule, there is some localized emphysema, and this can result in some respiratory interference in that area as that particular piece of lung tissue cannot perform the function of normal healthy lung tissue. (Rx2).

Dr. Lockey testified that a coal miner's chest x-ray over time may progress from normal to some abnormalities with profusion 0/1 and then to a 1/0 profusion. This progression does not happen over a few months, but rather over a couple year period of time. Dr. Lockey testified that NIOSH, through the Coal Workers' Health Surveillance Program has compiled statistics regarding how many coal miners in their screening studies develop pneumoconiosis, and that this is approximately 4% to 5%. (Rx2).

Medical records of the Center for Medical Arts were admitted into evidence. Petitioner was seen in Prompt Care Clinic on 1/10/06 for sore throat, hoarseness, rhinorrhea, minimal cough, some sinus congestion and drainage. He was diagnosed with an upper respiratory infection and started on Z-pack. On 3/23/10, he was established as a new patient, noting a history of Crohn's Disease. On review of systems it was noted that he had no recurrent pneumonia, asthma, chronic cough, shortness of breath or shortness of breath with activity. On examination, his lungs were clear with good air movement. Petitioner was seen on 4/24/12, noting he'd had an ostomy since last seen by Dr. Martin with a partial colectomy and a temporary colostomy. On review of systems respiratory, it was positive for dyspnea and negative for chronic cough. On exam, the lungs were clear to auscultation and his respiratory effort was normal. On 9/24/12, it was noted that he had a colectomy and ileostomy on August 31st. Since that time his energy had been very poor and he had had very little activity. His respiratory review of systems remained negative for chronic cough, cough, dyspnea and wheezing. His respiratory examination showed lungs to be clear to auscultation and respiratory effort to be normal. Petitioner was seen on 9/29/12 for persistent hiccups. Review of systems respiratory was positive for dyspnea but negative for cough and wheezing. On examination, his lungs were clear to auscultation. (Rx5).

When Petitioner was seen on 1/31/13, the review of systems respiratory was negative for cough or dyspnea. Physical examination of the chest revealed the lungs were clear to auscultation. It was noted that he had a prior history of pneumonia but was still having some difficulty catching his breath at times and wondered if he had asthma. A chest x-ray performed that day was interpreted as revealing slightly increased basilar atelectasis. Petitioner presented to Dr. Martin on 2/20/13 with DVT in his right arm. It was charted that Petitioner quit work three months prior and was on disability, and that since he quit working he had fewer hospitalizations, had gained some weight and his laboratory evaluations had normalized. It was noted he was doing better but had been very reluctant to quit work. His review of systems respiratory was negative for chronic cough or dyspnea. Physical examination of the chest revealed lungs to be clear. On 3/20/13, Petitioner had complaints of edema, and it was noted that he was short of breath with activity when he walked on a level surface for a long period of time. He had no increased cough. It was charted that he had frequent episodes of shortness of breath. When Petitioner was seen on 8/29/13, it was noted that he had previously discussed with Dr. Martin that the mine had called him and asked him to come back to work as a crane operator, and he was looking forward to doing so. On that date, examination of the chest revealed the lungs were clear to auscultation. (Rx5).
When Petitioner returned on 9/27/13, he reported that he had tried to go back to work for a couple of weeks, but really could not do it. His endurance was very poor and he was in a lot more pain. Physical examination of the chest revealed the lungs were clear to auscultation. Petitioner was admitted to Memorial Hospital of Carbondale on 11/5/13 for pyelonephritis. Respiratory review revealed no cough or shortness of breath, with or without exertion. Physical examination of the chest revealed the lungs to be clear. Chest x-ray was performed and was interpreted as revealing some linear atelectasis in both lower lungs. (Rx5).

Petitioner was seen on 12/2/13, for follow up on depression, renal insufficiency and inflammatory bowel disease. He had had a recent bout with kidney stones and acute renal insufficiency. Since that episode he had been fatigued and laying around all the time and reported that he was tearful a lot. Examination was indicated

to be negative for cough or dyspnea, and his lungs were clear to auscultation. Petitioner again underwent a chest x-ray on 3/14/14, and the impression was no acute cardiopulmonary process. At a 4/9/14 follow up, Petitioner continued to deny any cough, chronic cough, dyspnea or wheezing. His lungs were clear to auscultation and respiratory effort was normal. On 7/18/14, Petitioner was seen with complaints of low back pain. Review of systems respiratory was positive for cough and dyspnea, and negative for chronic cough and wheezing. Petitioner underwent a sleep study on 10/26/14, and based on the results was started on a CPAP machine. He had no shortness of breath. His review of systems respiratory was positive for dyspnea but negative for chronic cough, wheezing or cough. Respiratory exam was normal. (Rx5).

At his 4/17/15 yearly physical, Petitioner's respiratory review of systems was negative for chronic cough, cough, dyspnea or wheezing. Respiratory examination remained within normal limits. On 9/4/15, Petitioner reported complaints of feeling dizzy, hot, sweaty, weak and shaky while cleaning rooms at work at Herrin Hospital. His blood sugar was 61, and with orange juice and a candy bar his symptoms seemed to resolve. Respiratory exam was normal. On 2/29/16, Petitioner returned for fatigue, diarrhea and back pain. Review of systems respiratory was positive for dyspnea but was otherwise negative. Respiratory exam remained normal and negative. Petitioner was next seen on 5/18/16 for shortness of breath., noting that in the prior three months his dyspnea had persisted and episodes occurred frequently. His symptoms were aggravated by activities of daily living including moderate activities such as climbing stairs and mild activities such as walking. He denied cough and sputum production. Respiratory exam was normal, and a stress test was ordered with regard to the shortness of breath. At a 7/22/16 follow up, Petitioner reported that his shortness of breath had resolved and not recurred over the prior two months. Physical examination respiratory remained normal. (Rx5).

On 10/7/16, Petitioner was seen with head congestion and sinusitis and cough. There was no history of asthma, chronic cough, chronic sore throat or difficulty breathing. Review of respiratory systems was positive for cough and chest congestion, and Petitioner was diagnosed with sinusitis. Petitioner returned on 10/18/16 noting ongoing sinusitis issues, including a "hacky cough" during the day and some wheezing at night. Exam was positive for chronic cough, dyspnea and wheezing. The assessment was sinusitis, cough, wheeze, fever and Crohn's Disease. Chest x-rays showed no acute cardiopulmonary process. He continued to exhibit cough and dyspnea on 10/21/16 and 12/21/16, but respiratory exams were normal. At his 4/24/17 yearly physical, Petitioner's review of respiratory systems was normal, and Petitioner was described as a "pretty healthy young man." (Rx5).

Petitioner's medical records from Memorial Hospital of Carbondale were also admitted into evidence by Respondent. He was admitted on 6/9/09 for an exacerbation of Crohn's Disease with severe anemia and increasing abdominal pain. He reported feeling tired and had shortness of breath on exertion. He denied breathing/coughing problems. He returned on 9/16/09 with severe dehydration and malnutrition with hypokalemia, along with Crohn's Disease exacerbation. He was status post multiple bowel resection. He had shortness of breath on exertion and indicated that he felt extremely tired and fatigued. Physical examination of the chest showed good air entry up to the bases on auscultation without rhonchi. He had occasional scattered crepitations. On 10/14/09 he underwent colonoscopy, and Petitioner he denied shortness of breath on exertion, cough, or cough with sputum. Physical examination of the chest showed the lungs were clear to auscultation bilaterally. (Rx8).

Petitioner was admitted to the hospital on 1/23/13 for acute-on-chronic renal failure. On admittance to the hospital, pulmonary examination indicated his lungs were clear to auscultation bilaterally. Petitioner underwent chest x-ray based on a history of fever and shortness of breath, and the impression was no acute cardiopulmonary process demonstrated. On 2/11/13, pulmonary function testing was done for a diagnosis of pneumonia. The interpretation of this testing from Dr. Tazbaz showed a mild reduction in the FVC and FEV1

with normal FEV1/FVC ratio. Lung volumes were described as normal, but diffusion capacity was decreased. Dr. Tazbaz diagnosed a non-specific ventilatory defect with no obstructive defect. Petitioner was seen on 3/28/13, with complaints of edema and shortness of breath. Testing revealed limited exercise tolerance achieving 6.4 METS of physical activity, which was interpreted as a normal study. (Rx8).

Petitioner was seen by KDMS Consultants on 7/22/10 with a history of Crohn's Disease and chronic kidney disease. In review of systems, Petitioner complained of fatigue and daytime somnolence. He also complained of snoring and vision changes. Petitioner denied shortness of breath. His past medical history was negative for bronchitis and emphysema. The note recorded a positive history of tobacco use, having quit in 2009. It should be noted that this differs from the Petitioner's testimony and multiple other medical reports which reflect no history of smoking. Physical examination of chest revealed clear breath sounds with no wheeze, rale or rhonchi. He was also diagnosed with anemia attributable to his medications and chronic kidney disease. Petitioner returned on 10/28/10, at which time it was noted he had chronic malnutrition. Review of systems was positive for cough and sinus but negative for daytime somnolence, fatigue or shortness of breath. It was noted that Petitioner was allergic to Remicade, a prescription drug that would have been prescribed for his Crohn's Disease, and that this caused shortness of breath in Petitioner. On physical examination of the chest, Petitioner had clear breath sounds without wheeze, rhonchi or rales. (Rx6).

Petitioner was seen on 10/15/12, in follow up for chronic kidney disease. Since his last visit, Petitioner undergone removal of his colon and rectum and had a colostomy. He was hospitalized two weeks prior for acute respiratory failure and electrolyte imbalance, noting a loss of energy, fatigue and daytime somnolence. He denied shortness of breath and cough. It was again noted that Petitioner was a former smoker. On this date, physical examination of the chest revealed clear breath sounds without wheeze, rhonchi or rales. Petitioner was seen on 11/12/12 for follow up of his chronic kidney disease. He denied shortness of breath or cough, and arrangements were to be made for home dialysis. (Rx6).

On 1/11/13, Petitioner was seen at Herrin Hospital for consultation regarding end stage renal disease, which was being treated with hemodialysis, and he ended up being admitted for sepsis. It was noted that Petitioner had been laid off from work as a shift foreman in the coal mine and was seeking disability due to his Crohn's Disease and kidney failure. Physical examination of the chest revealed normal air movement without crackles or wheeze. The chest x-ray taken that day was interpreted as developing infiltrate/pneumonia in the left lung base. Petitioner was seen on 5/22/13, for follow up regarding his chronic kidney disease. Review of systems respiratory was positive for dyspnea on exertion but negative for cough. (Rx6).

Petitioner was again seen on 8/28/14. Review of systems at that time was positive for dyspnea on exertion, which was chronic. Physical examination of the chest and lungs showed the chest was resonant to percussion. Air movement was normal, and there were no crackles, wheezes or rubs. At a 9/24/15 re-evaluation of chronic kidney disease, Petitioner's chest was resonant to percussion on exam, and there were no crackles, wheezes or rubs. Petitioner was seen on 9/8/16, and the chest was again resonant to percussion with no crackles, wheezes or rubs. On 3/9/17, Petitioner reported chills and mouth sores. He also reported having dyspnea on exertion that was stable. His chest was resonant to percussion and there were no crackles, wheezes or rubs. (Rx6).

Medical records of Washington University were admitted into evidence as Respondent's Exhibit 7. Petitioner was in the Division of Gastroenterology on 3/30/12. It was noted Petitioner had a history of Crohn's ileocolitis diagnosed in 1984. This note detailed Petitioner's ongoing complaints and treatment regarding his Crohn's Disease from 1984 to 2012. According to the social history on that date, Petitioner had never smoked cigarettes. Physical examination of the chest revealed the lungs were clear to auscultation. A treatment plan was developed regarding his Crohn's disease. On 10/4/12, Petitioner followed up for his Crohn's Disease. It was noted he had

undergone proctocolectomy and ileostomy on 8/31/12. His lungs were clear to auscultation on exam. Petitioner was seen on 4/4/13, and it was noted that he had been hospitalized with dyspnea due to medication he was taking for Crohn's Disease. Physical examination of the chest revealed the lungs were clear to auscultation. Petitioner's chest was clear to auscultation when he was examined on 4/4/14, 10/3/14 and 4/3/15. Petitioner was seen on 3/3/16 with a three-week history of increased stool ostomy output which was sufficient to create a significant dehydration. He also reported substantial fatigue and worsening depression. On exam, his lungs were clear bilaterally to auscultation with no wheezes, rhonchi or rales. The doctor felt the fatigue was multifactorial and could be in part due to dehydration and depression. (Rx7).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Initially, the Arbitrator notes that it is clear that the Petitioner was exposed to coal dust, rock dust and glue fumes in his job with Respondent. The Arbitrator initially notes that it appears that the main respiratory disease that is being alleged by Petitioner is CWP. The Arbitrator finds that the Petitioner has failed to prove by the preponderance of the evidence that he has the condition of coal workers' pneumoconiosis (CWP). The Arbitrator further finds that the Petitioner has failed to prove that any other respiratory conditions he may have are more likely than not related to any of these coal mining exposures.

According to Section 1(d) of the Illinois Occupational Diseases Act: "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence."

The question is whether Petitioner has proven that he has developed CWP. All of the physicians involved in this case agree that CWP can exist despite normal pulmonary function and spirometry testing, as well as that the scarring that results from CWP is permanent, and that the main "treatment" for the condition is removal from the source of coal dust exposure.

Petitioner's examining physician, Dr. Paul, testified that Petitioner suffered from a restrictive abnormality caused by the fibrosis that results from coal workers' pneumoconiosis. However, Dr. Paul, testified that Petitioner had a normal physical examination of the chest. Dr. Meyer testified as to the training and testing that is required to be certified as a B-reader. Dr. Paul is not an A-reader or a B-reader so he has not received that specialized training. Dr. Paul did not know the date of the film he reviewed or what opacity type was present on the film. Dr. Paul did not give the film a profusion rating.

Dr. Smith and Dr. Alexander each interpreted the Petitioner's 5/2/13 chest x-ray as positive for pneumoconiosis, profusion 1/0 with opacities in all lung zones. Drs. Meyer and Lockey interpreted the same 5/2/13 x-rays as negative for pneumoconiosis. Dr. Lockey had the advantage of reviewing serial films taken on 1/23/13 and 11/15/13, and he did not find changes consistent with CWP on any of these films. The interpretations by Drs. Meyer and Lockey are consistent with the independent B-readings performed by NIOSH as part of the Coal

Workers' Health Surveillance Program. The NIOSH interpretations were the only independent B-readings. The Arbitrator finds the NIOSH readings to be credible as NIOSH is concerned with making sure their readings are accurate as the employee's rights to move to a less dusty job are dependent on the interpretation. The Arbitrator finds that greater weight of the evidence indicates that the Petitioner's chest x-rays were negative for CWP.

Dr. Meyer's testimony indicated significant experience and credentials in the field of radiology and the reading of films. He testified that he performs 30 to 40 B-readings per week. His testimony was important with regard to the importance of experience in reading films for coal workers' pneumoconiosis, particularly in the 1/0 versus 0/1 profusion category, which he indicated to be one of the most difficult interpretations radiologists perform. Dr. Lockey also testified to significant experience as a B-reader for coal workers' pneumoconiosis. Neither Dr. Smith nor Dr. Alexander testified in this matter. The Arbitrator therefore does not have any detailed explanations for their findings via deposition as we do with Dr. Meyer and Dr. Lockey, and the Arbitrator believes that the testimony provided by these physicians has enhanced the validity of their findings, as the Arbitrator found the testimony to be significantly credible and of significant weight in this case. Dr. Meyer's experience level combined with his explanations for his opinions also carries weight in the Arbitrator's conclusions that his opinions are more persuasive in this case than those of Dr. Smith, Dr. Alexander and Dr. Paul. Plus, Dr. Meyer's interpretation is consistent with the readings of Petitioner's chest x-rays taken as part of the Coal Workers' Health Surveillance Program.

It should also be noted that Petitioner returned to work for Respondent in September 2013, approximately four months after the 5/2/13 chest x-ray was performed, and just over a month after Dr. Paul's examination. Petitioner did not submit any reports of examination conducted after this last date of exposure, and therefore there is no evidence in the record that Petitioner suffered an occupational disease as a result of his exposure in September 2013.

If the evidence indicates that Petitioner's chest x-rays were negative for CWP, then the restrictive abnormality found by Dr. Paul would not be due to CWP or Petitioner's coal mine dust exposure. Dr. Lockey testified that the Petitioner's pulmonary function tests of February 2013, July 2013 and May 2014 demonstrated a mild restrictive pattern. However, he testified that in view of the lack of chest x-ray findings consistent with CWP, this mild restrictive pattern on spirometry was most likely normal for Petitioner or potentially a partial reflection of his age and increased BMI. Dr. Paul testified that on his testing in July 2013, Petitioner had a reduced diffusing capacity. Dr. Lockey testified that the diffusing capacity on the most recent testing in May 2014, was normal. Furthermore, Dr. Lockey testified that if an individual suffers a reduction in his diffusion capacity as a sequelae of dust exposure and scarring of the lungs, it would result in permanent reduction, and the diffusing capacity would not have been normal on the subsequent testing. Dr. Lockey testified that virtually every time he sees a restrictive impairment in relationship to coal dust exposure is when a person has obvious changes on his chest x-ray.

Much of the testimony and evidence presented by the claimant in support of his claim involves varying degree of speculation. This includes the possibility that a miner has a low level of CWP that cannot be detected via x-ray. It includes that CWP macules can potentially merge with non-CWP macules to make larger pathologies where CWP can no longer be detected by a distinctive size and shape. It includes referencing a study that indicates CWP can begin in the mid to lower lung lobes despite testimony from both Dr. Meyer and Dr. Lockey that question the viability of the one study cited versus the great majority of medical literature on the subject. Clearly, a coal miner is going to have a much greater likelihood of developing CWP than someone who is not. However, the bottom line the Arbitrator draws from the testimony in this case is that, short of an autopsy, the best evidence of the existence of CWP is a chest x-ray, and possibly a chest CT scan, which appears to be gaining traction as a more modern method. Both Dr. Meyer and Dr. Lockey have indicated that the greater

clarity of modern CT scanning leads them to the opinion that it may be even better at investigating CWP than general x-rays.

In this case, as noted above, the issue involves pulmonary/respiratory physicians and/or radiologists on one side who read x-rays to show a 1/0 perfusion evidence of CWP, and doctors on the other side who find the perfusion ratio to be 0/0, indicating no evidence of CWP. Arbitrators are thus often faced with the task of having to determine which side's arguments are more persuasive in a very specialized field of medicine.

While it is certainly possible that the Petitioner has CWP at some level that cannot be detected by x-ray or CT scan, this remains speculative and the greater weight of the presented evidence indicates a failure to prove the existence of CWP. Virtually every physician involved in this case agrees that a worker can have CWP that is not at a level where it can be detected on x-ray. Short of autopsy, x-ray and/or CT appears to be the only reliable way to diagnose the condition prior to a workers' death. Based on the evidence in the record, other respiratory and pulmonary problems can certainly point to CWP as a possible cause, but in cases like the one at bar, such problems can be multifactorial. Thus, it appears that short of x-ray findings of CWP, it is very difficult for a claimant to show the existence of CWP other than by speculation. Here, the Arbitrator believes that the testimony of Dr. Meyer and Dr. Lockey was significantly more persuasive than that of Dr. Paul, in terms of the existence of CWP. While Dr. Paul clearly has a wealth of experience, he also is not a B reader, and being a B reader appears to be the best indicator of a physician's ability to read x-rays for CWP.

The treatment records indicate occasional respiratory complaints, however most of these appear to have occurred either with acute conditions or exacerbations of longstanding Crohn's Disease and related surgeries. The Arbitrator notes with interest, and empathy, that the Petitioner has multiple other medical conditions that have likely impacted his body significantly. The potential if not actual impact of these conditions, including the multiple ongoing medications and surgery for Crohn's Disease with periods of complications, on the Petitioner's pulmonary and respiratory systems, as noted by Dr. Lockey, also cannot be ignored in this case. The fact that, based on the evidence presented, it appears that 50% or less of coal miners develop CWP, possibly as low as less than 10% of coal miners, indicates that the simple fact that a worker performs coal mining does not automatically equate to a determination that the worker has or will develop CWP.

Overall, the greater weight of the evidence indicates that Petitioner does not have coal workers' pneumoconiosis or any other causally related respiratory condition.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings with regard to exposure, accident and causation, this issue is moot.

WITH RESPECT TO ISSUE (O), THE EXISTENCE OF DISEASE, and WITH RESPECT TO ISSUE (O), SECTIONS 1(d), 1(e) and 1(f) OF THE OD ACT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings that the Petitioner failed to prove that he sustained an accidental injury via occupational exposure which arose out of and in the course of his employment with the Respondent, these issues are moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Doris Nunez,

Petitioner,

vs.

NO: 11 WC 15840

19IWCC0387

Kelly 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 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 October 27, 2016, 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.

19IWCC0387

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,100.00. 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: JUL 26 2019
TJT:yl
o 7/23/19
51

Thomas J. Tyrrell

Maria E. Portela

Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NUNEZ, DORIS
Employee/Petitioner

Case# **11WC015840**

KELLY SERVICES
Employer/Respondent

19IWCC0387

On 10/27/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST SUITE 2600
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
MARK F VIZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

19IWCC0387

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

DORIS NUNEZ
Employee/Petitioner

v.

KELLY SERVICES
Employer/Respondent

Case # **11** WC **15840**

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **9/09/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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 **2/09/2011**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**25,160.72**; the average weekly wage was $**483.86**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**15,851.99** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**15,851.99**.

ORDER

Respondent shall be given a credit of $15,851.99 for TTD, for a total credit of $15,851.99.

Respondent shall pay reasonable and necessary medical services of $4,121.95, as provided in Section 8(a) of the Act.

Respondent shall pay petitioner temporary total disability benefits of $322.57/week for 49 weeks, commencing 7/18/2014 through 6/26/2015, as provided in Section 8(b) of the Act.

Respondent shall pay petitioner the temporary total disability benefits that have accrued from 2/09/2011 through 9/09/2016, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $15,851.99 for temporary total disability benefits that have been paid.

Respondent shall pay petitioner permanent partial disability benefits of $290.32/week for 37.50 weeks, because the injuries sustained caused the 7.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

10.26.16
Date

OCT 27 2016

19IWCC0387

FINDINGS OF FACT

The petitioner testified that she is currently living in Las Vegas. [Transcript of Evidence on Arbitration, page (hereinafter T.) 12] She testified on February 9, 2011, she was working for Kelly Services doing office duty. (T.12) She was working at Fresh Star Bakeries. (T.13) She was asked to help set up for a meeting and she was getting a case of water when one of the bottles shifted and caught on the shelf. (T.14,15) The case of water went over her shoulder and her hand went up to the shoulder level and her elbow was down below the shoulder level. (T.14,15) She told Michael Marcus about the incident and also informed Kelly Services via telephone. (T.15,16)

She went to Urgent Care and x-rays were taken. (T.18) The pain worsened overnight and she went back on February 10. (T.19) She treated with them through February 18, 2011. (T.19) She was also treated by Dr. Tu who did an injection and recommended physical therapy, then she began treating with Dr. Freedberg. (T.20) He sent her for an MRI and diagnosed a tear of the rotator cuff of the left arm. (T.21) She had no prior or subsequent injuries to her arm. (T.21) She did have surgery and physical therapy. (T.22)

After the surgery, she was not able to do normal activities. (T.22) She had no strength, and the pain radiated up to the shoulder. (T.23) She has pain after 20 minutes with driving and also pain putting on her jacket. (T.23) When she has to reach above her head, she uses her right arm. (T.24)

She was involved in a motor vehicle accident on September 2, 2011. (T.28) She was rear-ended. (T.28) She injured her left back and was off work. (T.29) She went to the ER for that incident. (T.28) When she went back to Kelly Services after the motor vehicle accident with her off work slip, she was terminated. (T.30)

She testified that her hands never got above her shoulder level. (T.32,33) She is right hand dominant. (T.30) Her personal physician at that time was Juliette A. Valeriano, M.D. (T.34) She was seen at Adventist Bolingbrook Hospital after the motor vehicle accident. (T.35) She was seen by Paul Papierski, M.D. for an independent medical evaluation. (T.39)

Dr. Freedberg testified that he reviewed an MRI of the left shoulder taken on April 2, 2011, and it showed a small partial interstitial tear of the supraspinatus, but no evidence of a full thickness rotator cuff tear. (PX 8) He testified the petitioner underwent an EMG on June 20, 2011, which showed a left ulnar neuropathy. (PX 8) In October 2012, Dr. Freedberg recommended surgery, which was an arthroscopic procedure to evaluate the rotator cuff. (PX 8) He was not sure if it was a full thickness tear or partial tear, or if there was anything he needed to repair. (PX 8)

Dr. Paul Papierski testified that he examined the petitioner on June 18, 2012. (RX 1) She gave a history of lifting a 24-bottle carton of water and as she was lifting this, it got caught on the shelf and she felt sudden pain in her left shoulder. (RX 1) He found that she had some tenderness and weakness of the left shoulder. (RX 1) He felt that at least some of that was attributable to the February 2011 injury. (RX 1) He also felt that the intervening motor vehicle accident in September 2011 was likely responsible for some of the symptoms present in her left shoulder. (RX 1) He felt that the findings on the MRI were generally degenerative conditions and that did not indicate they were from the February 2011 incident. (RX 1)

19IWCC0387

CONCLUSIONS OF LAW

In support of the Arbitrator's decision whether or not an accident occurred that arose out of and in the course of the petitioner's employment by the respondent on February 9, 2011, the Arbitrator finds the following facts:

The arbitrator finds that the petitioner did suffer an accident arising out of and in the course of her employment on February 9, 2011, based upon her testimony and the histories contained in the medical records.

In support of the Arbitrator's decision regarding whether or not timely notice of the accident was given to the respondent, the Arbitrator finds the following facts:

The petitioner testified that she called Kelly Services and reported the incident on February 9, 2011. The arbitrator finds that timely notice was given.

In support of the Arbitrator's decision regarding whether or not the petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following facts:

The arbitrator finds that the petitioner suffered a left shoulder strain/sprain. The mechanism of injury is not sufficient to cause a rotator cuff tear, as the petitioner specifically testified that her hands and elbow were below shoulder level when the incident occurred. (T.32,33) The petitioner demonstrated how the accident occurred and the arbitrator makes note that the petitioner's reenactment of the accident shows that neither her hand nor her elbow ever got above shoulder level. (T.32,33) The arbitrator further notes that none of the complaints the petitioner is currently making deal with the rotator cuff, and deal more with the lower part of the arm. The arbitrator also notes that the petitioner testified she had no prior injuries to her left arm.

(T.21) The arbitrator takes judicial notice of case number 93 WC 30443, in which the petitioner filed a claim before the Illinois Workers' Compensation Commission for a left arm injury. The arbitrator also takes judicial notice of case number 07 WC 34877, again at which time the petitioner made an Application for Adjustment of Claim for an injury to her left arm. The arbitrator notes that the records of Dr. Valeriano note that on September 9, 2011, the petitioner denied any upper extremity numbness or weakness. (RX 2) Dr. Valeriano found that the upper extremities had a full range of motion at that time. (RX 2) The arbitrator notes that the records of Adventist Bolingbrook Hospital from September 8, 2011, note pain in the shoulder and scapula area. (RX 4) The records also note that the petitioner did not have any pain on the day of the accident. (RX 4) The records of Adventist Bolingbrook Hospital also note that other than complaints made from the accident, the petitioner had no other complaints of the upper extremities. (RX 4) All records of Adventist Bolingbrook Hospital indicate that prior to the motor vehicle accident, the petitioner was pain free. (RX 4)

Based upon the medical evidence, the arbitrator finds that the petitioner's current condition of ill-being is not causally related to the accident of February 9, 2011. This is supported by the records of Dr. Valeriano, Adventist Bolingbrook Hospital, and Dr. Papierski.

<u>In support of the Arbitrator's decision regarding what temporary total disability benefits are due and owing the petitioner, the Arbitrator finds the following facts:</u>

The petitioner did not testify to any off work slips and only testified that after the motor vehicle accident when she was taken off work by the hospital, she was terminated from her employment. The arbitrator finds that the petitioner failed to prove that the period of temporary

total disability benefits claimed is related to the accident arising out of and in the course of her employment with the respondent on February 9, 2011, and, in fact, relate to the motor vehicle accident and degenerative changes that resulted in the need for surgery. The arbitrator finds that the petitioner was entitled to temporary total disability benefits from July 18, 2014, through July 26, 2015, during which time she underwent surgery on her shoulder and recovered from said shoulder surgery. The surgery was recommended by Dr. Papierski as a diagnostic tool and was therefore related to the accident of February 9, 2011, and the 49 weeks from July 18, 2014, through June 26, 2016, are causally related to the accident of February 9, 2011.

In support of the Arbitrator's decision regarding what medical services provided to the petitioner were reasonable and necessary, the Arbitrator finds the following facts:

The arbitrator finds that the medical bill of Gray Medical, Inc. in the amount of $16,325.00 (PX 5) is not related to any accident arising out of and in the course of the petitioner's employment with the respondent on February 9, 2011. The bill from Gray Medical indicates that the bill is for a continuous passive motion machine. (PX 5) The petitioner did not testify to any such machine and there is nothing in the medical records to show that was provided by any doctor. Based upon the lack of evidence regarding this equipment, the arbitrator finds that the bill of Gray Medical, Inc. in the amount of $16,325.00 is not related to any accident arising out of and in the course of the petitioner's employment with the respondent and is not the responsibility of the respondent. The arbitrator finds that the bills of Prescription Partners, LLC in the amount of $1,604.65, the bill from Alivio Medical Center in the amount of $1,875.00, and the bill from Essential Testing, LLC in the amount of $641.30 are related to the accident arising

out of and in the course of the petitioner's employment on February 9, 2011, and are the responsibility of the respondent. The bills shall be paid pursuant to Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision regarding the nature and extent of the petitioner's injury, the Arbitrator finds the following facts:

The petitioner suffered a strain/sprain of the left shoulder as a result of the accident of February 9, 2011. None of the medical evidence shows that any other findings were related to said incident. The petitioner did suffer an intervening accident on September 2, 2011, and the surgery as performed by Dr. Freedberg showed only degenerative changes in the left shoulder. Based upon the medical evidence, the arbitrator finds that the petitioner suffered the permanent partial loss of use of the left shoulder to the extent of 7.5% loss of use of the person as a whole.

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

BROOKE L. SERBOUSEK,
Petitioner,

vs.

NO: 15 WC 2729

ST. JOHN'S HOSPITAL,
Respondent,

19IWCC0388

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, 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 5, 2017, 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: JUL 26 2019

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson
Deborah L. Simpson

MEP/dmm
O:070919
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SERBOUSEK, BROOKE L
Employee/Petitioner

Case# **15WC002729**

ST JOHN'S HOSPITAL
Employer/Respondent

19IWCC0388

On 9/5/2017, 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 1.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2427 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0265 HEYL ROYSTER VOELKER & ALLEN
JOHN O LANGFELDER
3731 WABASH AVE PO BOX 9678
SPRINGFIELD, IL 62791-9678

HRVA NO. 2289-T3644/JOL/kmm

19IWCC0388

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

Brooke L. Serbousek
Employee/Petitioner

v.

St. John's Hospital
Employer/Respondent

Case # **15** WC **2729**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **July 27, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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 _____

19IWCC0388

FINDINGS

On **07/16/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

In the year preceding the injury, Petitioner's average weekly wage was $1,190.41.

On the date of accident, Petitioner was **34** years of age, married, with **0** dependent children.

ORDER

Petitioner did not sustain an accident with a manifestation date of July 16, 2012 that arose out of and in the course of employment with Respondent.

Timely notice of this accident was not given to Respondent.

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

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

D. Glenn McCarty

Signature of Arbitrator

8/28/2017
Date

SEP - 5 2017

19IWCC0388

Brooke Serbousek
Employee/Petitioner

Case # **15 WC 2729**

v.

St. John's Hospital
Employer/Respondent

Setting: **Springfield**

The testimony and evidence presented at arbitration is summarized in the decision for 12 WC 33871 (date of accident March 16, 2012). The disputed issues in 15 WC 2729 (date of accident July 16, 2012) as to (C) Accident and (E) Notice are addressed in this decision.

Findings of Fact and Conclusions of Law

Petitioner filed two Applications for Adjustment of Claim for injuries she claimed arose out of her employment with Respondent St. John's Hospital. The two cases were consolidated for purposes of trial.

The first Application (12 WC 33871) alleged repetitive trauma injuries arising out of a specific accident of March 12, 2012, which was amended by agreement at time of trial to March 16, 2012. This was the date claimed by Petitioner when she reported the claim and provided notice to Respondent on April 26, 2012. This Application was filed on or about September 24, 2012. The issues in dispute were Causal Connection, Medical, and Nature & Extent.

The second Application (15 WC 2729) alleged repetitive trauma injuries arising out of work duties with a manifestation date of July 16, 2012. This Application was filed on or about January 20, 2015. The issues in dispute were Notice, Accident, Causal Connection, Medical, and Nature & Extent.

The Arbitrator incorporates by reference the **Findings of Fact** adopted in the accompanying case, 12 WC 33871.

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

The Arbitrator finds that Petitioner failed to meet her burden of proving that an accident with a manifestation date of July 16, 2012 (15 WC 2729) occurred that arose out of and in the course of her employment with Respondent.

In a repetitive trauma claim, the injury is said to have manifested itself on the date when both the injury and its causal relationship to claimant's employment become readily apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 IL 2d 524, 505 N.E. 2d 1026 (1987) Claimants are not permitted to automatically select the last day of work as the date of accident. *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill App. 3d 607, 531 N.E. 2d 174 (4th Dist. 1988) The date of accident must be determined from the facts and circumstances of each case, and the injury manifests itself when both the fact of

the injury and the causal relationship of the injury to claimant's employment become plainly apparent to a reasonable person. *Three D Discount Store v. Industrial Commission*, 198 Ill. App. 3d 43, 555 N.E. 2d 261 (4th Dist. 1989)

Petitioner's second Application (15 WC 2729) was filed on January 20, 2015 and alleged repetitive trauma injuries with a manifestation date of July 16, 2012, the last day of employment with Respondent. The injuries alleged to be the result of repetitive trauma were right and left arms, shoulders, hands, MAW. (Arbitrator Exhibit #2)

The facts and evidence show Petitioner last performed work as a vascular sonographer for Respondent on May 7, 2012 and by July 16, 2012, the Petitioner had already been treated by both Dr. Sandercock and Dr. Petersen. In addition, she had been seen by Dr. Hagen and been given a diagnosis.

As stated in the decision in the accompanying case, the proper manifestation date for the Petitioner's repetitive traumas is March 16, 2012.

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

The Arbitrator adopts his findings as to (C) Accident as his findings in addressing (E) Was timely notice of the accident given to Respondent. Regardless of the findings as to the issue of Accident, the Arbitrator finds that Petitioner failed to provide Respondent with timely notice of the second accident as outlined in her second Application.

Petitioner's first Application (12 WC 33871) alleged injuries of the left and right hands, arms and shoulders from repetitious movement of arms during ultrasounds. (Resp. Ex. #5) The first Application was then amended on January 20, 2015 to allege injuries of left and right hands, arms, and shoulder, and MAW. (Arbitrator Exhibit #1) Petitioner's second Application (15 WC 2729) was filed on January 20, 2015 and alleged repetitive trauma injuries with a manifestation date of July 16, 2012, the last day of employment with Respondent. The injuries alleged to be the result of repetitive trauma were right and left arms, shoulders, hands, and MAW. (Arb. Ex. #2)

The Illinois Workers' Compensation Act requires that notice of an accident be given to the employer as soon as practicable, but not later than 45 days after the accident. The second Application and amending of the first Application were filed January 20, 2015, approximately six months after Petitioner completed her treatment with Dr. Emanuel, and two and a half years following her last visit to Dr. Petersen (July 10, 2012) and completion of physical therapy treatments (July 24, 2012). The injuries alleged in the second Application were claimed to be the result of repetitive trauma. The amended first Application added "MAW" to the alleged injuries and changed the nature from "thoracic outlet syndrome" to "permanent." (Resp. Ex. #5) There is a reasonable inference that the filing of the second Application and the amending of the first Application were to allege and include the surgeries performed, or at least the surgeries performed by Dr. Emanuel.

The lack of timely notice deprived Respondent of the opportunity to investigate the injuries alleged in the second Application. An employer's knowledge of some type of injury does not establish statutory notice. *White v. Workers' Compensation Commission*, 374 Ill. App.3d 907, 873 N.E.2d 388 (4th Dist. 2007) In this case, the lack of notice unduly prejudiced Respondent as the medical treatment for Petitioner's alleged injuries had ended as

of July 21, 2014, six months prior to the filing of the second Application (15 WC 2729). The second Application was also filed 2 ½ years after Petitioner last saw Dr. Petersen with no pain complaints and completion of her physical therapy treatment on July 24, 2012.

The Arbitrator finds Petitioner failed to provide timely notice to Respondent in 15 WC 2729.

The claim is denied. All other issues become moot..

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BROOKE L. SERBOUSEK,
Petitioner,

vs.

NO: 12 WC 33871

ST. JOHN'S HOSPITAL,
Respondent,

19IWCC0389

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, 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 28, 2017, is hereby affirmed and adopted.

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

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

Bond for 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: JUL 26 2019

María Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

MEP/dmm
O:070919
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

SERBOUSEK, BROOKE L
Employee/Petitioner

Case# **12WC033871**
15WC002729

ST JOHN'S HOSPITAL
Employer/Respondent

19IWCC0389

On 9/28/2017, 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 1.17% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0265 HEYL ROYSTER VOELKER & ALLEN
JOHN O LANGFELDER
3731 WABASH AVE PO BOX 9678
SPRINGFIELD, IL 62791-9678

19IWCC0389

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

Brooke L. Serbousek
Employee/Petitioner

v.

St. John's Hospital
Employer/Respondent

Case # **12** WC **33871**

Consolidated cases: **15 WC 2729**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **7/27/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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 **3/16/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**61,901.32**; the average weekly wage was $**1,190.41**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner's medical bills listed in Petitioner's Exhibit No. 26, as provided in Sections 8(a) and 8.2 of the Act, and it shall reimburse Petitioner for her out-of-pocket payments of $1,075.46 for reasonable and necessary medical services. As is explained in the Conclusions of Law which are attached, the Respondent is not responsible for bills related to the Petitioner's torn labrum of the left shoulder.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 109.2 weeks, because the injuries sustained caused the 10% loss of use of the right hand, the 8% loss of use of the left hand, as provided in Section 8(e)(9) of the Act, and the 15% loss of the person as a whole for the bilateral shoulder injuries, 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.

D. Glenn McEntee

Signature of Arbitrator

9/26/17
Date

SEP 28 2017

19IWCC0389

FINDINGS OF FACT

In 12 WC 33871, Petitioner alleges that on March 16, 2012, she sustained injuries to her left and right hands, arms, shoulders and person as a whole through repetitious movement of the arms while doing ultrasounds. (AX 3) In 15 WC 2729, Petitioner alleges that she sustained injuries to her right and left arms, shoulders, hands, and the person as a whole through repetitive trauma. (AX 4) Both cases were consolidated for trial. The disputed issues in 12 WC 33871 are causal connection, medical bills and nature and extent. (AX 1) The disputed issues in 15 WC 2729 are accident, notice, causal connection, medical bills, and nature and extent. (AX 2)

Petitioner testified that she is 38 years old and right-hand dominant. She started working as a registered vascular sonographer for Respondent in 2003 and worked for Respondent until 2005 when Prairie Heart Institute bought the vascular department. In July 2011, Respondent bought back the vascular department, and she worked for Respondent up through July 16, 2012. Generally, she worked 8 hours a day, five days a week, with a 30-minute lunch. About 3 to 5 days per month, she would be on call and have to perform an ultrasound.

Petitioner noted that she was not a cardiac sonographer. She reviewed Petitioner's Exhibit No. 1, which is also marked as Respondent's Exhibit No. 7(a), which is the job description for a cardiac sonographer. Cardiac sonographers perform ultrasounds of the heart. Petitioner was a vascular sonographer and performed ultrasounds of all the veins and arteries in the body except the heart.

Petitioner testified that on average, she performed approximately 8 ultrasounds per shift. Petitioner's Exhibit No. 2 is a job description for a vascular sonographer, which she wrote. She performed three main studies: (1) DVT/reflux studies, also known as vein or venous studies, (2) abdominal studies, and (3) carotid studies, also known as arterial studies.

Petitioner testified that a DVT/reflux study is an ultrasound of the veins in the body. On average, she performed 2 to 4 of these exams per shift. Each took 60 to 90 minutes. These began with the patient lying on a stretcher and Petitioner checking the legs for blood clots. She would sit on a backless stool to the patient's right. She sat about 2 feet from the ground. The patient was about 3 and ½ feet above the ground on a stretcher. The exam required extensive reaching of the arms and grasping a transducer. She used both hands to perform these studies. She used her right hand until her shoulder, arm and hand would start having pain and then she would switch to her left hand. While scanning with the transducer, she used the opposite arm to run the ultrasound machine. The arm operating the ultrasound machine would be at about 90 degrees while the arm holding the transducer would be at or above shoulder level at approximately 120 degrees reaching across the patient. For the DVT portion of the study, there would be arm extension and wrist flexion due to the positioning of the patient. With the reflux portion of the study, the patient would stand on a step stool while Petitioner sat on another step stool. Her arm which was holding the transducer would be above her at approximately 145 degrees. Petitioner would have to apply extensive transducer pressure and shoulder pressure with heavier patients in order to visualize their blood vessels. Her hands and wrists would be in

awkward positions. She had to dorsiflex her hand while applying pressure with the transducer to visualize the vessels in the body.

Petitioner noted that abdominal studies were performed with the patient lying down on a bed. Abdominal studies took 20 to 40 minutes and she performed about 2 of these studies each shift. Due to abdominal gas and often the size of the patients, she would have to apply extensive pressure to the abdomen with the transducer in order to visualize vessels in the abdomen. She alternated arms in holding the transducer, holding the transducer in one arm and running the ultrasound machine with the other arm. Both arms would be at or above shoulder level. These exams involved awkward wrist and hand positions and she had to use extensive pressure to grip the transducer and to press it down on the patient.

Petitioner testified that she performed 3 to 4 carotid studies each shift, and each took about 10 to 20 minutes. She would sit on the patient's right hand side and would hold the arm which was grasping the transducer above 90 degrees. She alternated arms with her studies because she would get pinching, pressuring and pain in her shoulders that would radiate down her arm as well as hand numbness, weakness and tingling in her fingers. She noted that the carotid studies also involved awkward wrist and hand positions. She had to twists her hands and wrists while using the transducer and applying pressure to the blood vessels. Her wrists would be hyperflexed. She did note the pressure with the carotid studies was not as much as that required for the DVT/reflux and abdominal studies.

Petitioner testified that while performing ultrasounds, she would notice shoulder popping, clicking and radiating pain as well as weakness, numbness and tingling in her fingers. She started noticing these symptoms in 2011. She stated that she first saw her family physician, Dr. Sandercock, for these symptoms on September 27, 2011.

On September 27, 2011, Petitioner presented to Dr. Dave Sandercock, her primary care physician, with complaints of intermittent numbness and tingling of the entire right arm for the past 6 to 8 months with gradual radiation to right fingers and hand. Dr. Sandercock recorded that she had not been seen for these symptoms in the past. She complained the symptoms were interfering with her job and would wake up at night with numbness and tingling in the right arm. Exacerbating factors included certain positions, arm position with sleep, ultra sound scanning and holding a scanning transducer. She noted her left arm would have numbness and tingling on rare occasions, and the left arm symptoms were position related as well. Dr. Sandercock recommended an x-ray of the cervical spine and an EMG. (PX 5, pp. 3-4) Petitioner testified that she did not get the EMG done at this point.

Petitioner testified that on March 16, 2012, she was performing a carotid exam when she started having pain in her right shoulder and forearm. She tried switching arms but could not handle the pain any more. She had got to the point where she could not take it anymore.

On April 26, 2012, Petitioner presented to Dr. Sandercock, reporting that she had bilateral hand numbness, right greater than left, and stating that over the past 6 to 9 months, she had increased pain, numbness and tingling in the hands. She reported difficulty grasping her transducer for long periods of time. She was wearing bilateral wrist braces with little

improvement. Dr. Sandercock suspected carpal tunnel syndrome. He recommended a cervical x-ray, and EMG study and wrist splints. (PX 5, pp. 16-17)

Respondent's Exhibit No. 1 is entitled "Peminic Report" (first report of injury to St. John's Hospital). It lists a date of injury as March 16, 2012 and notes it was reported on April 26, 2012. It indicates that on March 16, 2012, Petitioner was using a carotid duplex when her hand fell asleep. She had pain and numbness radiating up her arm into her shoulder. She had trouble sleeping on that side after work. When she returned to work, she tried to use her left arm, but had the same symptoms. As the days went on, her symptoms would come and go. If she had a long day with difficult patients or difficult exams or if she did more patients than normal, she would have bilateral shoulder, arm and hand pain and numbness, which would continue while she was home. (RX 1)

Petitioner testified that Respondent referred her to Dr. Petersen, who at the time was an occupational medicine physician at the Orthopedic Center of Illinois, and she first saw Dr. Petersen on April 27, 2012.

The records of Dr. Petersen from April 27, 2012 through July 10, 2012 are contained in Petitioner's Exhibit No. 7 and Respondent's Exhibit No. 7. On April 27, 2012, Petitioner presented to Dr. Petersen and reported the gradual onset of bilateral upper extremity pain, right greater than left, that began about 6 months prior and became dramatically worse in about the middle of March 2012. She stated that her pain radiated from her proximal shoulder into her bilateral hands. She reported numbness in the bilateral second, third and fourth fingers. She stated that her pain and paresthesia were provoked by reaching forward and gripping the ultrasound transducer. She reported her pain was mild at rest and moderate to severe with prolonged shoulder elevation and forward reaching accompanied by gripping of the ultrasound transducer. Dr. Petersen performed a physical examination, indicating her shoulder range of motion was normal and that Hawkins and Neer sign were negative bilaterally. He diagnosed bilateral upper extremity pain with right greater than left. He recommended treating conservatively with anti-inflammatories, night splints for the wrists, and pillow splints for the elbows. He also recommended work restrictions of limited reaching and grasping and other repetitive use of the upper extremities to 20 minute per hour. (PX 7, pp. 57-59)

Petitioner completed an injury report on May 4, 2016, stating that the date she found she could not do her job due to bilateral arm, neck and hand pain and numbness was March 16, 2012. She wrote that in the fall of 2010 she had noticed bilateral shoulder pain as well as in the spring and summer of 2011 noticing upper arm/forearm weakness and pain. She wrote that on March 16, 2012 she was performing a carotid ultrasound when she got a shooting pain in the right side of her neck, arm and hand and had hand numbness and tingling in her fingers. She could not hold and grip the transducer. She listed Dr. Petersen as the doctor she was seeing for her problem. (PX 3; RX 2)

Petitioner testified that shortly after that, she was given a job handling patient charts and that her last day as a sonographer was May 7, 2012.

On May 8, 2012, Petitioner returned to Dr. Petersen, and he referred her to Dr. Paul Smucker for an EMG evaluation of her bilateral upper extremities. Dr. Petersen amended the

work restrictions to include no use of the bilateral upper extremities including overhead reaching or gripping activities. (PX 7, p. 44)

Petitioner underwent the EMG with Dr. Smucker on May 17, 2012. It did not find evidence of cervical radiculopathy, brachial plexopathy, diffuse peripheral polyneuropathy, or peripheral entrapment neuropathy. (PX 7, pp. 37-39)

On May 21, 2012, Dr. Robert R. Hagan saw Petitioner at the request of Respondent for a Section 12 examination. Petitioner told him her symptoms started a couple of years prior to his exam but became progressively worse on March 16, 2012. She complained of a radiating pain from the base of her neck across the anterior shoulder and into the medial arm in addition to hand numbness and tingling. Dr. Hagan noted that she had undergone an electrodiagnostic study on May 17, 2012 which showed no evidence of cervical radiculopathy, brachial plexopathy or peripheral nerve entrapment. However, he stated electrodiagnostic studies are just part of the overall equation but not definitive because the false negative rate is as high as 30%. Dr. Hagan commented that his physical examination showed tenderness to the right greater than left overlying anterior scalene and plexus interface, a positive Tinel sign on both the median and ulnar distributions, slightly rotated forward shoulders, and positive Phalen's test, right greater than left. Dr. Hagan diagnosed positional and postural neurogenic thoracic outlet, right greater than left. He believed her body habitus and posture predisposed her to this condition, but based on her personal job description, her job duties certainly could have aggravated this condition. Dr. Hagan also believed she had some element of bilateral carpal tunnel syndrome. He recommended bilateral carpal tunnel steroid injections for diagnostic purposes since her physical examination was moderately positive but her electrodiagnostic studies were negative. (PX 8)

On June 5, 2012, Petitioner returned to Dr. Petersen, indicating her symptoms had resolved with current work restrictions. He performed a bilateral shoulder examination, stating it was within normal for range of motion. He diagnosed neurogenic thoracic outlet syndrome caused by body habitus and posture, which was aggravated by work activities. He recommended physical therapy and weight loss. He issued a work restriction of restricting reaching, grasping and over shoulder level work for more than 10 minutes per hour. (PX 7, pp. 32-33)

On June 8, 2012, Petitioner presented to Midwest Rehab for a physical therapy evaluation. On a pain scale diagram, she marked aching and stabbing over the top of both shoulders. (PX 9, p. 28) She complained of intermittent upper extremity pain, right greater than left, particularly whenever she maintained her arms elevated at or above shoulder height, aching on both sides of the neck, intermittent stabbing pains about the superior aspects of the shoulders, and numbness which radiates from her elbow to her index and ringer fingers, right greater than left. (PX 9, p. 20) She was noted to have positive secondary impingement signs at the right shoulder. (PX 9, p. 33)

Respondent had a job site analysis performed on June 21, 2012, which used four analysis tools for assessing risks associated with Petitioner's position. The ANSI A-365 proactive job survey and the threshold limit value for hand activity tools indicated no trigger scores and within normal limits. The Moore-Garg Strain Index indicated some risk for the development of distal upper extremity disorders with no risk on the left. The Rapid Upper Limb Assessment indicated "further investigation, change soon." (PX 4, pp. 2-3) It was recommended that Petitioner be

educated on postures of back, neck, arms, wrists and hands during her tasks, that she keep work close to her body and avoid over reaching for long periods of time, and that she be educated on performing neck and upper extremity stretches periodically throughout the day. (PX 4, p. 3)

On July 3, 2012, during Dr. Petersen's physical examination, Petitioner had pain with overhead reaching and lifting with her bilateral shoulders, right greater than left. Her range of motion was decreased due to pain with restricted flexion and abduction. Impingement signs were positive on the right. Dr. Petersen ordered an MRI of the cervical spine to rule out any cervical disc pathology and recommended continuing with physical therapy. (PX 7)

On July 10, 2012, Petitioner was seen by Dr. Petersen, who reported Petitioner was still having subjective complaints voiced to her therapist of decreased range of motion. Dr. Petersen diagnosed bilateral upper extremity paresthesia, presumably related to thoracic outlet syndrome. He recommended Petitioner continue with physical therapy and issued a work restriction of limiting over the shoulder level activities to an occasional basis. She was scheduled to follow up with Dr. Petersen on July 24, 2012. (PX 7, pp. 1-2)

Petitioner last presented to physical therapy at Midwest Rehab on July 24, 2012. She reported no real change in her symptoms. It was noted that she did not meet all of her long tern goals and among the problems noted were right shoulder impingement and bilateral arm numbness and pain. (PX 9, p. 1)

Petitioner testified that her treatment with Dr. Petersen up through July 10, 2012 was authorized by Respondent. However, following her termination by Respondent on July 16, 2012, she was no longer able to treat with Dr. Petersen. As of July 10, 2012, Dr. Petersen had not placed her at maximum medical improvement and had not released her from his care.

On July 24, 2012, Petitioner presented to Dr. Sandercock with bilateral shoulder pain and numbness down both arms and hands. Dr. Sandercock recommended a referral to an orthopedic surgeon for a second opinion. (PX 6, pp. 29-30)

On August 15, 2012, Petitioner presented to Dr. Ra' Kerry Rahman, an orthopedic surgeon, with SIU Health Care. Dr. Rahman recommended that she have an EMG by Dr. Trudeau. (PX 10, pp. 72-80)

On November 13, 2012, Dr. Edward A. Trudeau performed an EMG/NCV study. Dr. Trudeau stated that the findings of his electrodiagnostic studies are those of bilateral median neuropathies at the wrists (bilateral carpal tunnel syndrome), moderately severe on the right side and mild on the left side in electroneurophysiologic testing terms. He found no evidence of brachial plexopathy. (PX 11)

Petitioner returned to Dr. Rahman on December 4, 2012, and he diagnosed bilateral carpal tunnel syndrome, right worse than left, and shoulder pain. He recommended that she see his partner, Dr. El-Amin, for her shoulders. He also recommended proceeding with carpal tunnel release surgeries. (PX 10, pp. 37-38)

On December 13, 2012, Petitioner presented to Dr. Saadiq El-Amin, an orthopedic surgeon at SIU Health Care. Dr. El-Amin diagnosed bilateral shoulder impingement versus rotator cuff tear and recommended physical therapy, anti-inflammatories, and an MRI of each shoulder. (PX 10, pp. 32-33)

Petitioner testified that between July 10, 2012, when she stopped seeing Dr. Petersen and December 20, 2012, when the MRI's were done, she did not sustain any type of injuries to her shoulders.

On December 20, 2012, Petitioner had MRI's without contrast of the left shoulder and right shoulder. The left shoulder MRI showed the following: (1) superior labral tear; (2) moderate acromioclavicular osteoarthritis with mild subacromial/subdeltoid bursitis; and (3) mild supraspinatus and infraspinatus tendinosis without partial or full thickness rotator cuff tear. (PX 12) The right shoulder MRI showed the following: (1) moderate acriomioclavicular osteoarthritis with moderate subacromial/subdeltoid bursitis; (2) mild supraspinatus and infraspinatus tendinosis without a partial or full thickness rotator cuff tendon tear; and (3) an intact glenoid labrum. (PX 13)

On January 3, 2013, Petitioner returned to Dr. El-Amin, and he diagnosed right shoulder impingement and left shoulder SLAP tear. He recommended an injection of the right shoulder and physical therapy and surgery to repair the left shoulder SLAP tear. (PX 10, pp. 23-25) He subsequently recommended a left carpal tunnel release. (PX 10, p. 8)

On March 22, 2013, Dr. Rahman performed a right carpal tunnel release. (PX 10, p. 15; PX 14) Petitioner returned to Dr. Rahman on April 5, 2013, noting she was very happy with the results of surgery.

On May 29, 2013, Dr. El-Amin, operated, performing an arthroscopic repair of a type 4 labral tear of the left shoulder and a left carpal tunnel release. He noted in his operative report that Petitioner's physical examination findings were consistent with a labral tear, and her left-hand numbness in the first 3 digits were consistent with carpal tunnel syndrome. For the repair of the labral tear, Dr. El-Amin utilized two Smith and Nephew suture anchors to fasten the labrum back to its insertion on the rim of the glenoid. Dr. El-Amin noted that the median nerve did appear to be inflamed. The doctor also noted that there were no bursa inflammation nor impingement signs in the left subacromial space. (PX 15)

According to a phone log from SIU dated July 9, 2013, Petitioner called in to Dr. El-Amin's office about taking her sling off. She also stated that she had brought in information to Dr. El-Amin during her June 13, 2013 office visit about her job and that he was going to dictate that this was work related. (PX 16) On July 23, 2013, Dr. El-Amin electronically signed a note which reads: "The original injury was work related. This was discussed at the initial visit with the patient, but was not dictated." (PX 16; RX 8, p. 43)

Petitioner participated in physical therapy at Physio Therapy Professionals for both shoulders between July 25, 2013 and August 29, 2013. On August 26, 2013, her therapist reported that she was progressing well but had some right shoulder weakness. On August 29, 2013, her therapist commented that she continued to show great progress with her strength and

pain control and demonstrated compliance with a prescribed home exercise program. It was noted, however, that she had some decreased range of motion and strength of the shoulder as expected post-operatively. (PX 17)

On September 5, 2013, Dr. El-Amin performed a subacromial injection with marcaine/lidocaine and depomedrol into the right shoulder. (PX 19, p. 18) On December 5, 2013, Dr. El-Amin noted Petitioner was still having some bilateral shoulder pain with overhead activity, left greater than right, which was mainly in the biceps tendon region. He performed bilateral injections of the biceps tendon. He recommended she work on her range of motion and strengthening. (PX 19, pp. 22, 8) On January 21, 2014, Petitioner called into Dr. El-Amin's office and indicated she was reaching up and felt a pop in the left shoulder and that it was hurting since the previous Thursday. An appointment was scheduled. She called back the next day and indicated her arm was feeling better so she canceled the appointment. (PX 19, pp. 4-5)

Petitioner testified that following her surgeries by Dr. Rahman and Dr. El-Amin, she improved somewhat, but not completely. Petitioner recalled calling Dr. El-Amin's office and noting that she had felt a pop in her left shoulder while lifting it in January 2014, but she testified the left shoulder had been hurting even prior to that incident. Her left shoulder never completely healed after surgery, and she was still having pain, popping and clicking with normal everyday activity. She testified that at some point she had a conversation with Dr. El-Amin about whether her injuries could be related to her work activities. Subsequently, she called into his office because the conversation they had was not dictated into his office note so she called in to ask if it could be put in his report.

Petitioner testified that she stopped seeing Dr. El-Amin and sought a second opinion with Dr. James Emanuel, an orthopedic surgeon at Parkcrest Orthopedics in St. Louis. Petitioner first presented to Dr. Emanuel on March 25, 2014 for an evaluation of bilateral shoulder pain. His examination of both shoulders documented positive Hawkin's signs and positive impingement signs. Range of motion was within normal limits. He diagnosed arthritis of the AC joint of the shoulders, a bone spur, subacromial bursitis, and impingement syndrome. He recommended surgery. (PX 20, pp. 1-2)

On April 9, 2014, Dr. Emanuel operated on the right shoulder, performing an arthroscopic debridement of the glenohumeral joint with debridement of the superior-posterior glenoid labrum, an arthroscopic subacromial decompression, and an arthroscopic distal clavicle resection with removal of torn cartilaginous homolog of the AC joint. The operative report lists the post-operative diagnoses as possible glenoid labral tear, subacromial bursitis with a spur, and acromioclavicular joint arthritis with torn cartilaginous homolog. (PX 21)

During a May 12, 2014, follow up visit, Dr. Emanuel noted Petitioner reported having no pain, was very pleased, had regained all of her motion, and was able to sleep on her right shoulder. She still had persistent problems with the left shoulder in the form of clicking, sharp and stabbing pain with certain movement as well as some persistent numbness/tingling in her right wrists following her carpal tunnel surgery. She had no problems with the left wrist. Dr. Emanuel recommended proceeding with a left shoulder arthroscopy. (PX 20, pp. 6-7) Dr. Emanuel recorded that Petitioner indicated her shoulders bothered her while working as an ultrasound technician and that she would alternate arms, one resting at 90 degrees operating a

computer and the other arm extended overhead pushing hard into the patient's body who was standing in front of her. He stated that in his medical opinion, this type of activity done for a number of years could cause or aggravated subacromial bursitis and impingement, acromioclavicular joint arthritis in both shoulders. (PX 20, p. 6)

On May 29, 2014, Dr. Emanuel performed a left arthroscopic extensive debridement with removal of loose sutures of the previous SLAP lesion repair and debridement of the labrum, an arthroscopic subacromial decompression, and an arthroscopic distal clavicle resection. Post-operatively, Dr. Emanuel diagnosed subacromial bursitis with a spur, acromioclavicular joint arthritis with a spur, previous SLAP lesion repair, and some lose suture materials in the superior labral previous repair. (PX 22)

During a June 24, 2014 follow up visit with Dr. Emanuel, Petitioner reported doing very well with her left shoulder and regaining her motion. Due to complaints of numbness and tingling in the ulnar distribution of the right hand Dr. Emanuel recommended an EMG study. (PX 20, p. 12) Dr. Emanuel stated in his office note that Petitioner's activities as a vascular ultrasonography specialist could have caused or contributed to the development of cubital tunnel syndrome and carpal tunnel syndrome. (PX 20, p. 12)

On July 21, 2014, Dr. David Peeples performed an EMG study. The study was normal and revealed no findings for right median or ulnar neuropathy, peripheral neuropathy, cervical radiculopathy, brachial plexopathy, or neurogenic thoracic outlet syndrome. The median motor and sensory conduction was improved and normal across the right carpal tunnel compared to the EMG performed on November 12, 2012. (PX 23, pp. 6-7)

On July 21, 2014, Dr. Emanuel diagnosed cubital tunnel syndrome with no evidence of peripheral entrapment. He noted no further medical or surgical intervention was necessary and that Petitioner was doing very well following her bilateral shoulder surgeries. He released her from his care on an as needed basis. (PX 20, p. 15)

Petitioner testified that she currently notices popping, clicking and weakness in both shoulders. Both are about the same. One is not worse than the other. She notices these symptoms any time she extends her shoulders above a normal 90 degree angle, with such activities as dusting, cleaning or lifting boxes. Around the house, if she lifts her arms above her shoulder, she notices popping, clicking, and shoulder pain. It is a pinching pain in the shoulder and like a weakness which travels down her arm into the forearms. She also notices it while she is sleeping as well as with applying makeup and washing her hair. Currently, she is self-employed as a jewelry artist. She attends approximately 6 art fairs a year, which requires her to lift boxes into and out of her car. She stated she improved following her shoulder surgeries, but she does not consider either side normal.

With respect to her hands, she currently notices bilateral tingling in her fingers about twice per week depending on her activity, such as gripping a telephone or steering wheel. She also notices tingling when holding pieces of copper or holding her torch while working as a jewelry artist. She does not plan on retiring soon.

On cross-examination, Petitioner noted that on or about April 13, 2012 she was given a final warning from Respondent, which she signed on April 25, 2012. According to a performance improvement action plan, Respondent's Exhibit No. 4, the warning was for clocking in early on several occasions and using profanity when referring to the department manager. (RX 4)

On cross-examination, Petitioner was asked if she had an EMG with Dr. Trudeau on June 8, 2011. She did not recall the date, but recalled having an EMG with Dr. Trudeau. She was asked if it happened when she was still employed at Prairie, and said no. On re-direct examination, Petitioner testified that she was positive she only saw Dr. Trudeau one time. Prior to her EMG with Dr. Smucker in 2012, she had never underwent an EMG study.

Dr. Emanuel testified on by way of evidence deposition. Dr. Emanuel is board certified in orthopedic surgery, with 100% of his practice devoted to the upper extremity. His practice primarily involves the shoulder, but he also performs carpal tunnel surgeries. When he first saw Petitioner on March 25, 2014, he examined both shoulders. He testified that his physical examination of the left shoulder showed tenderness of the acromial clavicular joint and front of shoulder as well as positive Hawkins and impingement tests. His physical examination of the right shoulder showed tenderness of the acromial clavicular joint and front portion of the shoulder as well as a positive cross arm test and positive impingement test. Dr. Emanuel testified that these findings were consistent with Petitioner's subjective complaints. He believed Petitioner was symptomatic from the acromial clavicular joints and had sub acromial bursitis, a bone spur and impingement syndrome. He recommended arthroscopies. (PX 27, pp. 7-14)

Dr. Emanuel testified that his operative findings from the April 9, 2014 right shoulder surgery confirmed his pre-operative diagnoses in that he found a thickened bursitis, a significant bone spur, torn piece of cartilage in the AC joint with some arthritic changes at the acromial clavicular joint. He testified that his May 28, 2014 left shoulder surgery showed the labrum had healed from her previous surgery but the sutures were loose so he removed them and proceeded with the same surgical procedure he did with the right shoulder. He removed a significant amount of bursitis, removed a large spur from the anterior medial acromion, removed a torn cartilaginous homolog at the AC joint, and did a distal clavicle resection. (PX 27, pp. 15-20)

Dr. Emanuel testified that on June 24, 2014, he recommended an EMG because Petitioner continued to have complaints of numbness and tingling in the ulnar nerve distributions of her hands, right more than the left. Dr. Emanuel has a general understanding of ultrasounds from having had ultrasounds in his office, having them performed on himself, and having rotated through radiology and vascular labs during medical school. (PX 27, pp. 21-24)

Dr. Emanuel was asked to assume the following facts to be true: Petitioner worked as a vascular ultrasound technician (sonographer) starting in 2003 for Prairie Heart which was bought out by Respondent in July 2011 and worked for Respondent through July 16, 2012. He was told she worked 8 hours a day, with a 30 minute lunch, and saw approximately 8 patients each day. He was told that she alternated hands with the transducer and ran three main studies. The DVT/reflux studies took 60 to 90 minutes and she did 1 to 2 per shift. She did 3 to 4 carotid studies a day that took 10 to 15 minutes and did 1 to 2 abdominal studies which took 30 to 35 minutes. Dr. Emanuel was further asked to assume Petitioner's job description contained in

Deposition Exhibit No. 4, which was introduced into trial as Petitioner's Exhibit No. 2, was a fair and accurate job description. He also asked to assume Petitioner had a gradual onset of symptoms which became worse in early 2012, including numbness to the bilateral hands, right greater than left, causing her to start treating. This included the treatment with Dr. Petersen who she saw on April 27, 2012 reporting a gradual onset of bilateral upper extremity pain, right greater than left. He was informed she had a normal EMG with Dr. Smucker on May 17, 2012 but saw Dr. Hagan on May 21, 2012 who recorded a positive Tinel's sign over the median and ulnar nerves and diagnosed an element of carpal tunnel syndrome. Dr. Emanuel was informed Petitioner participated in physical therapy for bilateral shoulder pain from June 8, 2012 through July 24. 2012. He was told that she started treating with Dr. Rahman on August 15, 2012 and had an EMG with Dr. Trudeau on November 13, 2012 that showed bilateral carpal tunnel syndrome. He was also informed about the December 20, 2012 shoulder MRI's and that shad the previous surgeries by Dr. Rahman and Dr. El-Amin and Dr. El-Amin. (PX 27, pp. 25-28)

Dr. Emanuel testified that Petitioner's work for Respondent could have caused or contributed to the development of her bilateral carpal tunnel syndrome. He reasoned she used both hands to grip the transducer and applied pressure for prolonged periods of time when doing the ultrasounds. The carpal tunnel surgeries she had were reasonable and necessary. (PX 27, pp. 28-29) Dr. Emanuel testified that the shoulder conditions which required two left shoulder surgeries and one right shoulder surgery were related to Petitioner's job activities. The position of her arms with the arm above shoulder height pressing and pushing into the patient as well as reaching out onto an abdomen and pushing down could cause or aggravate both subacromial bursitis impingement and acromial clavicular joint arthritis. (PX 27, pp. 29-30)

Dr. Emanuel reviewed the job site analysis performed on June 21, 2012, and he noted nothing in that report altered his opinions. (PX 27, p. 31)

On cross-examination, Dr. Emanuel testified that the first time he addressed the relationship between Petitioner's work activities and her injuries was on the May 12, 2014 office visit at her request. The causation opinion he rendered in his office note of June 24, 2014 was also done so because Petitioner requested it. Dr. Emanuel testified that the position of her arms, the amount of pressure applied, and holding the transducer for a significant amount of time are more relevant to his opinions than the actual number of patients she saw in a day. He was not provided any information about Petitioner's activities outside of work. While her sex and body habitus are factors for carpal tunnel syndrome, she did not have diabetes or hypothyroidism, which are also factors. (PX 27, pp. 32-42)

On re-direct examination, Dr. Emanuel testified that Petitioner asked him to state in his records whether he thought her work activities could have caused her symptoms, and he had stated they could so he put that in his records. However, if he did not believe her work activities caused her symptoms then he would have specifically stated her injuries were not work related. (PX 27, p. 47)

Respondent took the evidence deposition of Dr. Petersen. Dr. Petersen is board certified in occupational medicine. He first saw Petitioner on April 27, 2012 after she had complained to her supervisor of having pain in her bilateral upper extremity and having difficulty performing her work. His physical examination showed a normal shoulder range of motion and Hawkins

and Neer signs were negative bilaterally. These tests are designed to test for shoulder impingement. Initially, he diagnosed bilateral upper extremity pain, right greater than left, and he wanted to rule out entrapment neuropathy. Dr. Petersen noted he was provided a copy of Dr. Hagan's independent medical examiner's report of May 21, 2012. (RX 9, pp. 5-20) Dr. Petersen testified that when he saw Petitioner on June 5, 2012, she had not been performing her stenography duties due to his work restrictions of May 8, 2012 and her symptoms had resolved with her restrictions. When asked if he agreed with Dr. Hagan's assessment of thoracic outlet syndrome, Dr. Petersen indicated he did not see a lot of patients with that condition so he would defer to Dr. Hagan. (RX 9, pp. 21-24)

Dr. Petersen testified that as of July 10, 2012, his assessment was bilateral upper extremity paresthesia, presumably related to thoracic outlet syndrome. At that point, he recommended that Petitioner continue physical therapy. He was trying to get her to maximum medical improvement to be able to work with no restrictions. He had not gotten to the point where a surgical consultation for carpal tunnel or thoracic outlet syndrome was warranted because he was still treating her conservatively. He did not see an indication or objective findings for a surgery consultation for her shoulders. (RX 9, pp. 31-34)

On cross-examination, Dr. Petersen noted an MRI would be an objective test, and he never had the benefit of a left or right shoulder MRI. (RX 9, pp. 42-43) He never placed Petitioner at maximum medical improvement. His opinions are limited to his treatment of Petitioner through July 10, 2012. Dr. Petersen testified that if Petitioner was subsequently diagnosed with carpal tunnel syndrome and conditions of ill-being of her shoulders, he would defer opinions on causation for those conditions to the specialists who treated her. (RX 9, p. 43)

Dr. Petersen noted pain with lifting the arm and holding it at or above shoulder level and pain with resting on the shoulder can be symptoms of a rotator cuff tear or a labral tear. (RX 9, p. 44) When Petitioner first presented to him on April 27, 2012, she complained of pain in both arms radiating from her proximal shoulder into her bilateral hands. She complained of moderate to severe pain with prolonged shoulder elevation and forward reaching accompanied by gripping an ultrasound transducer. The fact that a person has a negative Hawkins or Neer test would not necessarily exclude a rotator cuff or labral injury. (RX 9, pp. 44-49) He did opine the thoracic outlet syndrome was aggravated by the work activities. (RX 9, p. 49) Dr. Petersen acknowledged that when Petitioner first presented to physical therapy on June 8, 2012, she complained of intermittent upper extremity pain, right greater than left, particularly whenever she maintained her arms elevated or above shoulder height and her sleep was disturbed by shoulder pain. (RX 9, pp. 51-52) The therapist noted Petitioner had a positive Hawkins-Kennedy and Neer test for right shoulder impingement. (RX 9, p. 53)

On cross-examination, Dr Petersen was asked if he would defer causation opinions to orthopedic surgeons who subsequently diagnosed carpal tunnel syndrome, rotator cuff tears, and should impingement. (RX 9, p. 56) He stated he would respect their opinions so long as they reviewed the job site analysis. He noted: "I certainly respect their opinion and respect their opinion on causation as well, so yes." (RX 9, pp. 56-57)

Dr. Peterson testified that he saw no indication for ordering MRI's of the Petitioner's shoulders and saw no indications for the need for surgery of either shoulder during the time that he treated her.

On re-cross examination, Dr. Pertersen stated that he did not have the benefit of an MRI during his treatment of Petitioner and acknowledged an MRI is a test that could definitively diagnose or rule out a rotator cuff tear. (RX 9, p. 71) Dr. Petersen testified that on several occasions, Petitioner complained of pain with overhead reaching, and at some point if those complaints persisted, he could have referred her for a consultation with an orthopedic surgeon. (RX 9, pp. 71-72) Several symptoms for thoracic outlet syndrome overlap with a shoulder injury. (RX 9, p. 81)

At the request of Respondent, Petitioner underwent an impairment rating with Dr. Robert Gordon of Midwest Occupational Heath Associates on April 7, 2016. Dr. Gordon's report is marked as Respondent's Exhibit No. 13. Utilizing the Guides to the Evaluation of Permanent Impairment, Sixth Edition, Dr. Gordon assessed the following impairments: (1) right shoulder, 11% permanent impairment of the right upper extremity and 7% permanent impairment of the whole person; (2) left shoulder, 11% permanent impairment of the left upper extremity and 7% permanent impairment of the whole person; (3) right carpal tunnel syndrome, 3% permanent impairment of the right upper extremity, 3% permanent impairment of the right hand, and 2% permanent impairment of the whole person; and (4) left carpal tunnel syndrome, 3% permanent impairment of the left upper extremity, 3% permanent impairment of the left hand, and 2% permanent impairment of the whole person. (RX 13)

CONCLUSIONS OF LAW

With respect 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 injury, the Arbitrator finds as follows:

The Arbitrator adopts his findings of fact contained above and incorporates them herein by this reference.

The Arbitrator believes that this is a repetitive trauma claim as opposed to one involving a specific identifiable accident. The medical histories and the Petitioner's own testimony establish that she developed symptoms gradually in both upper extremities, with the right being more symptomatic than the left. Dr. Peterson's history during his initial initial examination of April 27, 2012 described the onset as gradual. The Petitioner described a similar gradual onset to Dr. Hagen at his examination on May 21, 2012. The Petitioner had in fact gone to his family physician Dr. Sandercock on September 27, 2011 with complaints of numbness and tingling in both arms for six to eight months, the right being more noticeable than the left.

The Petitioner's description of her job, which she had performed on a full time basis for about eight years prior to her developing symptoms, involved the use of her hands and arms. Dr. Emanuel had an accurate description of the job and opined that her various injuries could have been caused or aggravated by her work. With respect to her bilateral carpal tunnel syndrome, the

doctor said the activity of gripping the transducer while applying pressure to her patients for prolonged periods of time was more of a causative factor than keyboarding, for example. (PX 27 at 24, 28, 29, 44) There were no opinions offered to rebut those of Dr. Emanuel.

With respect to the Petitioner's shoulders, there are conflicting medical opinions. Dr. Emanuel did explain persuasively the basis for his opinions concerning the Petitioner's bilateral shoulder arthritis, impingements and bursitis. When she performed reflux or DVT tests, the Petitioner was pushing with one arm elevated up at an angle exceeding 90 degrees while the other arm was elevated at 90 degrees while operating the computer. Dr. Emanuel said that performing that activity over the years, which the Petitioner did, could be causative. (PX 27 at 18) Later during his testimony, he gave the same opinions with respect to the Petitioner's performance of abdominal exams. (Id at 30, 31) Dr. Petersen did not really challenge Dr. Emanuel's theories with respect to the mechanism of injury. Instead, he was of the opinion that whatever problems the Petitioner had with her shoulders was resolved by the time his treatment ended on July 27, 2012. He said at that time she had no signs of impingement and that there was no reason for him to order any other diagnostics for that part of her body. Dr. Petersen's opinions however fail to mesh with the fact that he did find shoulder impingement and restricted right shoulder motion during his exam of July 3, 2012, as well as the impingement findings noted by the physical therapists during the Petitioner's treatment between June 8 and July 24, 2012.

In addition, both he and Dr. Hagen opined that the Petitioner's work duties were a causative factor in problems in both upper arms which they diagnosed as thoracic outlet syndrome. They presumably felt the repetitive use of the arms related to nerve irritation. If the work was a factor in bringing about nerve entrapment in those areas of the body, it would follow that the same work could contribute to some compression in the shoulder joint as well.

The timeline from the onset of symptoms when the Petitioner saw Dr. Sandercock through the time when Dr. Emanuel performed his two surgeries also support causation. The Petitioner made shoulder complaints not only to Dr. Petersen but Drs. Rahman and El-Amin as well. There appear to be no substantial gaps in care and also no independent intervening accidents. Whatever the Petitioner experienced in January 2014 with her left shoulder is insignificant. First of all, she said the increase of pain was only temporary. Secondly, she had just been to Dr. El Amin on December 5, 2013 with complaints in both upper arms.

The Arbitrator does not find a causal relationship between the Petitioner's work duties and her torn labrum in the left shoulder. While Dr. Emanuel may have hinted at causation in his testimony, he never really explained it as he did with respect to the other shoulder conditions for which he did surgery. The Arbitrator fails to see how the repetitive use of the left arm could have been causative to the superior labral tear repaired by Dr. El Amin. The Arbitrator also feels the proof inadequate with respect to cubital tunnel syndrome. The first time that condition was mentioned in the records was in the summer of 2014, more than two years after the Petitioner last worked as a sonographer for the Respondent.

The Arbitrator finds that on March 16, 2012, Petitioner sustained an accident that arose out of and in the course of her employment by Respondent and that her current conditions of ill-being, except for those referenced above, are causally related to her injuries. The Arbitrator

relies upon Petitioner's testimony, the medical records, job description and the opinion of Dr. Emanuel.

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

The Arbitrator finds the medical services rendered to Petitioner have been reasonable and necessary as a result of the March 16, 2012 work injuries. However, given the Arbitrator's determination on accident and causation, Respondent is not responsible for the treatment rendered on May 29, 2013 as it pertains to the left labral tear. Otherwise, the Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 26, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $1,075.46.

With respect to issue (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

Concerning Section 8.1b(b)(i), Dr. Gordon, who used the Guides to the Evaluation of Permanent Impairment, Sixth Edition, found the impairments to be as follows: (1) right shoulder, 11% permanent impairment of the right upper extremity and 7% permanent impairment of the whole person; (2) left shoulder, 11% permanent impairment of the left upper extremity and 7% permanent impairment of the whole person; (3) right carpal tunnel syndrome, 3% permanent impairment of the right upper extremity, 3% permanent impairment of the right hand, and 2% permanent impairment of the whole person; and (4) left carpal tunnel syndrome, 3% permanent impairment of the left upper extremity, 3% permanent impairment of the left hand, and 2% permanent impairment of the whole person. (RX 13) The Arbitrator notes that Dr. Gordon did not consider the torn labrum in arriving at the Class of Diagnosis, so the fact that the Arbitrator did not relate the tear to the accident does not affect his ultimate conclusions. The Arbitrator places some weight on this factor.

Concerning Section 8.1b(b)(ii) of the Act, Petitioner is self-employed as a jewelry artist. She takes pieces of copper, melts them together, and places pieces of jewelry and natural stones to the pieces. She attends about 6 art fairs in a year, which requires her to lift boxes into and out of her vehicle. Lifting boxes sometimes causes symptoms of weakness, pain, and clicking. She testified that she notices tingling when holding pieces of copper or holding her torch. The Arbitrator places some weight on this factor.

Concerning Section 8.1b(b)(iii) of the Act, Petitioner was 34 years old at the time of the accident. (Arb. X 1) She may reasonably be expected to continue living and working with the effects of her injuries for the foreseeable future. The Arbitrator gives some weight to this factor.

Concerning Section 8.1b(b)(iv) of the Act, there is no evidence that Petitioner's future earning capacity has been diminished. The Arbitrator gives no weight to this factor.

Concerning Section 8.1b(b)(v) of the Act, evidence of disability corroborated by the treating medical records, the Arbitrator considers the residuals from the Petitioner's bilateral carpal tunnel syndromes and bilateral shoulder impingements. Dr. Gordon accurately summarized the final examination findings of Dr. Emanuel in his report of April 7, 2016. The Petitioner's symptoms reported at arbitration were consistent with those findings. This factor is afforded some weight.

Based upon the above factors, the Arbitrator awards the Petitioner 15 % loss of the whole body for her shoulder injuries along with 10 % of her right hand and 8 % of her left hand for her carpal tunnel syndromes.

STATE OF ILLINOIS)
) SS.
COUNTY OF Mc LEAN)

☒ 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

Tiffany Nichols,
Petitioner,

vs. No: 16 WC 35795

State of Illinois,
Respondent.

19IWCC0390

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 relationship to the injury, accident, prospective medical treatment, Arbitrator's Decision is barred by prior settlement agreement 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).

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 30, 2018 is hereby affirmed and adopted.

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

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

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

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: JUL 26 2019

Marc Parker

mp/wj
07-11-19
68

Deborah L. Simpson

Barbara N. Flores

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

NICHOLS, TIFFANY
Employee/Petitioner

Case# **16WC035795**

SOI/DEPT OF HUMAN SERVICES
Employer/Respondent

19IWCC0390

On 5/30/2018, 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:

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

6140 ASSISTANT ATTORNEY GENERAL
JOSEPH L MOORE
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

MAY 30 2018

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tiffany Nichols
Employee/Petitioner
v.
State of Illinois/Department of Human Services
Employer/Respondent

Case # **16** WC **35795**
Consolidated cases: **N/A**

19IWCC0390

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 **Bloomington**, on **April 20, 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, **November 2, 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$71,700.00**; the average weekly wage was **$1,378.85**.

On the date of accident, Petitioner was **35** 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** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0.**

Respondent shall be given a credit of **$IF ANY** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall authorize the treatment recommended by Dr. Rhode, including, but not limited to, the recommended right cubital tunnel release with submuscular transposition.

Respondent shall pay the reasonable and necessary medical services as included in Petitioner's Exhibit 4 as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall be given a credit of **$IF ANY** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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

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

Signature of Arbitrator

5/28/18
Date

ICArbDec19(b)

MAY 30 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Tiffany Nichols
Employee/Petitioner

Case # 16 WC 35795

v.

Consolidated cases: N/A

State of Illinois/Department of Human Services
Employer/Respondent

19IWCC0390

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she is 36 years old, divorced with 3 minor children and resides in Peoria. She testified that she began working for Respondent in January of 2007 as an Office Assistant and that she was promoted to a Case Worker in January of 2008.

Petitioner testified that she had a prior claim for right cubital tunnel. She testified that following the appeal of that decision, she had surgery performed by Dr. Blair Rhode on September 22, 2014 and that she was released to return to work full duty on December 30, 2014. She testified that she did well following the surgery and did not see any doctors regarding her right upper extremity until she returned to Dr. Rhode on November 2, 2016. She testified that after her first surgery, she returned to work as a Case Worker doing the same work duties as before. She testified that as a Case Worker, her responsibilities included interviewing clients who were applying for aid benefits and that she would input their information into the computer system to process their benefits. She testified that the job duties listed in Petitioner's Exhibit 6 were accurate. She testified that she agreed with the job description that she would perform frequent manipulation of her hands 6-8 hours per day and gross manipulation 4-6 hours per day.

Petitioner testified that she had no upper extremity pain when she returned to work on December 30, 2014. She testified that in the summer of 2016, however, she began to have similar symptoms that gradually returned. She testified that her symptoms included some twinges in her right elbow which eventually lead to sudden, sharp pains in her arm along with some numbness and tingling. She testified that she was concerned that the cubital tunnel condition was returning and scheduled an appointment with Dr. Rhode.

Petitioner testified that when she saw Dr. Rhode on November 2, 2016, he ordered EMG/NCV testing with Dr. Trudeau to see if she was having recurrent cubital tunnel. She testified that upon obtaining the results of the testing, Dr. Rhode gave her an injection in her right elbow in an attempt to resolve her symptoms with conservative measures. She testified that when she returned to see Dr. Rhode on February 8, 2017, the injection had only provided temporary relief and that her symptoms had returned. She testified that at that time, Dr. Rhode recommended surgical intervention.

With regard to her job duties, Petitioner testified that after the prior cubital tunnel release, she returned to work performing the same job duties as prior to her surgery until she received a promotion to Staff Development Specialist in November of 2015. She testified that she continued to do the Case Worker duties; however, she would also train new employees and teach job duties at classes for new employees. Additionally, she testified that she would prepare manuals and booklets for training seminars. She testified that the teaching aspect of her job duties would be doing classroom duties anywhere between 2–4 days a week for a couple of weeks each month and that the remainder of the time, she would continue to do her old job. She testified that while she was in a classroom she was still using a computer, but that she was typing less than six hours per day.

Petitioner further testified that her work station is not ergonomically correct. She testified that she has tried to make her own modifications to her work station by purchasing arm rests and a mouse pad with a wrist rest. She testified that she also would use a brace on her arm while sleeping to keep it straight.

The transcript of the deposition of Dr. Blair Rhode was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Rhode testified that he is an orthopedic surgeon and has a "sub-emphasis" in knee, shoulder and elbow surgery. He testified that he previously treated Petitioner for complaints of right elbow pain secondary to a work exposure, that she underwent initial conservative management with a diagnosis of cubital tunnel syndrome, that she ultimately underwent surgical intervention which consisted of a cubital tunnel release *in situ* and that she was returned to full unrestricted duty and released at maximum medical improvement. He testified he last saw Petitioner on December 30, 2014. (PX1).

Dr. Rhode testified that on November 2, 2016, Petitioner returned for evaluation of a work-related right elbow injury that she stated was progressively worsening in her numbness and tingling to her ring and little finger. He testified that on examination Petitioner had clinical findings suggestive of cubital tunnel recurrence with a positive Tinel's. He testified that based on the fact that Petitioner had a symptom recurrence, they were going to proceed with a new EMG to assess the nerve condition and continue her on full duty work. He testified that the EMG was performed by Dr. Trudeau and was positive for bilateral cubital tunnel syndrome, right greater than left. (PX1).

Dr. Rhode testified that Petitioner underwent an injection on January 14th and that he next saw her on February 8, 2017. He testified that Petitioner continued to have symptomatology after the injection, that she stated that it provided temporary relief but that her symptoms returned and that she continued to experience night symptomatology. He testified that he had a discussion with Petitioner as to treatment options and that she wished to proceed with surgical intervention. He testified that his recommendation was to perform a nerve transposition on the right. He testified that Petitioner was then seen by the physician's assistant Lori Welke on August 14, 2017, that she was continuing to have symptomatology to the medial aspect of the right elbow, that she continued to have provocative maneuvers consistent with cubital tunnel syndrome and that she wished to proceed with surgery. He testified that they continued Petitioner with home stretching and prescribed an anti-inflammatory. He testified that he has not seen Petitioner since that time. He testified that if Petitioner were in the same condition, he would continue to recommend a cubital tunnel release with a submuscular transposition. He testified that his recommendation post-operatively would be that an ergonomic assessment be performed to prevent a potential symptom recurrence. (PX1).

Dr. Rhode testified that his opinion on causation remained the same as testified to in the prior case. He testified that Petitioner stated that she was performing the same duties that she performed before as a caseworker, that she stated that she typed approximately six hours per day, that she said that she had received a promotion but continued to perform similar work duties and that her exposure dose in total was approximately ten years. He testified that he reviewed Petitioner's index evaluation in November of 2012

and that she denied a history of diabetes or thyroid dysfunction and that she further denied any outside interests that may have been causative to her symptoms. He testified that he believed that the treatment he rendered was made necessary by her work. (PX1).

On cross examination, Dr. Rhode testified that he did not know what Petitioner's work station looked like. He testified that he did not know exactly what her job duties were. When asked if he knew how much typing Petitioner performed, Dr. Rhode responded that Petitioner stated on November 2, 2016 that she typed approximately six hours per day. When asked if it was continuously, Dr. Rhode admitted that he did not know. Dr. Rhode agreed that he did not know what Petitioner was typing, how fast she was typing or how often she was typing during those six hours. (PX1).

On cross examination, Dr. Rhode testified that Petitioner did not tell him of the size of the files that she used or the frequency with which she managed files. He testified that Petitioner did not tell him where she had to put the files. He testified that Petitioner did not talk to him about whether she used the phone, nor did she talk to him about any regular or lunch breaks that she had. He testified that Petitioner did not talk to him about what time off she might have had during a year. (PX1).

On cross examination, Dr. Rhode testified that Petitioner indicated that she worked as a caseworker for the State, that she stated that she typed about six hours per day, that she was required to answer phones and that she was required to manage files. He testified that Petitioner also described what he referred to as a dose response in that her symptoms got worse with increasing work activity and that it supported an exposure dose that her symptoms got worse as she worked. He testified that he weighed this against the fact that Petitioner did not have any preexisting risk factors and that she also denied outside interests that potentially would have been causative to her symptomatology. (PX1).

On cross examination, Dr. Rhode testified that he did not know whether Petitioner played on Facebook or played games on her cell phone. Dr. Rhode disagreed that the largest cause of cubital tunnel syndrome was idiopathic. When asked why the culmination of Petitioner's job exposure would not cause any carpal tunnel syndrome symptoms but would cause cubital tunnel, Dr. Rhode responded that it was because what she was exposed to had affected her elbows more than her wrists. (PX1).

On cross examination, Dr. Rhode testified that Petitioner's sex affected her chances of developing cubital tunnel syndrome. He agreed that he was treating the situation as a recurrence of cubital tunnel syndrome. When asked when doing the transposition whether it created increased protection against it recurring again, Dr. Rhode responded that he would hope so. (PX1).

The medical records of Dr. Blair Rhode dated November 2, 2016 through August 14, 2017 were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on February 6, 2018, at which time it was noted that she continued to have pain and swelling in the medial portion of her elbow. It was noted that Petitioner was waiting for surgical authorization for submuscular ulnar nerve transposition. The assessment was noted to be that of elbow pain and cubital tunnel syndrome. It was noted that Petitioner had sustained a recurrence in her work-related right cubital tunnel symptomatology and that she awaited authorization. It was noted that Petitioner could remain at full duty as long as she provided padding under her elbow while resting on her chair during work hours and that Dr. Rhode advised bracing her elbow at night to avoid flexion. It was also noted that Petitioner was to start Meloxicam. At the time of the February 8, 2017 visit, it was noted that Petitioner continued to experience nocturnal symptoms and that she continued to experience symptomatology on the right greater than the left. It was noted that Petitioner stated that the injection provided temporary relief and that [s]he continued to experience nocturnal symptoms. It was noted that Petitioner was unwilling to live with her current symptoms and wished to proceed with a right elbow cubital tunnel submuscular transposition. It was noted that Petitioner would continue full duty until surgery. (PX2).

The records of Dr. Rhode reflect that Petitioner was seen on January 14, 2017, at which time it was noted that she was status post an EMG which demonstrated evidence of bilateral cubital tunnel syndrome, right greater than left, and that she continued to experience nocturnal symptoms. It was noted that arthrocentesis of the right elbow bursa was performed and that the bursa was injected. The assessment was noted to be that of elbow pain and cubital tunnel syndrome. It was noted that Petitioner had sustained a recurrence in her work-related cubital tunnel symptomatology and that she continued to have the same job exposure that she had previously. It was noted that Petitioner would proceed with an EMG of the right upper extremity and that she would be continued full duty. At the time of the November 3, 2016 visit, it was noted that Petitioner was seen for evaluation of a work-related right elbow injury. It was noted that Petitioner stated that she had progressively developed medial-sided elbow pain with numbness and tingling to the ring and little fingers, that she had previously treated for a work-related right cubital tunnel syndrome sustained at the same employer performing the same duties, that she worked as a case manager, that she stated that she typed approximately six hours per day and that she had received a promotion but continued to perform similar work duties. It was noted that Petitioner was employed as a staff development specialist, that she had worked for her current employer for ten years, that she continued to work full duty, that she stated that she wrote with her left hand but was right-hand dominant and that she had previously undergone a right-sided cubital tunnel release *in situ*. It was further noted that Petitioner stated her symptoms were similar to her prior symptoms, but that her numbness was worse. The assessment was noted to be that of elbow pain and cubital tunnel syndrome. It was noted that Petitioner had sustained a recurrence in her work-related right cubital tunnel symptomatology, that she continued to have the same job exposure that she had previously and that she was to proceed with an EMG of the right upper extremity. Petitioner was instructed to continue to work full duty. (PX2).

The medical records of Dr. Trudeau dated November 23, 2016 were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner underwent an EMG/nerve conduction studies on November 23, 2016, which were interpreted as revealing (1) bilateral ulnar neuropathies at the elbows (bilateral cubital tunnel syndrome) moderately severe on the right side, mild and neurapractic on the left side, right greater than left in electroneurophysiologic testing terms; (2) no current evidence of distal ulnar neuropathy (Canal of Guyon syndrome); (3) no current evidence of cervical radiculopathy; (4) no current evidence of brachial plexopathy. (PX3).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 4.

The Decision and Opinion on Review for 11 WC 46577 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The Decision and Opinion on Review affirmed and adopted the Decision of the Arbitrator, who found that Petitioner sustained a repetitive trauma injury while working for Respondent which manifested itself on August 8, 2011, that Petitioner's diagnosed condition of ill-being was causally related to her work activities performed on behalf of Respondent, that the outstanding medical charges represented reasonable and necessary medical care and treatment designed to cure or relieve the conditions of ill-being caused by the accident and that Respondent was liable to Petitioner for same, and that the surgery prescribed by Dr. Rhode represented reasonable and necessary medical care designed to cure or relieve the condition of ill-being caused by the accidental injury. (PX5).

The Demands of the Job was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The documented noted that Petitioner's job demands included, among other things, use of hands for gross manipulation (grasping, twisting, handling) for 4-6 hours per day and use of hands for fine manipulation (typing, good finger dexterity) for 6-8 hours per day. (PX6).

The Worker's Compensation Packet was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Workers' Compensation Employee's Notice of Injury was completed on November 9, 2016 and noted a date of injury or illness of November 2, 2016. (RX1).

The Job Description was entered into evidence at the time of arbitration as Respondent's Exhibit 2.

The IME Reports and Deposition Transcript of Dr. James Williams was entered into evidence at the time of arbitration as Respondent's Exhibit 3. Dr. Williams testified that his profession is that of an orthopedic surgeon and that he is board-certified in orthopedic surgery. (RX3).

Dr. Williams testified that he treats conditions of the elbow and treats both conservatively as well as surgically. He testified that he performed an initial IME of Petitioner on May 2, 2012 and that he also performed a subsequent exam on June 5, 2017. He testified that when he saw Petitioner on May 2, 2012, he found no evidence of carpal tunnel but did find evidence that she appeared to have right-sided cubital tunnel with a positive Tinel's at the cubital tunnel as well as what is known as a positive elbow flexion test. He testified that he thought that Petitioner had what would be termed ulnar nerve neuritis. He testified that as to the pertinent findings at the time of the second IME, it appeared that Petitioner had a recurrence of her symptoms and had gone back to Dr. Rhode with the same complaints and that she was doing worse and had had a recurrence of her problems. He testified that his physical examination found Petitioner to still have findings of cubital tunnel on the right side and that he opined her diagnosis was status post right elbow cubital tunnel syndrome with what appeared to be a recurrence of her right elbow cubital tunnel. (RX3).

Dr. Williams testified that as to the second IME performed, he did not feel that Petitioner's diagnosis of right cubital tunnel syndrome status post right elbow ulnar nerve decompression *in situ* was related to her alleged work injury. He testified that his opinion was based upon the history Petitioner gave him in regard to her work duties, that Petitioner had noted to him that she had changed positions where she stated that she was doing less typing, that Petitioner never complained of resting her forearms or wrists on the table nor of her problems being worse while she was typing and the fact that her nerve study, which was done before her surgery, did not indicate any evidence of cubital tunnel syndrome. He testified that the only thing that he found when he examined Petitioner at the second IME was that he noted that her grip strength was slightly weaker on the right side than the left. He testified that he did feel that Petitioner could possibly require a second procedure, but that he did not feel that the need for the procedure would have been aggravated and/or caused by her work duties. He testified that he believed that the need for the procedure was more likely related to her initial surgery which had been done and for which she had a recurrence of symptoms within six months of that procedure, and was thus requiring a second procedure due to that. (RX3).

Dr. Williams testified that at the time that he saw Petitioner, she had been working full duty and had not had any restrictions. He testified that he did not see any reason why she was not able to continue working full duty. He testified that he felt that Petitioner was at maximum medical improvement but may, indeed, require further treatment, but that he did not feel like it was related to work. (RX3).

On cross examination, Dr. Williams agreed that Petitioner did not exhibit any evidence of symptom magnification or malingering. He testified that he opined that partially Petitioner did have recurrence of her right elbow cubital tunnel syndrome. He agreed that he believed that this was a recurrence of the first surgery. He testified that he believed that the only reason that Petitioner was having symptoms now was because of the surgery that was done and that he thought that she probably still had something going on with the nerve as a result of that surgery that probably created some scar tissue and that was why she had symptoms six months after the surgery. He testified that his opinion as to it having been idiopathic dealt with before the first surgery was ever done, and that it was a recurrence after the first surgery. (RX3).

On cross examination, Dr. Williams testified that if Petitioner was having symptoms, the submuscular transposition was the best revision surgery that one could do for cubital tunnel. He testified that the first surgery created that problem that was leading to the second surgery. Dr. Williams agreed that if the first surgery was work-related, the recurrence would also be work-related. He agreed that his opinion

has remained consistent from the first IME to the second with the exception of removing the word "idiopathic." (RX3).

The Settlement Contract Lump Sum Petition and Order for 11 WC 46577 was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The Contract referenced an alleged date of accident of August 8, 2011, that it was a repetitive trauma claim involving the right arm and that the nature of the injury was that of cubital tunnel. The Contract noted that the claim was settled for 12.5% loss of use of the right arm under Section 8(e), that Petitioner agreed to "forever release, acquit and discharge the Respondent from any and all claims including any, temporary total disability, if any, and demands for further medical, hospital, surgical, rehabilitation and miscellaneous expenses..." arising out of the incident set forth therein and that she waived any and all rights under Sections 19(h) and 8(a) of the Act. The Contract reflects that Petitioner signed it on May 5, 2015 and that it was approved on May 14, 2015. (RX4).

CONCLUSIONS OF LAW

With respect to disputed issues (C), (E) and (F), given the commonality of facts and evidence relative to both issues, the Arbitrator addresses those concurrently.

The Arbitrator finds that Petitioner has met her burden of proving that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on November 2, 2016, that timely notice of the accident was given to Respondent and that her current condition of ill-being is causally related to her work activities for Respondent.

The Arbitrator finds that Petitioner has met her burden of proving that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on November 2, 2016. It was Petitioner's uncontradicted testimony that she would spend six hours per day at her computer entering information into the computer system. The Arbitrator notes that while her job duties did have some minor changes when she began teaching and training new employees, Petitioner continued to perform her case manager duties of typing for the vast majority of the time she was at work. As a result thereof, the Arbitrator finds that Petitioner has met her burden of proving that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on November 2, 2016.

Furthermore, the Arbitrator finds that Petitioner did provide timely notice to Respondent. The medical evidence reveals that Petitioner first sought medical treatment with Dr. Blair Rhode on November 2, 2016. (PX2). The documentary evidence reveals that the Workers' Compensation Employee Notice of Injury was completed on November 9, 2016, which is within the 45 days as required in Section 6(c) of the Illinois Workers' Compensation Act. (RX1). As a result thereof, the Arbitrator finds that timely notice of the accident was given to Respondent.

As to the issue of causation, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work activities for Respondent. Although the Arbitrator acknowledges that Petitioner had a prior claim involving right cubital tunnel syndrome which was settled, the evidence reveals that she had concluded the treatment for the prior claim in 2014. (PX1). The Arbitrator finds it to be significant that nearly two years had passed before Petitioner again sought medical treatment for the recurrent right cubital tunnel syndrome condition. Furthermore, Arbitrator also finds to be significant in this case that Petitioner testified at the time of arbitration that she had no upper extremity pain when she returned to work on December 30, 2014 and that in the summer of 2016, however, she began to have similar symptoms that gradually returned. Additionally, the Arbitrator further finds to be particularly persuasive Dr. William's

testimony on cross examination that if the first surgery was work-related, the recurrence would also be work-related. (RX3).

Having considered and reviewed the entirety of the evidence, the Arbitrator finds that Petitioner has met her burden of proving that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on November 2, 2016, that timely notice of the accident was given to Respondent and that her current condition of ill-being is causally related to her work activities for Respondent.

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary, and causally related to her work accident of November 2, 2016. As a result, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services as set forth in Petitioner's Exhibit 4, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issue of causation, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Rhode, including, but not limited to, the recommended surgery which is that of a right cubital tunnel release with submuscular transposition.

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.

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

Maria Colletti,
Petitioner,

vs. No. 16 WC 16427

19IWCC0391

Rockford Park District,
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 relationship to the injury, temporary total disability, medical expenses, prospective medical expenses, temporary 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 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).

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 30, 2018 is hereby affirmed and adopted.

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

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

19IWCC0391

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

DATED: JUL 26 2019

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
07-17-19
68

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

COLLETTI, MARIA
Employee/Petitioner

Case# **16WC016427**

19IWCC0391

ROCKFORD PARK DISTRICT
Employer/Respondent

On 1/26/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% 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:

1315 DWORKIN AND MACIARIELLO
GERALD CONNOR
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Maria Colletti
Employee/Petitioner

Case # 16 WC 16427

v.
Rockford Park District
Employer/Respondent

Consolidated cases:
19IWCC0391

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Gregory Dollison, Arbitrator of the Commission, in the city of Waukegan, on 10/31/17 and 12/7/17. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

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

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

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

K. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD

L. ☐ What is the nature and extent of the injury?

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

N. ☒ Is Respondent due any credit?

O. ☒ Other Prospective Medical Care

FINDINGS

On 4-23-16, 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.

In the year preceding the injury, Petitioner earned $22,070.88; the average weekly wage was $424.44.

On the date of accident, Petitioner was 52 years of age, single, with 0 children under 18.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $12,935.31 for TTD, $0.00 for TPD, $0.00 for maintenance, and $8,433.25 for other benefits, for a total credit of $21,368.56.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $282.96/week for 36-4/7 weeks, commencing 04/23/2016 through 01/03/2017, as provided in Section 8(b) of the Act.

The Arbitrator further finds that Petitioner's request for prospective medical care is hereby 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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

1/25/18
Date

ICArbDec p. 2

JAN 26 2018

FINDINGS OF FACT:

The Arbitrator notes this matter initially proceeded to trial on October 31, 2017. At the time, the parties stipulated that the issues in dispute were accident, causal relationship, medical expenses, temporary total disability, temporary partial disability, prospective medical care and credit for TTD and medical expenses paid. (Arb. Ex. 1) Subsequent to the closing of proofs, an Agreed Order to Reopen Proofs and Amend Request for Hearing Form was filed reflecting that Respondent stipulated to accident and the average weekly wage would be revised to reflect $424.44. (Arb. Ex. 3) Based on the parties agreement, the Arbitrator hereby revise the Request for Hearing consistent with the parties agreement.

Petitioner testified that on April 23, 2016 she was employed as a police officer for the Rockford Park District (Respondent). She also worked part-time in the same capacity for the Maple Park District. She had been an officer since June of 2001.

Petitioner testified that on April 23, 2016 she was attending a mandatory defense training course for Respondent. Petitioner stated that while participating with another officer, she fell to the ground and landed on her head/neck. Petitioner also stated that the other training officer landed on her. Petitioner indicated that she immediately experienced neck pain and dizziness. Petitioner stated that after the fall, she stopped training for twenty (20) to thirty (30) minutes before she resumed training which last another two (2) hours. Petitioner stated she did not seek immediate medical attention, but instead applied Biofreeze to her neck.

Petitioner testified that she provided notice to Respondent on April 30, 2016 when she told Sergeant West about her work injury. Petitioner indicated that thereafter, she was referred to Physicians Immediate Care. She testified that she did not report her injury right away because she "didn't want to appear to be a weakling."

Records submitted show Petitioner presented to Physicians Immediate Care on April 30, 2016. According to the records, Petitioner reported that she was participating in defensive tactic training for the police department when she fell and another trainee landed on her. She reported progressively worsening pain. She reported the pain radiated to her bilateral shoulders. She had minimal range of motion due to pain. She was unable to pick her head up off her pillow without using her hands to assist. She had been using ice and heat alternatively. Her physical examination revealed decreased range of motion in the cervical spine. X-rays were taken showing abnormal joint space. She was diagnosed with sprain of joints and ligaments of the neck. Petitioner was returned to work with restrictions of no lifting greater than 15 pounds. (PX 1)

Petitioner continued treating at Physicians Immediate Care. By May 26, 2016, Petitioner continued with symptoms, reporting pain with lateral flexion. Spasm was noted during examination and she had limited range of motion. Physical therapy was ordered for a diagnosis of neck strain and muscle spasm. Her work restrictions were continued. (PX 1)

Petitioner testified that she next sought treatment with Dr. Brian Braaksma of OrthoIllinois. Records submitted show that a telephone encounter occurred on May 25, 2016. During the encounter, Petitioner conveyed she had been referred by her attorney and that she had neck pain as a result of an injury at work. The records states, "Patient reports symptoms are the result of an injury at work . . . patient reports she in a defensive tactics class which involved combat and take downs … she was partnered with someone who attempted to do a takedown where she reports falling on her head. She reports she was taking down another person who ended up falling on her neck . . ." (PX 2)

Petitioner's initial visit with Dr. Braaksma occurred on June 6, 2016. Petitioner's reported pain scale was 3/10 with rest and 5/10 with activity. Her pain was burning and throbbing. It was aggravated by lifting, looking down, looking left, looking right and up. She reported numbness that started at the base of her neck radiating down her arms into her fingers. Upon examination, Dr. Braaksma noted limited range of motion of the neck, tenderness to palpation, and paraspinal muscle spasms. She had subjective pain and paresthesias bilateral C6 and C7 dermatones. Dr. Braaksma assessed spondylosis with radiculopathy, cervical region. The doctor ordered a MRI noting Petitioner had persistent symptoms which failed to respond to conservative care. (PX 2)

Petitioner underwent a cervical spine MRI for a clinical indication of neck pain, radiating into the mid shoulder on June 21, 2016. The MRI report noted that C4-C5 demonstrated right sided uncovertebral degenerative disc disease with mild narrowing of the right-sided foramen without evidence of significant foraminal or spinal canal stenosis. There were was no significant disc bulge or disc herniation. At C5-C6 there was a mild broad based posterior disc protrusion which appeared to cause flattening of the ventral surface of the spinal cord. Also noted was disc material and uncovertebral degenerative disc disease contributing bilaterally to the mild to moderate foraminal stenosis. At C6-C7 there was a mild broad-based posterior disc protrusion without significant spinal canal stenosis. Uncovertebral degenerative disc disease was present bilaterally without significant left-sided foraminal narrowing and mild right-sided foraminal stenosis. The MRI findings resulted in an impression of mild degenerative disc disease and uncovertebral degenerative disc disease most significant at he C5-C6 level. (PX 2)

Petitioner returned to Dr. Braaksma on June 27, 2016. The doctor reviewed the MRI films indicating same redemonstrated multilevel spondylosis with loss of disc height and disc signal intensity in particular at C5-6 and C6-C7. Dr. Braaksma recommended Petitioner remain on restricted work duty and to continue physical therapy. His diagnosis at that time was 1.) spondylosis with radiculopathy, cervical region; and 2.) cervicalgia. (PX 2)

On August 8, 2016, Dr. Braaksma noted Petitioner continued to complain of neck pain with intermittent radicular symptoms. At that point he felt Petitioner was at maximum medical improvement with conservative measures. The doctor believed she was at a crossroad where she would have to live with her symptoms, obtain a functional capacity evaluation to determine her functional capabilities or consider surgical intervention in the form of a C5 – C7 anterior cervical discectomy and fusion. He continued her on light duty work restrictions. (PX 2) By September 12, 2016, Dr. Braaksma reiterated his position that conservative treatment failed and recommended a cervical discectomy and fusion and the C5-C7 levels. In outlining his position on surgery, Dr. Braaksma wrote:

> "…She remains to have significant and disabling neck pain, as well as bilateral upper extremity pain and paresthesias in a C6 and C7 dermatomal distribution, which has now failed an appropriate and exhaustive course of nonoperative treatments, including months of relative rest, activity modifications, anti-inflammatories, physical therapy, and pain management. At this point her treatment options are to live with her symptoms, obtain a partial capacity evaluation for any permanent restrictions as she is at maximum medical improvement from conservative treatment perspective versus surgical intervention to hopefully eliminate the problem and return to work without restrictions eventually. This would require a C5-C7 anterior cervical discectomy and instrumented fusion . . ." (PX 2)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Joseph Monaco on October 4, 2016. Petitioner reported to Dr. Monaco that on April 23, 2016, while doing a takedown with another officer she injured her neck. She was restraining an officer weighing 230 to 240 pounds with a headlock that he was trying to get out of and she fell on her head. She applied Biofreeze to her neck and continued training when a second episode occurred when an officer landed on top her neck. She completed the

training. The doctor recorded that Petitioner stated she continued working while experiencing increasing neck pain.

During the evaluation, Petitioner reported her pain was at 3/10 constantly and 4 to 5/10 with certain activities. She denied any prior neck problems. She complained of numbness in both hands in a glove-type distribution, as well as numbness in both of her feet in a stocking-type distribution. Turning and moving her neck caused an increase in pain. She reported that she could get some relief while sitting if she was able to lean back and have support for her neck. Petitioner indicated that she could sleep well if she slept in a supine position. She reported that she had no difficulty with activities of daily living. She had no difficulty sleeping. She reported that she goes to the gym three times a week. Petitioner is using Biofreeze and low impact activity such as a recumbent bike. She reported that for dumbbells she uses 10 to 15 pounds and nothing like she used to.

Upon physical examination, there was no tenderness to palpation in the cervical spine. Petitioner's motor and sensory exams were normal. Petitioner's Spurling sign caused some mild discomfort in the left trapezius both to the right and left, but with no radicular complaints. Petitioner's upper extremity tests such as the Tinel's sign, Guyon's canal, Phalen's test and median nerve compression tests were all negative bilaterally. Spurling sign caused some mild discomfort in the left trapezius muscle both to the right and left with no radicular complaints reproduced. Petitioner's range of motion of the neck was limited by pain at 20 degrees of extension and 30 degrees of flexion, as well as 40 degrees of rotation each way.

Dr. Monaco reviewed the MRI films of the cervical spine. He opined the films showed a bulging disc at C5-6 that effaced the central portion of the spinal canal. At C6-7 there were similar bulging without evidence of spinal canal stenosis. Dr. Monaco also noted degenerative changes causing mild foraminal stenosis from C5 through C7.

Dr. Monaco opined that Petitioner had nonspecific neck pain with no objective evidence of radiculopathy. He noted that the review of the medical records yielded no evidence of any objective findings consistent with radiculopathy noting Petitioner's motor strength was 5/5 in the C6 and C7 myotome. Petitioner's sensation was intact. Petitioner's deep tendon reflexes were also intact. The doctor noted the medical records did indicate subjective complaint of paresthesias, but there was never mentioned of the distribution of these pain complaints. Dr. Monaco further noted that Petitioner had a completely normal neurological exam with deep tendon reflexes at 2+ and equal bilaterally. Petitioner's motor function was graded at 5/5 and the muscles tested. Her sensation was intact to light touch in all dermatomes.

Dr. Monaco provided that "It is my opinion to reasonable degree of medical certainty based on the review of the medical records and my evaluation today that Ms. Colletti's cervical spine condition is related to her alleged April 23, 2016 work injury and it is also my opinion that her mechanism of injury is consistent." Dr. Monaco provided that he had some disagreement with Petitioner medical providers "specifically in regards to the presence or absence of radiculopathy." The doctor wrote that based the medical records reviewed and his evaluation, Petitioner demonstrated no evidence of cervical radiculopathy. The doctor was of the belief that Petitioner would not benefit from the recommended cervical fusion from C5 to C7. Instead, Dr. Monaco opined that Petitioner would benefit from a course of work conditioning for six (6) weeks, three (3) to four (4) days per week. Dr. Monaco stated that medical evidence would indicate that a cervical fusion for axial neck pain was controversial and a last recourse. He however noted that although there was lack of level one evidence for surgical treatment for axial pain, there are studies where it has been noted to provide clinical benefit. Dr. Monaco opined that Petitioner was not at MMI but anticipated that she would be so after a six (6) week course of work conditioning. He believed Petitioner could work light duty work restrictions of no repetitive use of her arms above her shoulders, no lifting floor to waist or waist to chest at greater than 20 pounds, and no pulling or

pushing greater than 20 pounds. The doctor also opined that the medical treatment provided was reasonable, necessary and related to the April 23, 2016 work injury. (PX 3, RX 4)

Petitioner underwent a course of work conditioning from November 3, 2016 through January 3, 2017. (RX 11) Upon discharge, the therapist noted Petitioner reported that although she had some strength gains in the program, her pain and numbness remained unchanged. She continued to report feeling of weakness regarding her bilateral upper extremities, especially regarding overhead reaching/activities. Petitioner reported that she would continue to perform an HEP and had been going to a gym to progress her overall conditioning. According to the therapist, Petitioner reported that she planned to pursue surgery and did not feel that she could safely return to full duty work. Petitioner reported the need for surgery is being questioned by her employer and she had concerns with losing both her part-time law enforcement jobs as a result of her current situation and therefore would to apply for SSDI. It was noted that Petitioner cervical range of motion included decreases in her flexion, bilateral side bends, bilateral rotations, compared to when she began work conditions. Although extension was increased, it was only by two degrees. The therapist noted that all of Petitioner's demonstrated range of motion were greater when she was distracted or performing general exercises/activities.

The therapist noted that Petitioner's effort had been very good and that she appeared quite functional with her only noted limitation being overhead lifting which she may or may not have to perform on her job. The therapist noted that Petitioner's primary reported limitations were her pain and numbness. The therapist noted that these reports were consistent with her diagnosis but maybe exaggerated at times. The therapist noted that there were no situations observed or documented where Petitioner dropped or could not handle varying objects at times or reporting "total numbness". The therapist did not recommend additional work conditioning and indicated that if it is determined that Petitioner did not need surgery and that it was not appropriate to attempt or return to fully work, a FCE would be appropriate to bring the case to closure. (RX 11)

According to the records submitted, Petitioner last saw Dr. Braaksma on January 8, 2017. At that time her main complaint was neck pain, numbness and tingling. The quality of pain was described as intermittent, aching and throbbing. Dr. Braaksma again noted that despite an appropriate and exhaustive course of nonoperative treatment, Petitioner symptoms continued. Again, he offered a surgical option which Petitioner expressed an interest to proceed with. The doctor continued Petitioner's work restrictions of no excessive cervical bending, twisting, or lifting greater than 15lbs and no overhead activity. (PX 2) Petitioner testified that after this date, Respondent stopped paying TTD and medical benefits.

At Respondent's request, Petitioner saw Dr. Monaco for an updated Section 12 examination on March 9, 2017. Petitioner reported that she had 24 sessions of work conditioning over a six week period at Ortho Illinois, going three hours per day. Petitioner stated that the work conditioning did not help with regards to her pain or numbness in her neck or bilateral hands. Petitioner stated, however, that work conditioning made her stronger. Petitioner stated that she still could not lift anything over her head greater than 10 pounds. She also complained that lifting overhead with any weight creates pain. Petitioner also complained of pain in her throat over the anterior aspect of her neck that she attributed to work conditioning and working out at the gym. She continued to complain of pain in the back of the neck, sides of the neck, and base of the neck. She described this pain at a severity of 3-4/10. Petitioner complained of numbness in the bilateral hands at a severity of 4-5/10. Petitioner stated that due to the numbness in her hands she had a hard time carrying and holding onto to items with her hands. She stated that her bilateral hands were numb as she was in the examination room. She described the numbness in her hands in a glove type distribution over both the volar and dorsal aspects. (Dr. Monaco noted that her numbness complaints were not in any peripheral nerve or nerve root dermatomal distribution.) Petitioner complained that she could not spend more than a half an hour without her neck beginning to hurt. Petitioner stated that the pain in her posterior neck was unchanged since April 2016.

Upon physical examination, her cervical spine revealed significant limitations at range of motion to all plains. Petitioner complained of discomfort with lateral bending at the base of the neck, anterior aspect of the neck, and the area of the throat. (Dr. Monaco noted that Petitioner's range of motion in the cervical spine was slightly worse than when she was seen in October of 2016.) Petitioner had a negative Spurling sign with no radicular complaints. (Dr. Monaco noted that during the course of his physical examination when he was not specifically measuring range of motion, Petitioner frequently exhibited increased level of motion in the neck when distracted than she did during her range of motion exam.) There was no tenderness to palpation over the spinous process of the cervical spine or over the paracervical muscles. There were no signs of any paracervical muscle spasms. There was no tenderness to palpation over the interscapular area or the trapezius. Petitioner had normal deep tendon reflexes bilaterally at the biceps, triceps, and brachioradialis. She had full motor function in the bilateral upper extremities.

Dr. Monaco noted that the physical examination findings were consistent with those of Dr. Braaksma as well as Petitioner's physical therapist. Specifically, Petitioner's active range of motion was markedly limited during focused testing but when distracted and doing other activities Petitioner moved the neck more freely.

Dr. Monaco opined that Petitioner was offering signs of symptom magnification. He stated that Petitioner's subjective complaints were not confirmed by any objective findings of cervical radiculopathy. The doctor noted Petitioner's cervical spine MRI showed only diffuse degenerative changes with no specific nerve root impingement. Specifically, Dr. Monaco did not find any subjective radicular complaints that were consistent with a C6-C7 radicular pattern. He noted this was not consistent with Petitioner's complaints of whole hand numbness. He noted the numbness complaints were subjective and not confirmed with any other objective findings as she had normal deep tendon reflexes, motor function, and intact sensation to both upper extremities. He noted that his opinion remained unchanged from the previous evaluation. He opined that Petitioner had complaints of non-specific neck pain with a non-physiologic and exaggerated physical complaints with no objective evidence of radiculopathy. He noted that these findings were corroborated by Petitioner's work conditioning notes.

Relying on his examination, Petitioner's medical records and her description of mechanism of injury, Dr. Monaco opined Petitioner had a "mild strain of her neck without evidence of objective findings of radiculopathy". Dr. Monaco felt that such a condition would be expected to resolve in six (6) weeks. Further, Dr. Monaco opined Petitioner had non-specific chronic neck pain that was unrelated to the work-related incident of April 23, 2016. Dr. Monaco stated, "There has really been no change in her subjective complaints over the past 11 months. As noted…there are confounding findings in regards to subjective complaints and physical findings and signs of symptom magnification…It should be noted that even Ms. Coletti's subjective complaints of paresthesias are not consistent with any radicular pattern…" The doctor added that a review of Petitioner's work conditioning documentation indicate that she had made good progress and exhibited the functional capacity to perform her regular duties as a police officer. Lastly, Dr. Monaco opined that due to inconsistencies between Petitioner's subjective complaints and objective findings, she would not benefit from a cervical disc ACDF. Finally, Dr. Monaco performed an impairment rating and determined a 0% PPI rating

Petitioner testified that she was terminated from her part-time job at the Maple Park District as of October 11, 2017. Since her termination and inability to go back to either work force, she found a job at Dick Sporting Goods. Petitioner testified that she was making $9.00 an hour working 20 to 25 hours a week. The parties stipulated to a TPD rate while Petitioner works at Dick's Sporting Goods of $256.27.

At the time of trial Petitioner testified that she was feeling neck pain and some numbness in her hands and arms. Petitioner testified that she had limitations after April 23, 2016. She testified that she was unable to do much. Petitioner denied making any progress in physical therapy. She testified that it helped a little with overhead lifting. She had difficulty pushing the vacuum. She testified that she had limitations with her neck

which included overhead lifting and some pushing and pulling behind her neck. She testified she had difficulty doing lateral raises and pull downs. She had issues with rotating her neck. She could not tilt her neck from side to side. She testified that she had problems raising anything over her head even like a box of cereal. She testified that it was difficult for her to tilt her neck from side to side. She testified that while driving she had difficulty reaching and looking over her shoulder.

Petitioner testified that she exercised regularly prior to the accident. She resumed working out at Peak Sports Club in the Winter of 2017. She stated that she can lift between 15lbs. to 20lbs. chest to shoulder, biceps and triceps. She testified that she could perform pulldowns up to 70lbs. She could bench press 65lbs. from a flat bench and she can lift 10 – 15lbs overhead with dumb bells.

Officer Scott Vincent testified on behalf of Respondent. He testified that he was a sergeant with the Rockford Park District. He had been with them for 19 years. He testified that he did the nightshift patrol as well as training program. He also supervised Petitioner. Officer Vincent testified that he supervised a training session on April 23, 2016. He testified that all officers were required to attend but not participate. If the officers were injured, they were recommended not to participate. It was his understanding that Petitioner had injured her upper extremity and could not participate in the training session. She participated anyway. Officer Vincent testified that there were eight to ten officers participating in the training session. He stated that he did not observe Petitioner falling on her neck nor did he observe Petitioner stop in the session to apply balm on her neck. Lastly, Officer Vincent testified that Respondent had a protocol for injuries. Injuries were to be reported as soon as possible or within 24 hours. He could not recall when Petitioner reported the injury, but it was not reported to him on the day of the training.

Dan Smith, an investigator, also testified on behalf of Respondent. Mr. Smith testified that he was a 25 year employee with Smith Surveillance. He testified that he performed surveillance on Petitioner on April 26, 2017, May 2, 2017, May 4, 2017 and May 11, 2017. (RX 8, RX 9) He subsequently prepared reports that were marked RX6 and RX7. Mr. Smith testified that there were observations he made that were not depicted on the video. There were some aspects of her working out that he was unable to videotape. He testified that he observed Petitioner on an abdominal machine performing stomach crunches. She was prone sitting at a 90 degree angle with her hands above her shoulder hanging on to bars behind her neck. She pulled the bar forward and perform a stomach crunch. She would then return to her starting position which was angled back at 45 degrees. He stated that it didn't appear that Petitioner had any difficulty performing the maneuver. Nor did it appear Petitioner had any difficulty rotating her neck from left or right.

The Arbitrator reviewed the CD films. The surveillance films reveal Petitioner able to turn her head left and right to look over her shoulder while driving. She is also seen lifting items overhead such as a vase. The May 11, 2017 surveillance of Petitioner shows her working out at Peak Sports Club. The surveillance depicts her performing lat pull downs, tricep presses, shoulder presses and bull body presses. It doesn't appear she has any difficulty with her neck. (RX 8, RX 9)

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

The Arbitrator finds that Petitioner failed to prove that her current cervical condition of ill-being is causally related to the accident sustained on April 23, 2016. In support of the Arbitrator's finding regarding causation, the Arbitrator adopts the opinions of Dr. Monaco, the only causal connection opinion entered at trial. Dr. Monaco performed two Section 12 examinations of Petitioner, October 4, 2016 and March 9, 2017. Initially, Dr. Monaco opined that Petitioner's cervical spine condition was related to her alleged April 23, 2016 work injury and that her mechanism of injury was consistent. Dr. Monaco provided that he had some disagreement with Petitioner medical providers "specifically in regards to the presence or absence of radiculopathy." The

doctor wrote that based the medical records reviewed and his evaluation, Petitioner demonstrated no evidence of cervical radiculopathy. Dr. Monaco opined that Petitioner had nonspecific neck pain with no objective evidence of radiculopathy. He noted that the review of the medical records yielded no evidence of any objective findings consistent with radiculopathy noting Petitioner's motor strength was 5/5 in the C6 and C7 myotome. Petitioner's sensation was intact. Petitioner's deep tendon reflexes were also intact. The doctor noted the medical records indicated subjective complaint of paresthesias, but there was never mentioned of the distribution of these pain complaints. Dr. Monaco further noted that Petitioner had a completely normal neurological exam with deep tendon reflexes at 2+ and equal bilaterally. Petitioner's motor function was graded at 5/5 and the muscles tested. Her sensation was intact to light touch in all dermatomes. The doctor was of the belief that Petitioner would not benefit from a cervical fusion from C5 to C7. Instead, Dr. Monaco opined that Petitioner would benefit from a course of work conditioning for six (6) weeks, three (3) to four (4) days per week. Dr. Monaco opined that Petitioner was not at MMI but anticipated that she would be so after a six (6) week course of work conditioning.

Petitioner underwent the recommended course of work conditioning from November 3, 2016 through January 3, 2017. Upon discharge, the therapist noted Petitioner reported that although she had some strength gains in the program, her pain and numbness remained unchanged. According to the therapist. Petitioner's cervical range of motion included decreases in her flexion, bilateral side bends, bilateral rotations, compared to when she began work conditions. The therapist noted that all of Petitioner's demonstrated range of motion were greater when she was distracted or performing general exercises/activities. The therapist noted that Petitioner appeared quite functional with her only noted limitation being overhead lifting. Petitioner's primary reported limitations were her pain and numbness. The therapist noted that these reports were consistent with her diagnosis but was possibly exaggerated at times. The therapist noted that there were no situations observed or documented where Petitioner dropped or could not handle varying objects at times or reporting "total numbness". The therapist did not recommend additional work conditioning.

Petitioner saw Dr. Monaco for an updated Section 12 examination on March 9, 2017. The doctor recorded that Petitioner stated that the work conditioning did not help with regards to her pain or numbness in her neck or bilateral hands. She continued to complain of pain in the back of the neck, sides of the neck, and base of the neck. She stated that her bilateral hands were numb as she was in the examination room. She described the numbness in her hands in a glove type distribution over both the volar and dorsal aspects. Dr. Monaco noted that her numbness complaints were not in any peripheral nerve or nerve root dermatomal distribution. Petitioner complained that she could not spend more than a half an hour without her neck beginning to hurt. Petitioner stated that the pain in her posterior neck was unchanged since April 2016.

During physical examination, Petitioner's cervical spine revealed significant limitations at range of motion to all plains. Petitioner complained of discomfort with lateral bending at the base of the neck, anterior aspect of the neck, and the area of the throat. Dr. Monaco noted that Petitioner's range of motion in the cervical spine was slightly worse than when she was seen in October of 2016. Petitioner had a negative Spurling sign with no radicular complaints. Dr. Monaco noted that during the course of his physical examination when he was not specifically measuring range of motion, Petitioner frequently exhibited increased level of motion in the neck when distracted than she did during her range of motion exam. Dr. Monaco noted that the physical examination findings were consistent with those of Dr. Braaksma as well as Petitioner's physical therapist. Specifically, Petitioner's active range of motion was markedly limited during focused testing but when distracted and doing other activities Petitioner moved the neck more freely.

Dr. Monaco opined that Petitioner was offering signs of symptom magnification. He stated that Petitioner's subjective complaints were not confirmed by any objective findings of cervical radiculopathy. The doctor noted Petitioner's cervical spine MRI showed only diffuse degenerative changes with no specific nerve root impingement. Specifically, Dr. Monaco did not find any subjective radicular complaints that were

consistent with a C6-C7 radicular pattern. He noted this was not consistent with Petitioner's complaints of whole hand numbness. He noted the numbness complaints were subjective and not confirmed with any other objective findings as she had normal deep tendon reflexes, motor function, and intact sensation to both upper extremities. He noted that his opinion remained unchanged from the previous evaluation. He opined that Petitioner had complaints of non-specific neck pain with a non-physiologic and exaggerated physical complaints with no objective evidence of radiculopathy. He noted that these findings were corroborated by Petitioner's work conditioning notes. Dr. Monaco opined Petitioner had a "mild strain of her neck without evidence of objective findings of radiculopathy". Dr. Monaco felt that such a condition would be expected to resolve in six (6) weeks. Dr. Monaco opined Petitioner had non-specific chronic neck pain that was unrelated to the work-related incident of April 23, 2016. Dr. Monaco stated, "There has really been no change in her subjective complaints over the past 11 months. As noted…there are confounding findings in regards to subjective complaints and physical findings and signs of symptom magnification…It should be noted that even Ms. Coletti's subjective complaints of paresthesias are not consistent with any radicular pattern…" The doctor added that a review of Petitioner's work conditioning documentation indicate that she had made good progress and exhibited the functional capacity to perform her regular duties as a police officer. Lastly, Dr. Monaco opined that due to inconsistencies between Petitioner's subjective complaints and objective findings, she would not benefit from a cervical disc ACDF.

Dr. Monaco's opinions are supported by the therapist's notes from Petitioner's work conditioning program. The therapist noted history from Petitioner of increased ability on distraction testing. The therapist noted that Petitioner's functional limitations were a lot less than she was exhibiting. He noted no finding consistent with her complaints of numbness in the bilateral hands. He noted Petitioner's range of motion was greater on distraction.

Additionally, Dr. Monaco's opinions are supported by the surveillance video. The video shows Petitioner appeared to have no difficulty with her neck on overhead lifting. She appeared to perform lateral pulls and triceps presses without demonstrating any difficulty with her cervical spine. During trial Petitioner testified she had difficulty lifting more than 10lbs., however, the video seemed to suggest otherwise. This is supported by the work conditioning records where the therapist noted that Petitioner possibly displayed exaggeration at times and could return to work.

In summation, Dr. Monaco initially opined that Petitioner's cervical spine condition was related to her alleged April 23, 2016 work injury and that her mechanism of injury was consistent. Dr. Monaco opined that Petitioner had nonspecific neck pain with no objective evidence of radiculopathy. The doctor was of the belief that Petitioner would not benefit from a cervical fusion from C5 to C7. Instead, Dr. Monaco opined that Petitioner would benefit from a six (6) week course of work conditioning. Consistent with Dr. Monaco's recommendation Petitioner participated in a work conditioning program from November 3, 2016 through January 3, 2017. Thereafter, she had an updated examination with Dr. Monaco on March 9, 2017. Dr. Monaco opined Petitioner had a mild strain of her neck without evidence of objective findings of radiculopathy and had non-specific chronic neck pain that was unrelated to the work-related incident of April 23, 2016. The doctor opined she had made good progress and exhibited the functional capacity to perform her regular duties as a police officer.

Based on the foregoing, the Arbitrator finds that Petitioner suffered a cervical strain as a result of the accident sustained on April 23, 2016. Relying on the above referenced opinions of Dr. Monaco and the results from the work conditioning program, the Arbitrator finds Petitioner was at maximum medical improvement as of January 3, 2017, the date Petitioner was discharged from work conditioning.

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

Incorporating the findings noted above in paragraph (F), the Arbitrator finds Petitioner was temporarily and totally disabled for work from April 23, 2106 through January 3, 2017. Petitioner's treating physician has imposed work restrictions since the inception of treatment. At no time has Respondent accommodated same. Respondent's Section 12 examiner, Dr. Monaco, opined during his first examination that Petitioner's cervical spine condition was related to her April 23, 2016 work injury and that her mechanism of injury was consistent. Dr. Monaco opined that Petitioner was not at MMI but anticipated that she would be so after a six (6) week course of work conditioning. He believed Petitioner could work light duty with no repetitive use of her arms above her shoulders, no lifting floor to waist or waist to chest at greater than 20 pounds, and no pulling or pushing greater than 20 pounds. Petitioner participated in a work conditioning program from November 3, 2016 through January 3, 2017. Dr. Monaco, on March 9, 2017, opined Petitioner made good progress and exhibited the functional capacity to perform her regular duties as a police officer.

Based on the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of April 23, 2106 through January 3, 2017 or 36-4/7 weeks. Relying on the Arbitrator's findings regarding causal relationship, Petitioner request for temporary partial disability is denied.

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

Incorporating the findings noted above in paragraph (F) the Arbitrator finds Respondent is liable for the following medical expenses per the Illinois fee schedule:

Physicians Immediate Care	($0.00)
Ortho Illinois	($0.00)
Forest City Diagnostic Imaging	($0.00)

On October 4, 2016, Dr. Monaco opined that Petitioner was not at MMI and would benefit from a six (6) week course of work conditioning. He further opined that the medical treatment provided was reasonable, necessary and related to the April 23, 2016 work injury. Thereafter, Petitioner underwent the recommended course of work conditioning through January 3, 2017. Dr. Monaco subsequently opined she could perform her regular duties as a police officer.

Based on the above, the Arbitrator awards medical bills through January 3, 2017. The Arbitrator notes that Respondent has already paid the above bills (PX 6) and shall receive credit for same.

With respect to O.) Prospective Medical Care, the Arbitrator finds as follows:

Based on the Arbitrator's finding that Petitioner's cervical condition of ill-being had reached maximum medical improvement on January 3, 2017, her request for prospective medical care is denied.

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

Vanessa Sims,
Petitioner,

vs.

Pace,
Respondent.

19IWCC0392

NO: 16 WC 24673

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, temporary disability, permanent disability, medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 11, 2018, is hereby affirmed and adopted.

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

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

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: JUL 29 2019
o6/20/19
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0392

SIMS, VANESSA
Employee/Petitioner

Case# **16WC024673**

PACE
Employer/Respondent

On 1/11/2018, 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 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:

0123 COHN & COHN
ERWIN COHN
77 W WASHINGTON ST SUITE 1422
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
ELENA K CINCIONE
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

19IWCC0392

☐ 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

Vanessa Sims
Employee/Petitioner

v.

Pace
Employer/Respondent

Case # **16** WC **24673**

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 **Waukegan**, Illinois on **10/31/2017 and 11/13/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3/11/2016**, 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*** 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 $**50,396.32**; the average weekly wage was $**969.16**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**6,882.37** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,882.37**.

Respondent is entitled to a credit of $**50,737.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay the Petitioner the sum of **$581.49** / week for a period of **10** weeks, because Petitioner sustained permanent partial disability to the extent of **2%** pursuant to §**8(d)(2)** of the Act.

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

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

Signature of Arbitrator

1/9/18
Date

ICArbDec p. 2

JAN 11 2018

19IWCC0392

STATEMENT OF FACTS

Petitioner testified that on March 11, 2016, she was working as a bus driver for Pace when the bus she was driving was impacted from behind by another vehicle. Admitted into evidence as Respondent's Exhibit 1 is a video taken during the accident. The video showed the interior of the bus from a vantage point of the front of the bus over the windshield. It shows how the impact physically affected Petitioner including the movement of her body. Specifically, the video shows that Petitioner was jostled in her seat but did not hit her left shoulder, or any other part of her body, on any surface during the impact.

Petitioner testified that she felt pain in her left shoulder after the accident and was transported to the emergency room via ambulance. She also testified that she subsequently sought medical treatment from Dr. Zhong, Advocate Lincolnshire, and Dr. Collins. She testified that she underwent surgery in June 2016. She returned to full duty work in December 2016 and continues to work as a bus driver for Pace. Petitioner testified that after returning to work, "everything was well." She had no problems "until a year ago" when she experienced increased shoulder pain.

On May 19, 2016, Petitioner presented for a Section 12 examination at Respondent's request with Dr. Bryan Neal. The parties deposed Dr. Neal on November 22, 2016; the transcript of his deposition and related exhibits were admitted into evidence as Respondent's Exhibit 2. Dr. Neal performed an examination of Petitioner and reviewed medical records, diagnostic imaging, and the video of the interior of the bus during the accident. He opined that Petitioner sustained some shoulder pain of unknown etiology as a result of the motor vehicle accident on March 11, 2016. However, it was his opinion that all of Petitioner's other shoulder issues were not related to the March 11, 2016 accident and that she did not require shoulder surgery. He also opined Petitioner was engaged in symptom magnification and exaggeration and that Petitioner did not require any work restrictions and could return to work full duty.

Also admitted into evidence were Blue Cross Blue Shield itemized consolidated statement of benefits (Respondent's Exhibit 3) and a record of medical bills paid by Respondent (Respondent's Exhibit 4).

With regard to (F), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner failed to prove that her current left shoulder condition of ill-being is causally related to the March 11, 2016 accident. In support of this decision, the Arbitrator relies on Respondent's Exhibits 1 and 2, the video of the interior of the bus during the accident and the deposition transcript of Dr. Neal.

The Arbitrator notes that this case proceeded to trial in Waukegan on October 31, 2017. The matter was then continued to November 13, 2017 in Rockford to allow the parties an opportunity to cure any potential deficiencies with the submission of their respective exhibits prior to the close of proofs.

It is well settled that the claimant has the burden of proceeding and must prove by a preponderance of the evidence all the elements required to establish the liability of the employer, and liability cannot be based upon imagination, speculation, or conjecture. *Illinois Bell Telephone Company v. Industrial Commission*, 265 Ill.App.3d 681 (1994). Petitioner must prove each element by a preponderance of the evidence. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253 (Ill. 1980). Additionally, the proceedings before the Illinois Workers'

Compensation Commission are subject to the Illinois Rules of Evidence, except where they conflict with the Illinois Workers' Compensation Act. 50 Ill.Admin. Code § 9030.70.

While medical records are considered hearsay under the Illinois Rules of Evidence, the Act includes a provision in §16 for admission of medical records into evidence in a Workers' Compensation proceeding. Specifically, §16 requires medical records to be accompanied by either a certification from the medical provider's keeper of records or a valid subpoena in order to be considered admissible. Additionally, the subpoena response or certified records must be intact when presented as an exhibit. If the response or records are not the intact collection submitted by the provider, the certification (or rebuttable presumption of certification) is no longer valid.

In the instant case, Petitioner's Exhibits 2 through 5 were on their face not intact subpoena responses or certified collections of records. The dates of certification in some instances predate the records submitted. The same certification is attached to multiple differing sets of records. The records of Condell are accompanied by a subpoena, but the pagination and print dates reveal Petitioner's Exhibit 4 (collective) is not an intact subpoena response from the provider. The medical bills lack any certification or subpoena verification. Lastly, Petitioner's attorney admitted that the records were not maintained as intact collections by his office. Therefore, Petitioner's Exhibits 2 through 5 are received as rejected exhibits and will not be considered.

The Arbitrator has observed what occurred inside the bus at the time of the accident. Respondent's Exhibit 1 shows that Petitioner did not sustain an impact to the left arm during the motor vehicle accident. Dr. Neal further notes that, upon review of the video, Petitioner did not sustain a mechanism of injury that would cause her shoulder complaints or the need for surgery. He opines that, at most, Petitioner may have sustained a soft tissue contusion as a result of being jostled in her seat. The opinion of Dr. Neal is the only admissible medical opinion available for the Arbitrator to consider.

Based on the evidence admitted into evidence, the Arbitrator finds that Petitioner failed to prove that her current post-operative condition is causally related to the work accident. The Arbitrator does find that Petitioner suffered a soft tissue contusion that was causally related to the March 11, 2016 motor vehicle accident, and that the condition resolved relatively quickly per Dr. Neal's opinion.

With regard to (J), Were medical services provided reasonable and necessary and has Respondent paid all appropriate charges, the Arbitrator finds the following:

Based on the above noted causal relationship findings, the Arbitrator finds that all medical services beyond the initial emergency room visit on March 11, 2016 are not causally related to the accident. The Arbitrator also finds that Respondent has paid all appropriate charges. Respondent's Exhibit 4 was admitted into evidence and indicates the emergency room visit bill was paid by Respondent.

With regard to (K), What temporary total disability benefits (TTD) are in dispute, the Arbitrator finds the following:

The Arbitrator finds that Petitioner failed to prove entitlement to temporary total disability benefits as there is no admissible medical evidence to support Petitioner being off work as a result of the March 11, 2016 accident. Dr. Neal opined that Petitioner did not require any work restrictions and did not need to undergo surgery. Furthermore, as no additional medical records were admitted into evidence, there is no medical basis for Petitioner to have been off work as a result of any injuries sustained in the accident.

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 subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a bus driver, and maintains that employment today without issue. The Arbitrator assigns some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years at the time of the accident. Because Petitioner is an older individual with a relatively short work-life expectancy, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner presented no evidence that her earning capacity has been impacted by the injury. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by medical records, the Arbitrator notes the medical evidence introduced and admitted is the records from Respondent's Section 12 examiner, Dr. Neal. On May 19, 2016, Petitioner presented to Dr. Neal for a Section 12 examination. The doctor also testified via deposition on November 22, 2016. He opines that, at most, Petitioner may have sustained a soft tissue contusion as a result of being jostled in her seat. Petitioner did not require any work restrictions and could

return to work full duty. Petitioner ultimately returned to work full duty. She has not sought any additional treatment subsequent to her discharge. The Arbitrator assigns greater weight to this factor.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lluvia Alvarez,

Petitioner,

19IWCC0393

vs.

NO: 17 WC 32764

Atlantic Aviation Corporation,

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, temporary disability, medical and being advised of the facts and law, changes the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As indicated above, this matter was arbitrated under §19(b) of the Act. The Arbitrator found that Petitioner failed to meet her burden of proving a compensable accident. The Commission affirms that finding. However, in the "ORDER" section of the decision, the Arbitrator included the language that "in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any." Because the claim was denied in its entirety, the matter will not be remanded for determination of any additional benefits and therefore the decision does bar subsequent awards. Therefore, the Commission strikes the above quoted language from the "ORDER" section of the Decision of the Arbitrator.

19IWCC0393

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 14, 2018, is hereby affirmed and adopted with the changes noted above.

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

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.

JUL 29 2019

DATED:
o6/20/19
DLS/rm
46

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

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

19IWCC0393

ALVAREZ, LLUVIA
Employee/Petitioner

Case# **17WC032764**

ATLANTIC AVIATION CORPORATION
Employer/Respondent

On 8/14/2018, 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:

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19IWCC0393

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)

Lluvia Alvarez
Employee/Petitioner

v.

Atlantic Aviation Corporation
Employer/Respondent

Case # **17** WC **32764**

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 **June 12, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0393

FINDINGS

On the date of accident, **October 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 accident ***was*** given to Respondent.

Petitioner's current condition of ill-being as causally related to the accident is moot as an accident did not arise out of employment.

In the year preceding the injury, Petitioner earned $**31,334.16**; the average weekly wage was $ **602.59**.

On the date of accident, Petitioner was **36** 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 $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**00**for other benefits, for a total credit of $**0**.

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

ORDER

Denial of benefits

Because Petitioner failed to prove an accident arose out of employment, benefits are denied.

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

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

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

Signature of Arbitrator

August 10, 2018
Date

ICArbDec19(b)

AUG 14 2018

Preface

The parties proceeded to hearing June 12, 2018, on a Request for Hearing indicating the following disputed issues: whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; whether Petitioner's current condition of ill-being is causally connected to the injury; is Respondent responsible for certain unpaid medical bills; is Petitioner entitled to temporary total disability; and is Petitioner entitled to any prospective medical care. The hearing proceeded on a Petition for Immediate Hearing Under Section 19(b) of the Act and an 8(a) Petition for Medical Care and Treatment. Arbitrator's Exhibit 1; Lluvia Alvarez v. Atlantic Aviation Corporation, No. 17 WC 32764 Transcript of Evidence on Arbitration at 4-5; Arbitrator's Exhibit 3.

Findings of Fact

Lluvia Alvarez (Petitioner), a 36 year old female, testified she was working for Atlantic Aviation Corporation (Respondent), a charter airline company at Midway Airport, on October 22, 2017, in customer service. She testified she did anything the clients requested. Alvarez at 10, 29-30, 11.

Respondent's General Manager, Bernard Young, testified that on October 22, 2017, Petitioner had worked for Respondent two and a half weeks. During her second week of hire, on October 19, 2017, Petitioner came to him with a concern about her schedule flexibility because of her child. Young testified, at her orientation, Petitioner said she was flexible and willing to work all shifts. Young said they were hiring for the second shift position. Petitioner told Young things were not working out at home, she wanted to work the first shift. She told Young if Respondent could not accommodate a first shift schedule it would not be beneficial to stay with the company. Young said he told Petitioner to take the weekend to consider it. Young testified their follow up conversation was to be that Monday, but the accident happened Sunday and she never returned to work. Alvarez at 83-86.

I note, Petitioner filed an Application for Adjustment of Claim in this case, November 7, 2017. On the face of the Application, in answer to the question "How did this accident occur?", Petitioner said "slipped and fell on water that was leaking from an ice machine." Subsequently, Petitioner filed a Petition for an Immediate Hearing Under section 19(b) of the Act on May 10, 2018. On the face of the Petition, in answer to information "Description of the accident," Petitioner indicated "slipped and fell on water that was leaking from an ice machine." Arbitrator's Exhibit 2; Arbitrator's Exhibit 3.

Surprisingly, at trial, Petitioner went to great lengths to avoid specifically testifying that water was leaking from an ice machine.

Petitioner testified her manager asked her to get four bags of ice, and she went back in the building where the ice machines were. The machine was large, 2-3 times the width of a body, with ice bags next to the machine. She took a bag to the machine, used a scoop to fill the bags, and tied off the bags. She took two bags back to the front of the building, without any problem. The other two bags were on the floor right in front of the machine. Petitioner testified she went back to get the other two bags and fell while walking back to the machine. She does not know how far from the ice she was when she fell. At first, she offered that the floor *is like a ceramic, but then it's like a shiny coat, so it can be slippery*, leaving that hang in the air to suggest the floor itself was slippery without actually saying she slipped on a slippery floor. The Petitioner said there were two carpets on the ground with a foot and a half gap between them. She testified at first, that's "...where I believe that's where I slipped and fell." Somewhat later, Petitioner testified she slipped in between the rugs. Petitioner testified she slipped on water, she knows it was water "Because when I came to, I was wet all on the side of my—the back of my pants and my suit jacket." She never testified where the water came from, not that there was water on the floor when she filled the four bags of ice, nor when she was walking back to pick up the remaining two bags of ice. She offered that at her orientation, we do not know when, she noticed water on the floor leaking from the ice machine and brought it to a supervisor's attention, leaving another theory hang in the air to suggest the machine leaked yet without actually saying it was leaking at that time. Petitioner also testified her employer was aware of an issue with the ice machine. What that issue was, was left unexplained. Alvarez at 12-14, 28, 31-33.

Petitioner testified she fell and knocked herself out. She said she remembers a man asking if she was ok and being taken to a supervisor's office. She testified Respondent did not take her for medical attention, she called her husband who took her to the hospital. Alvarez at 13-17. The parties had stipulated at the time of the injury, Petitioner was single. Arbitrator's Exhibit 1.

Anthony Johnson, a line service technician for Respondent, testified pursuant to subpoena. He testified he was working October 22, 2017, and was walking back to the refrigerator and saw someone laying on their back on the floor a foot away from the ice machine. He identified that person as Petitioner. Three times he asked Petitioner if she was alright without a response. Petitioner did not respond when he asked her if she needed medical attention, what happened, and if he should call an ambulance. Johnson helped Petitioner sit up then she said, "ow my head." He took her to the manager's office and went to ask the manager to come check on Petitioner. Alvarez at 65-68; Respondent's Exhibit 3.

Johnson testified that less than a minute after he put Petitioner in the manager's office, he went back to where Petitioner was laying. He testified neither of the rugs laying in front of the ice machines, or catering freezer was out of place, there was no ice on the ground, and the area where Petitioner was laying was not wet. He said there was a bag of ice a foot away from Petitioner, and it was not leaking. He took it 45-50 feet away to an aircraft and it did not leak when he was walking. He said Petitioner's clothing did not appear wet. Johnson, a 20 year employee further testified the ice machine never leaks. Alvarez at 63, 68-71, 75.

Petitioner has recounted several different versions of her fall. She told an emergency room doctor at Advocate Christ Medical Center, she was walking in Midway Airport and slipped and fell backwards. She told a doctor at Concentra Medical Center, when she went back to get two bags of ice, she fell on the ground. She told Dr. Wellington Hsu, during an independent medical examination, she was filling bags of ice, grabbed two, moved to the front of the room, during this maneuver, she slipped and fell on the floor. Petitioner's Exhibit 3 at 17; Petitioner's Exhibit 4 (unpaginated); Respondent's Exhibit 1at 1.

There being no testimony or evidence there was water leaking from an ice machine and no testimony or evidence the area in which the Petitioner alleges she fell was wet at all, we have only Petitioner's testimony she slipped on water, she knows it was water because when she came to she was wet on the back of her pants and suit jacket. But that is not why the back of her pants and suit jacket was wet. The notes of Dr. Damali Nakitende in the emergency room of Advocate Christ Medical Center on the date of the fall, October 22, 2017, state "The patient also mentioned that when she fell backwards she felt she urinated slightly in her underwear." Alvarez at 14; Petitioner's Exhibit 3 at 17.

Both Anthony Johnson and Bernard Young testified Petitioner was asked if she needed medical attention or an ambulance. Johnson testified Petitioner said "no." Alvarez at 66, 76, 88.

Petitioner was seen at Advocate Christ Medical Center on October 22, 2017. She complained of a slight headache and an episode of nausea and vomiting; and some slight left side neck pain. She was diagnosed with blunt head trauma and cerebral concussion. For a brief period of time she was put in a soft cervical collar. She was told to follow up with her primary care provider. There is no evidence she ever did. A CT scan of the head found no evidence of acute intracranial abnormality. A CT scan of the cervical spine found only mild multilevel disc and facet degenerative changes. Petitioner's Exhibit 3 at 17, 15, 18, 38, 28, 30.

Petitioner testified she was sent to Concentra Medical Center by Respondent. She was seen at Concentra October 25, 2017. She complained of head and neck pain. No medication was prescribed or dispensed. Petitioner told a doctor at Concentra that if she goes to work and falls while on flexeril, "I will come back and sue you." She was referred to neurology. Petitioner was returned to full work that day. She told a doctor at Concentra her worker's compensation will be stopped if they released her from care and returned her to full duty. Petitioner admitted she was released to return to work but sought her own opinion from another doctor. Bernard Young testified he spoke to Petitioner after she was seen at Concentra. Petitioner said she didn't feel like she could come to work and was seeking a second opinion. Young's subsequent attempts to contact Petitioner were unsuccessful. Alvarez at18, 19, 89-90; Petitioner's Exhibit 4 (unpaginated).

Petitioner testified she sought her own opinion from Dr. Mark Farag at Midwest Anesthesia & Pain Specialists. Nothing about Farag's qualifications was offered into evidence. Petitioner first saw Farag on October 26, 2017. She did not complete the portion of the Registration form which asks, "How did you hear about us?" Petitioner did not testify how she came to see Dr. Farag. Alvarez at 19; Petitioner's Exhibit 5 (unpaginated).

Petitioner complained of pain in the back of her head and neck, her left midback, and being dizzy and sensitive to light. She told Farag she didn't feel she could work. Farag diagnosed Petitioner with: post traumatic headache; cervicalgia; cervical sprain; and thoracic back pain. His plan was to order physical therapy, continue ibuprofen, and return to work November 6, 2017, with a restriction of being allowed to sit 30 minutes out of each hour. Farag also, as had Concentra, referred Petitioner to a neurologist. Petitioner testified she saw a neurologist but there is no corroborating evidence and no records of such a visit. Alvarez at 19, 20; Petitioner's Exhibit 5 (unpaginated).

Petitioner continued with visits to Midwest Anesthesia & Pain Specialists through January 17, 2017. She remained off work, and continued to be sent for physical therapy, even though she said the therapy was not helping. She complained of anxiety, short term memory loss, neck pain, dizziness, and double vision. Farag propose injections at C5-C6 CESI, and prescribed an H Wave Home Unit. Petitioner had an MRI of the brain, November 13, 2017, that was unremarkable. She had an MRI of the cervical spine, December 11, 2017, which showed: multilevel mild spondylotic changes from C3-C7; posterior herniation at C4-5 impinging the ventral thecal sac; posterior herniation at C5-6 causing mild to moderate foraminal stenosis; posterior herniation at C3-4 causing mild foraminal stenosis; and straightening of normal cervical lordosis (may represent muscle spasm versus strain). Farag simply noted, on January 17, 2018, a diagnosis of displacement of cervical intervertebral disc. Petitioner's Exhibit 5 (unpaginated); Petitioner's Exhibit 7; Petitioner's Exhibit 8.

Petitioner submitted to an independent medical examination February 23, 2018. She was seen by Dr. Wellington Hsu, a Board certified Orthopaedic Surgeon, of the Northwestern University Feinberg School of Medicine, Department of Orthopaedic Surgery and the Department of Neurological Surgery. Hsu reviewed the records of Midwest Anesthesia & Pain, conducted a physical examination, viewed x-rays and MRIs, and took a history from Petitioner. Petitioner's chief complaint was headache and blurry vision. He diagnosed Petitioner with cervical strain, resolved; and cervical spondylosis. He believed the fall caused the cervical strain. Petitioner had no functional disability. He did not believe the H Wave system was reasonable or necessary. He thought Petitioner could return to work without restrictions as it pertained to the spine. He thought epidural injections were not indicated. Alvarez at 23; Respondent's Exhibit 1.

Bernard Young testified Respondent offered Petitioner her job back. Respondent terminated Petitioner after she refused to come back to work. She was given 15 days to report back after being released from Concentra. She failed to return. Petitioner testified she applied for a job with North American Warehousing Company on May 24, 2018. She was offered a job and waiting to hear back from them at the time of the hearing. Petitioner testified the reason she did not go back to work with Respondent was because Dr. Farag disagreed with the IME. However, Petitioner testified, in contradiction to the notes of Midwest Anesthesia & Pain Specialists, Dr. Farag did not say she could not work, he said she could look for a job, she should start looking for a job. Alvarez at 96-97, 44-45, 48-49, 51; Petitioner's Exhibit 5 (unpaginated).

Day Dary, lead investigator of DigiStream, testified he was asked to do surveillance on Petitioner and did so May 23, 24, 30, and 31, 2018. He obtained video and generated a report.

The observations proved unremarkable. Respondent's Exhibit 9; Respondent's Exhibit 10; Alvarez at 100-119.

The credibility of a witness is always an issue and relevant. That determination involves the consideration of a witness's ability and opportunity to observe; their memory; manner while testifying; interest; bias; and previous inconsistent statements or actions. See e.g. Illinois Pattern Jury Instructions-Civil No. 1.01[5]. In this case, at trial, Petitioner proved less than credible. She had the ability and opportunity to observe any water leaking from ice machines, walking to it initially, standing at it while filling the bags, and walking back to pick up the other bags. Yet she never testified about leaking water. Her memory was repeatedly faulty regarding prior medical treatment. She often testified in an evasive manner especially during questioning about why she did not go back to work with Respondent. At times she really gave no answer or a convoluted answer to a question. She had an interest in her testimony given her likely leaving the company because she did not get the shift change she wanted and telling Concentra her worker's compensation would be stopped if they released her to work. Statements to Concentra, Dr. Farag, and to Dr. Hsu were inconsistent and Petitioner said simply their notes were wrong or not true.

Conclusions of Law

The decision in this case begins and ends with disputed issue C, did an accident occur that arose out of and in the course of Petitioner's employment with Respondent.

A claimant bears the burden of proving, by a preponderance of the evidence, that her injury arose out of and in the course of the employment. Both elements must be present in order to justify compensation. First Cash Financial Services v. Industrial Commission (Rios), 367 Ill. App. 3d 102,105 (2006). In the course of employment, refers to the time, place, and circumstances of the injury. If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of her duties and while she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980).

Here, Petitioner was doing a job she was employed to do, during a period of time she was supposed to be working, where she was supposed to be. I find as a conclusion of law, the injury occurred in the course of employment.

Arising out of the employment pertains to the origin or cause of a claimant's injury. To determine whether an injury arose out of employment, the risk to which an employee is exposed must be categorized into one of three kinds: those distinctly associated with employment; those personal to the employee, such as idiopathic falls; and neutral risks that have no particular employment or personal characteristics. First Cash, supra at 105.

Injury resulting from an idiopathic fall arises out of the employment only where the employment conditions significantly contributed to the injury by increasing the risk of falling or the effects of the fall. First Cash, supra at 105. In this case there is no evidence Petitioner suffered from a physical condition that cause her to fall, and no evidence the employment conditions increased the risk of falling at all. The fall was not idiopathic in nature.

An injury resulting from a neutral risk, that is one to which the general public is equally exposed, does not arise out of employment. By itself, the act of walking across a floor at an employer's place of business does not establish a greater risk than faced by the general public. Id.

For an injury caused by a fall to arise out of employment, Petitioner must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment. Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at a work site, or performing some work related task which contributes to the risk of falling. First Cash, supra at 106.

The only evidence offered by Petitioner explaining the cause of her fall was her testimony she slipped on water and she knows it was water because the back of her pants and suit jacket were wet. This is not direct evidence, she never testified where the water came from, or that there was even water on the floor. At most this is circumstantial evidence which must support an inference which is reasonable and probable, not merely possible.

The inference is not reasonable given Petitioner's statement to Dr. Nakitende that she urinated in her underwear after she fell backwards. It is not reasonable because Anthony Johnson testified that moments after the fall, the area was dry, the carpets were no disturbed, and no water was leaking from the ice machine or bag of ice. The inference is not probable given Johnson's testimony and Petitioner's failure to give direct evidence on the cause of the accident she set forth in previously filed documents.

I find, as a conclusion of law, there is no reasonable certainty any injury to Petitioner stemmed from a risk associated with her employment. She failed to prove the injury arose out of her employment.

As to disputed issue **F**, involving Petitioner's current condition; **J**, involving the payment of medical charges; **K**, prospective medical care; and **L**, temporary benefits, because Petitioner did not prove an accident arose out of her employment, she is not entitled to medical benefits, or temporary total disability. No benefits of any kind are awarded.

Thomas J. Cole

Arbitrator

August 10, 2018

AUG 14 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

OLMEDO BERNAL,

Petitioner,

19IWCC0394

vs.

NO: 15 WC 21052

ALTRIA GROUP, INC.,

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, and medical expenses both current and prospective and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained his burden of proving he sustained a compensable accident on May 6, 2014 which caused a condition of ill-being of his right hand/wrist. The Commission further remands this case to the Arbitrator for further proceedings for a determination of medical expenses, amount of temporary total compensation, and of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. Procedural History

Following an arbitration hearing on February 14, 2018, the Arbitrator issued a decision dated April 20, 2018 and found that Petitioner did not prove accident or causation. He noted that Petitioner was still symptomatic from a pre-existing condition prior to the accident, as noted in Dr. Tulipan's February 27, 2014 treatment record. The Arbitrator also found that Petitioner was not credible about the onset of symptoms. Ultimately, the causation opinion testimony of Dr. Carroll was deemed more persuasive than that of Dr. Tulipan at arbitration. As a result, the Arbitrator concluded that Petitioner's condition was indeed the result of his rheumatoid arthritis and not the work incident.

19IWCC0394

II. Findings of Fact

Petitioner testified that he worked for Respondent since May of 1978 as a maintenance mechanic/machinist. He maintains, repairs and/or rebuilds various machines in Respondent's plant. The machines contain bolts that are "lock tight." Many of the bolts require him to use wrenches and a "pipe to break loose." Petitioner is not always able to use a pipe because some work spaces are small. The machines he works on are old. He has to use a lot of force to loosen/tighten the bolts. Petitioner is right handed. The plant was actually scheduled to close on March 31, 2018. The Respondent was moving operations moved to Tennessee. Petitioner had been traveling to Tennessee four times a month since October of 2017 because he was the only person with the company who knew how to work on these types of machines.

Petitioner acknowledged prior surgeries on his right wrist. He treated with Dr. Tulipan, who performed carpal tunnel and long trigger finger releases in April of 2010, a tensynovectomy in October of 2011 and a procedure to remove sutures and scar tissue in September of 2012. Petitioner returned to work full duty following the suture/scar tissue procedure in October of 2012. Petitioner had a workers' compensation claim for these injuries, which he handled *pro se*. Upon inquiry to a Ms. Martinez, Petitioner learned that his claim had been closed. During this conversation he learned that, in order to receive a settlement on his case, he needed a final evaluation. Respondent agreed to allow him to return to Dr. Tulipan for the evaluation.

On February 27, 2014, prior to the instant incident, Petitioner presented to Dr. Tulipan who noted it was regarding a "pending arbitration on the problems he has suffered with his right hand." He treated Petitioner since 2010 and was released previously to work full duty. Petitioner reported that he still had intermittent discomfort, particularly in the dorsum of the right wrist with heavy use. Instead of being able to use a wrench normally, he reported that most of the time he had to use an extension pipe to facilitate use.

Dr. Tulipan's exam revealed, among other things, Petitioner's grip strength was 54 pounds on the right versus 50 pounds on the left, pinch strength was 17 pounds on the right versus 19 pounds on the left and his range of motion was "equal to other side." No swelling was noted. His impression was that Petitioner had "some residual discomfort status post extensive surgery in the right hand from old work related injury, with some weakness and residual dysfunction."

On May 6, 2014, Petitioner was called to a machine because the chain jumped out of the time. He was on his knees with his arms extended trying to loosen the bolt. Petitioner explained that he had to loosen the bolt with all of his force. While doing so, he felt a pop in his right wrist and a burning. His wrist also began to swell. Petitioner testified that he had to loosen those bolts every six months, and that the machines break down a lot because of their age.

After the accident, Petitioner went to the company nurse. He asked the nurse whether he could be referred back to Dr. Tulipan, and she agreed. Petitioner returned to Dr. Tulipan on May 12, 2014. Dr. Tulipan noted that Petitioner had had multiple problems with his right wrist but was doing reasonably well "until late last week when he was using a wrench and all of a sudden felt a sharp pain and noted swelling on the dorsum of his right wrist." His exam found swelling about the dorsum and pain about the central and ulnar portions of the wrist. He also found Petitioner's range of motion was limited. Dr. Tulipan took x-rays which showed advancing degenerative changes particularly in the dorsal radioulnar joint but also some ulnar translocation of the entire carpus. Dr. Tulipan diagnosed post-traumatic arthritis with acute chronic strain. He administered an injection and offered to place him off work, but Petitioner wanted to continue working. On July 29, 2014 Dr. Tulipan offered Petitioner a second injection or surgery. Petitioner chose the injection so that he could continue working. Dr. Tulipan concluded on August 26,2014 that Petitioner had failed conservative treatment and recommended surgery. Respondent then discontinued sending Petitioner to Dr. Tulipan after that recommendation and sent him to a Section 12 medical examination.

Petitioner underwent a Section 12 examination with Dr. Carroll on October 6, 2014. Dr. Carroll's exam found Petitioner's grip strength was 15 pounds on the right and 40 pounds on the left. He noted that surgery could be considered after a rheumatological work up. Dr. Tulipan referred Petitioner for such an evaluation with Dr. Lin.

An MRI ordered by Dr. Lin showed advanced arthritic changes of the wrist, extensive subchondral cystic changes and reactive osteitis in the radiocarpal joint, and extensive synovitis throughout the wrist. These findings raised strong suspicion of underlying inflammatory arthritis such as rheumatoid arthritis. The MRI also showed extensive complex degenerative tear of the TFCC, multiple loose bodies adjacent to the wrist, and ulnar subluxation of the extensor carpi ulnaris tendon. Dr. Tulipan interpreted the MRI as showing "evidence of a rather significant TFCC injury as well as diffuse osteoarthritic problems." On December 14, 2014 Dr. Lin diagnosed Petitioner with inflammatory/rheumatoid arthritis and prescribed methotrexate.

On December 18, 2014, Dr. Tulipan informed Petitioner that they should give the methotrexate a few months to see if it resolves his symptoms. He indicated that perhaps surgery could be avoided. Petitioner returned to see Dr. Tulipan on February 26, 2015. Dr. Tulipan noted that Petitioner was doing a little bit better on the methotrexate and that he is no longer having pain over the flexor carpi radialis tendon. However, he stated Petitioner still had significant midcarpal and ulnar-sided wrist pain with a lot of inflammation about the ecu tendon and a significant TFCC tear. Dr. Tulipan recommended surgery. Dr. Lin's follow up notes indicated the methotrexate helped some but Petitioner continued to have pain and swelling.

Regarding his current condition of ill-being, Petitioner testified that his wrist was "pretty much" constantly swollen and painful because he uses his right arm a lot. He has loss of range of motion, and his problems worsened after the accident. Petitioner testified that he was not wearing a wrist brace when he was injured.

19IWCC0394

On cross examination, Petitioner agreed that he had three surgeries to treat his right wrist injuries prior to the instant accident. He had a carpal tunnel release/trigger-finger release, radical extensor tensynovectomy, and removal of scar tissue in 2010, 2011, and 2012, respectively. Petitioner continued to treat with Dr. Tulipan after the surgeries and saw him on February 27, 2014. He t obtained a report to settle his prior claim. After the instant accident Petitioner returned to Dr. Tulipan.

Throughout his four years of treating with Dr. Tulipan, prior to the instant accident, he never recommended that Petitioner see a rheumatologist. After Dr. Carroll's examination, he saw a rheumatologist, Dr. Lin, who diagnosed rheumatoid arthritis and prescribed Methotrexate. Petitioner stopped seeing Dr. Lin about six months prior to the hearing and no longer took medication for rheumatoid arthritis. Petitioner was currently working for Respondent at full duty. Dr. Tulipan never took him off work. The last time he saw Dr. Tulipan was in October 2016. Petitioner had no complaints regarding his wrist on the day of accident, prior to the injury.

On redirect examination, Petitioner testified that. he stopped taking Methotrexate for rheumatoid arthritis a year prior to the hearing. The medication did not help his pain, swelling, or loss of range of motion in his wrist. Petitioner testified that he was normal prior to the instant accident.

Dr. Tulipan testified by evidence deposition on June 27, 2017. Dr. Tulipan testified he first performed carpal tunnel/trigger finger release surgeries on Petitioner in 2009 or 2010. He also performed surgery in 2011 for inflammation of the tendon, and in 2012 to remove scar tissue which was causing some problems. To the best of his knowledge, Petitioner returned to work in October 2012 after those surgeries.

Dr. Tulipan testified that he saw Petitioner on May 12, 2014. Petitioner reported doing well until a week before when he felt a sharp pain and swelling in the right wrist after using a heavy wrench. Dr. Tulipan took x-rays which showed advanced degenerative joint disease in the wrist and "ulnar translocation of the carpus." He testified that because Petitioner reported minimal symptomology prior to the incident, it appeared that the incident increased his symptomology or exacerbated his condition. His prior surgeries should not cause any increased risk of injury. Dr. Tulipan believed the incident could be one of the causes for the need for surgery.

Dr. Tulipan was asked about the conclusions of Dr. Carroll in his Section 12 reports. Dr. Carroll had indicated that Petitioner's surgery may be required but would not be related to a work trauma. It would be related to a degenerative and inflammatory condition. Dr. Tulipan agreed that Petitioner had an underlying problem with rheumatoid arthritis, but he still believed that Petitioner's current condition was, in part, caused by the accident because he was minimally symptomatic prior to it.

19IWCC0394

On cross examination, Dr. Tulipan was asked about his note from February 27, 2014. In it he noted Petitioner had some pain in his wrist, "presumably from the previous time [he] saw him; and he was going to arbitration to try to settle that case presumably." He agreed that at the time of that visit, Petitioner still had some form of dysfunction in his right wrist. While he indicated that Petitioner was doing reasonably well, the symptoms for which he previously treated Petitioner had not completely resolved.

Dr. Tulipan diagnosed post-traumatic arthritis, administered an injection, and released him to work. He agreed that Dr. Lin diagnosed Petitioner with rheumatoid arthritis in December 2014. Dr. Tulipan acknowledged that in December of 2014 he felt that the rheumatoid arthritis accounted for a significant portion of his symptoms. He agreed that a TFCC tear can be the result of degeneration over time.

Dr. Carroll testified by evidence deposition on December 11, 2017. He performed a Section 12 examination of Petitioner on October 6, 2014. Petitioner reported problems with his right wrist and hand since May 6, 2014. He was twisting a large bolt with a wrench and felt pain/swelling in the wrist. He received two injections and surgery was recommended. Currently, the swelling waxed and waned. He had prior surgeries: a right carpal tunnel release with long-finger release on April 28, 2010; a right ~~wrist~~ tensynovectomy on October 14, 2011; and a mass excision on September 19, 2012.

After his examination, reviewing medical records, and Petitioner's history, Dr. Carroll diagnosed flexor carpi radialis/extensor carpi ulnaris tendinitis. However, based on his x-ray findings and Petitioner's tenosynovitis, Dr. Carroll thought Petitioner may have some form of inflammatory arthritis. He believed the treatment he received to date was reasonable and appropriate. However, Dr. Carroll believed a rheumatologic evaluation should be made prior to prospective treatment. Pending the evaluation, Dr. Carroll believed Petitioner's condition was degenerative in nature.

Dr. Carroll was provided additional records from Dr. Tulipan, records from Dr. Lin, and an MRI report and issued an addendum report on February 16, 2015. The MRI showed extensive complex degenerative tear of the TFCC, bony changes in the radius and ulna, and prominent degenerative changes. The rheumatologist diagnosed inflammatory arthritis and prescribed Methotrexate. That confirmed Dr. Carroll's suspicion about inflammatory arthritis. The Methotrexate was a medication intended to obviate the need for surgery.

After the diagnosis, Dr. Tulipan did not then recommend surgery but did not close the door on it. Dr. Carroll's causation opinion that Petitioner's condition was an inflammatory/degenerative condition and not related to the work incident had not changed with the new information. At the same time, he believed Petitioner may eventually need surgery. He did not believe the work incident aggravated Petitioner's underlying degenerative/inflammatory condition.

19IWCC0394

On cross examination, Dr. Carroll testified he believed the surgery Dr. Tulipan recommended appeared to be directed to the rheumatoid arthritis and not the TFCC tear. He did not believe that repetitive movements can aggravate rheumatoid arthritis. The rheumatoid arthritis caused the tendinitis. Repetitive movements could theoretically aggravate the tendinitis, in the absence of rheumatoid arthritis. The work activities in the job description would not cause the degree of degeneration Petitioner exhibited. Dr. Carroll suggested that work activities would not affect an inflammatory condition which "doesn't take work into consideration. It goes where it goes."

On redirect examination, Dr. Carroll testified that the prior tensynovectomy surgery "would fit with trying to surgically care for the rheumatoid condition or inflammatory arthritis." A TFCC tear can be caused by trauma, degeneration, inflammation, or fracture. He offered no opinion on the cause of the TFCC tear.

III. *Conclusions of Law*

Given the totality of the record, the Commission assesses Petitioner's credibility differently than the Arbitrator. Petitioner's testimony was internally consistent, and consistent with the medical records. In addition, the Commission finds the opinions of Dr. Tulipan more persuasive than those of Dr. Carroll. Dr. Tulipan had a more complete understanding of Petitioner's prior condition than Dr. Carroll having had the opportunity to treat him for several years and having performed three prior surgeries on his hand/wrist. Notably, Dr. Tulipan also had the opportunity to examine Petitioner both several weeks prior to, and a few days after, the accident. Dr. Carroll was not afforded these opportunities or the clinical insights stemming from such a long physician-patient relationship involving several surgeries to the affected body part. Furthermore, although Petitioner still had minimal symptoms from his prior condition, Petitioner and Dr. Tulipan both testified that he was much more symptomatic after the instant accident, supporting Dr. Tulipan's opinion that the incident aggravated his underlying condition.

We also find unpersuasive Dr. Carroll's opinion that trauma could not aggravate degenerative/rheumatoid arthritis. In this regard, the Commission notes that while Dr. Lin and Dr. Carroll both diagnosed rheumatoid arthritis, Dr. Tulipan also diagnosed post-traumatic arthritis. These diagnoses are not mutually exclusive *i.e.*, a patient can have both rheumatoid arthritis and post-traumatic arthritis simultaneously. The onset of post-accident symptoms, which were no longer tolerable and more severe than pre-accident symptoms, in light of a post-accident MRI showing a new severe TFCC tear objectively verifies pathology that was not present prior to the accident. For his part, Dr. Carroll acknowledged that a TFCC tear can be traumatic in nature, but offered no opinion regarding the causation of Petitioner's TFCC tear. Also, as Dr. Tulipan noted, the methotrexate gave Petitioner some relief but he continued to have significant pain and swelling after taking it for months further supporting his opinion that the work accident was a cause of Petitioner's condition. Thus, given the record as a whole, the Commission finds the opinions of Dr. Tulipan to be more persuasive than those of Dr. Carroll.

19IWCC0394

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated April 20, 2018 is hereby reversed and the Commission finds that Petitioner sustained his burden of proving he sustained a compensable accident on May 6, 2014 which caused a current condition of ill-being of his right hand/wrist.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay reasonable and necessary medical expenses incurred to treat Petitioner's current condition of ill-being causally related to the accident on May 6, 2014 under §8(a), subject to the applicable medical fee schedule in §8.2 of the Act

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective treatment recommended by Dr. Tulipan to treat the condition of ill-being of Petitioner's hand/wrist causally related to the work accident on May 6, 2014.

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 $30,000.00. 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: JUL 29 2019

Barbara N. Flores

Marc Parker

DLS/dw
O-6/20/19
46

19IWCC0394

Dissent

I respectfully dissent with the decision of the majority. I would have affirmed and adopted the Decision of the Arbitrator in which he found that Petitioner did not sustain his burden of proving he sustained a compensable accident which caused a current condition of ill-being of his right hand/wrist and denied benefits.

I agree with the Arbitrator that Petitioner's continued symptomology from his previous right-hand/wrist condition is very significant. That fact suggests that his current condition was simply continuation of symptoms from his pre-existing condition. I also agree with the Arbitrator that the opinions of Dr. Carroll are more persuasive than those of Dr. Tulipan. Dr. Carroll's suspicion of rheumatoid arthritis was confirmed by Dr. Lin a rheumatologist.

In addition, while the majority is correct that Dr. Carroll acknowledged that a TFCC tear can be traumatic in nature, Dr. Tulipan not only acknowledged that a TFCC tear can be degenerative, he also conceded that Petitioner's rheumatoid arthritis "accounted for a significant portion of his symptoms." Furthermore, despite Petitioner's testimony to the contrary, Dr. Tulipan noted in his treatment records that Petitioner's condition had improved after being prescribed Methotrexate for his rheumatoid arthritis by Dr. Lin. There is a great likelihood that Petitioner's current condition of ill-being of his right hand/wrist is caused by his underlying medical condition of rheumatoid arthritis and not a work accident. Therefore, in my opinion Petitioner has not sustained his burden of proving his current condition was caused by a work accident.

I would have affirmed and adopted the Decision of the Arbitrator in which he found that Petitioner did not sustain his burden of proving he sustained a compensable accident which caused a current condition of ill-being of his right hand/wrist and denied benefits. Therefore, I respectfully dissent from the decision of the majority.

Deborah L. Simpson

DLS/dw

Deborah L. Simpson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES D. STANLEY,

Petitioner,

19IWCC0395

vs.

NO: 14 WC 20075

FRESH EXPRESS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, and entitlement to temporary total disability ("TTD"), and permanent total disability (PTD) benefits and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Decision of the Arbitrator, filed with the Commission on July 26, 2017, denied to Petitioner any compensation under the Illinois Workers' Compensation Act ("Act"), finding Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment. The accident in question was an injury to his left knee that he claimed was injured as a result of him picking up a case of lettuce to place on a pallet. The presiding Arbitrator cited discrepancies between Petitioner's testimony and his medical records concerning the alleged mechanism of injury and also the lack of any medical opinion that related Petitioner's meniscal tear to the alleged mechanism of injury as reasons for denying his claim. The Commission, after reviewing the evidence, arrives at a different conclusion than did the Arbitrator and finds Petitioner proved that the meniscal tear in his left knee arose out of and in the course of his employment.

The Commission, in finding for Petitioner on the issue of accident, is most persuaded by the First Report of Incident that was completed by Petitioner and his supervisor on the date of the

accident, May 17, 2014. In the report, Petitioner stated that he felt his left knee "pop" while he was picking up Item 56292, later identified as a case of lettuce. Ms. Lever's contribution to the report was a recitation of she was told by Petitioner, namely that he felt his knee pop as he picked up Item 56292 and that it occurred without him doing anything out of the ordinary, "just picking product like he does every day." The presiding Arbitrator took issue that Petitioner did not report engaging in any twisting motion while performing the described activity. The Commission believes Petitioner "picking product like he does every day" would necessarily involve him twisting his knee to move the cases from one location to another. The Commission cannot penalize Petitioner for not realizing the potential legal ramification that not providing his supervisor with an exact description of his bodily movements would have.

Four days after the claimed accident, on May 17, 2014, on May 21, 2014, Petitioner presented to Barrington Orthopedic Specialists and provided a history of how he came to injure his left knee. That history was that he was moving boxes when he twisted his left knee. Approximately two months later, on July 15, 2014, Petitioner provided a similar history concerning his left knee when he presented for a rehabilitation evaluation of his left knee. He was recorded as stating that "he felt the [left] knee "pop" while lifting something and placing on a palate [sic] . . .."

At the time of the arbitration hearing on May 23, 2017, while on direct examination, Petitioner testified, "I picked up the product that I needed to pick. I transferred it to the other pallet. When I transferred it to the other pallet, I felt a popping in my left knee." On cross-examination, Petitioner was questioned about the history he purportedly provided in the emergency department of St. Alexius Medical Center on the day of the accident, a history that related that Petitioner heard a "pop" in his left knee while standing at work. While still on cross-examination, Petitioner disputed the accuracy of the history of his accident as depicted in that record.

The Commission, again, takes the position that it is not unreasonable for an injured worker, particularly at time of an accident and for a reasonable amount of time thereafter, to not be able to recall every aspect of an accident, particularly when the injury occurs while the body is in continuous motion as it appears to have been so in this case. Accordingly, the Commission is not as disturbed by Petitioner's initial failure to mention that his left knee was twisted when he experienced a "pop" to that knee than was the presiding Arbitrator. The Commission finds Petitioner satisfied his burden of showing that his accident arose out of and in the course of his employment, specifically, while he was transferring a case of lettuce onto a pallet.

The injury to Petitioner's left knee caused by his May 17, 2014 accident resulted in his initially treating at St. Alexius Medical Center on the day of the accident and then transferring his care to Barrington Orthopedic Specialists. It was as a result of him treating at Barrington Orthopedic Specialists that he underwent an MRI of his left knee at Salt Creek Medical Imaging on May 29, 2014. The MRI revealed, among other things, a subtle tear of the posterior horn of the medial meniscus. The subsequent surgery on July 10, 2014, to repair this tear confirmed the presence of the medial meniscus tear and also revealed a lateral meniscus tear. Postoperatively, Petitioner undertook physical therapy with Barrington Orthopedic Specialists. The Commission finds a clear chain of events that causally connect Petitioner's May 17, 2014 accident to his need

for the medical treatment he received to address the injuries caused by the accident.

As noted immediately above, Petitioner underwent surgery upon his left knee on July 10, 2014 with the medial and lateral meniscus tears being repaired as a result. The surgery, per the Barrington Orthopedic Specialists medical records, left Petitioner unable to perform any work activity from July 14, 2014 through August 25, 2014. As of August 26, 2014, Petitioner was permitted to ease back into performing his normal work activities as he was instructed to work only eight hours for the first two weeks following his return to work. After those two weeks, Petitioner was permitted to resume working without restrictions. Though there was no medical record that precluded Petitioner from working from the date of surgery, July 10, 2014 to the date he was formally excused from working, the Commission believes Petitioner was more likely than not also unable to work as of the date of the surgery through July 14, 2014, the date of Petitioner's first postoperative visit to his treating doctor at Barrington Orthopedic Specialists. Petitioner, following his knee surgery on July 10, 2014, was temporarily totally disabled from that date through August 25, 2014.

Petitioner was discharged from rehabilitation on August 29, 2014, three days after he returned to work. Subjectively, he indicated that he had no pain while performing activities of daily living, had returned to work with no complications, was capable of standing for long periods of times as well being able to squat and go up and down stairs. Objectively, Petitioner was found with 5/5 strength in his lower extremities and bilateral flexion to 140°. No complaints of pain or discomfort appears to have accompanied the objective examination of his left knee. Petitioner was found to have met all functional goals and his left knee to be 96% functional. It is uncertain if that assessment of functionality was based on Petitioner's assessment or his therapist's.

Ten weeks after Petitioner's knee surgery and, approximately one month after he returned to work, on September 22, 2014, he returned to Barrington Orthopedic Specialists for a postoperative evaluation. He complained of left-sided knee pain but reported improvement with physical therapy and his home exercise program. He also noted that he did not experience any problems returning to work. The examination noted effusions, swelling, and tenderness were absent to Petitioner left knee with only mild crepitation present. The examination also revealed the range of motion of Petitioner's left knee was unimpaired and pain-free. Petitioner, at this visit, was found by his treating doctor to be at maximum medical improvement ("MMI") and capable of returning to work without restrictions. Petitioner's medical records cease with this September 22, 2014 visit.

By the time Petitioner completed treatment to address the injuries sustained by his May 17, 2014 accident, he had incurred $24,444.51 in medical expenses. Evidence introduced in the form of billing statements revealed St. Alexius Medical Center billed $12,808.97, Barrington Orthopedic Specialists billed $10,485.54, and Medical Center Anesthesia billed $1,150.00. Notice is taken that the Request for Hearing indicated the bill from Barrington Orthopedic Specialists was $13,988.00, but the Commission is unable to reconcile that amount from the billing statement introduced by Petitioner that indicated only $10,485.54 was charged for his treating with Barrington Orthopedic Specialists.

Petitioner testified on May 23, 2017 about the lingering effects of his injuries. He

19IWCC0395

testified to experiencing "[o]ccasional stiffness, some tender feelings." These residual complaints do represent a permanent impairment that is compensable under the Act.

The criteria for determining PPD pursuant to Section 8.1b of the Act is applicable in this case as Petitioner sustained accidental injuries on May 17, 2014. The Commission applies the criteria set forth in Section 8.1b(b) as follows:

i) Neither party obtained secured a permanent partial disability impairment report; in the absence of such a report, the Commission places no weight to this factor;

ii) Petitioner is a forklift operator, just as he was at the time of his accident; Petitioner testified that being a forklift operator is a physically-demanding job and also that he moves cases weighing between two and thirty pounds by hand throughout his workday; the Commission places some weight on this factor;

iii) Petitioner was 50 years old at the time of his injury; Petitioner's age means that he will likely continue to experience the as-testified-to stiffness and tenderness for a prolonged period of time; the Commission places some weight on this factor;

iv) No evidence was provided concerning Petitioner's future earning capacity; in the absence of such a report, the Commission places no weight to this factor; and

v) There is no evidence of disability corroborated by the treatment medical records save for an unspecified complaint of left-sided pain made by Petitioner on September 22, 2014; Petitioner's rehabilitation discharge note, dated August 29, 2014, indicated he had no complaints of discomfort or impairment and assessed him as having full range of motion and full strength in his left knee; Petitioner's final examination note, dated September 22, 2014, indicated he complained of pain of unknown quality to the left-side of his knee, but the physical exam elicited no complaints of pain or tenderness and resulted in him being declared at maximum medical improvement and being allowed to return to work without restrictions; the Commission places significant weight on the medical records.

Petitioner's most recent medical records and the lack of any treatment subsequent to September 22, 2014 and his successful return to work implies that he experienced a complete recovery from the May 17, 2014 accident that resulted in tears to the medial and lateral menisci in his left knee. His testimony of experiencing only occasional stiffness and some feeling of tenderness is all that prevents the Commission from finding that he experienced a recovery without any residual aftereffects.

Petitioner seeks a permanency award under Section 8(e) of 30% loss of use of the left leg, claiming that he experienced increased symptomology in his left knee after returning to work as a forklift operator. Referring back to Petitioner's medical records dating back to the time he was released to resume working, Petitioner was never recorded as experiencing increased symptomology as result of his return to work. Those records explicitly contradict that claim. Petitioner's testimony mirrors his medical records as it also contains no claim that his return to

19IWCC0395

work exacerbated the symptoms in his left knee. An award of 30% loss of use the left leg is not justified. The Commission finds proper compensation under Section 8(e), given the medical records and Petitioner's testimony as noted above, to be 15% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $398.29 per week for a period of 6-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $358.44 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of the left leg

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $24,444.51 for medical expenses under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,900.00. 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: JUL 29 2019
DLS/mav
O: 05/21/19
46

Thomas J. Tyrrell

Barbara N. Flores

DISSENT

Petitioner, on May 17, 2014, sustained an injury to his left knee, that based on the records most contemporaneous to the time of the injury indicate that the injury, under the Act, did not arise out of and was not in the course of his employment with Respondent. For this reason, I respectfully dissent from the opinion of the majority and would have affirmed and adopted the Decision of the Arbitrator in its entirety.

A First Report of Near-Miss/Incident/Food-Incident was completed on May 17, 2014 that had Petitioner stating that he "was picking up item 56292's [sic] when I felt my left knee 'pop'."

19IWCC0395

In the portion of the report completed by Petitioner's supervisor, the supervisor wrote, "[Petitioner] told me he didn't do anything out of the ordinary, he was just picking product like he does every day." Even a cursory review of this report fails to reveal Petitioner made reference to any specific body movement that could be attributable to his experiencing a "pop."

Petitioner presented to the emergency department of St. Alexius Medical Center approximately three-and-half hours after his injury and described to Nathan Rud, the physician's assistant attending to him, the circumstances as to how he came to be injured. It was recorded, "[Patient] states he heard a 'pop' while standing at work today."

It wasn't until Petitioner was seen by Dr. Sean Jereb at Barrington Orthopedic Specialists on May 21, 2014 was there any indication that the condition of his left knee was attributable to his work activities. Dr. Jereb chronicled the injury being the result of Petitioner twisting his left knee while moving boxes at work. It is unclear in the medical notes whether this was Petitioner's description or the doctor's interpretation.

No explanation was offered as to why four days passed before Petitioner provided a history that involved his work activities. The First Report of Near-Miss/Incident/Food-Incident gives no indication that Petitioner was in such pain as to distract him from providing a detailed history as to what had just occurred. To the contrary, the report indicates Petitioner intended to go home to get his wife before proceeding to the hospital rather than going directly to the hospital. Furthermore, the report indicated Petitioner's spirit was "upbeat" while he was in his supervisor's office making the report of the accident. At St. Alexius Medical Center, no record was made of Petitioner being in distress such that he was unable to relate what had happened to him. He was noted to be awake and alert and oriented times three and speaking coherently. Petitioner's ability to complete the First Report of Near-Miss/Incident/Food-Incident and to communicate coherently with his supervisor, to not go directly for emergency treatment, and again be able to coherently communicate with the personnel at St. Alexius Medical Center implies that he should have been able to articulate, on the day of the accident, that his knee "popped" as a result of his twisting while moving boxes. Instead, that history did not emerge until four days after the accident.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0395

STANLEY, JAMES D
Employee/Petitioner

Case# **14WC020075**

FRESH EXPRESS
Employer/Respondent

On 7/26/2017, 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 1.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5625 GRAUER & KRIEGEL LLC
ANDREW J KRIEGEL
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

2461 NYHAN BAMBRICK KINZIE & LOWRY
JAMES P TOOMEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

19IWCC0395

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES D. STANLEY,
Employee/Petitioner

Case # **14 WC 20075**

v.

Consolidated cases: **N/A**

FRESH EXPRESS,
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 **GEORGE ANDROS**, Arbitrator of the Commission, in the city of **CHICAGO**, on **May 23, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/17/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,064.80**; the average weekly wage was $**597.40**.

On the date of accident, Petitioner was **50** 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 $2,638.38 for TTD, $0 for TPD, $0 for maintenance, and $7,145.78 for medical benefits paid, for a total credit of $**9,784.16**.

Respondent is entitled to a credit of $5,414.91 under Section 8(j) of the Act.

ORDER

Denial of benefits

The Petitioner did not sustain an accident in the course and scope of his employment.
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.

#01 George J. Andros
Signature of Arbitrator

7/24/17
Date

JUL 26 2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

19IWCC0395

Respondents' Proposed Findings of Fact

Petitioner, James D. Stanley, testified under direct and cross-examination before the Arbitrator. Petitioner testified that he was 53 years old, and that he received his high school diploma in 1981. (T. 7). Petitioner testified that he had been employed by Fresh Express for approximately 5 years as of the alleged date of accident of May 17, 2014. (T. 8). He testified that he is still employed at Fresh Express as a forklift operator. He testified that his job duties as a forklift operator consisted of picking and loading, unloading, and putting away. (T. 9). He testified that he gets on and off the forklift and transfers boxes from one pallet to another. (T. 9). Petitioner testified that the boxes could range from 2 pounds to 30 pounds. (T. 10).

Petitioner testified that he sustained an injury while working at Fresh Express on May 17, 2014. He testified that he stopped at a location and picked up the product that he needed to pick. (T. 10-11). He testified that when he was transferring the product to another pallet, he felt a popping in his left knee. (T. 11). Petitioner testified that he reported this injury to his supervisor, Pat DeDio, and that the supervisor had him fill out an incident report. (T. 11).

Petitioner testified that he presented to the emergency room at St. Alexius Medical Center with his wife, as he could not drive to the emergency room from work. (T. 12). He testified that after discharge from the emergency room, he sought treatment with his orthopedic doctor, Dr. Jereb at Barrington Orthopedics. He testified that he reported to Dr. Jereb that he injured his knee while transferring boxes from one pallet to another. (T. 13-14). Petitioner testified that Dr. Jereb ordered an MRI, and that Dr. Jereb recommended surgery on his left knee. (T. 14-15). Petitioner testified that he underwent physical therapy after surgery in July 2014, and that he returned to work in approximately 6 weeks. (T. 15).

Petitioner testified that prior to the May 17, 2014 injury, he had previously injured both knees at Fresh Express. He testified that he had stiffness in his left knee and some discomfort prior to the alleged accident of May 17, 2014. (T. 15-16). He testified that after the alleged accident of May 17, 2014, he experienced pain and swelling in the left knee, and that it was difficult to walk. (T. 16). Petitioner testified that he currently experienced some stiffness and tender feelings in his left knee. (T. 17).

On cross-examination, Petitioner agreed that he truthfully reported all of his symptoms and past medical history to all of his medical providers in this matter. (T. 18). He testified that there were no witnesses to the alleged accident. (T. 19). Petitioner was presented Petitioner's Exhibit 6, a Fresh Express "Near-Miss" report. He testified that he was picking Item 56292 when he experienced pain in his left knee. (T. 20). He testified that Item 56292 was a lettuce product, and that each case weighed approximately 15-20 pounds. (T. 20). He testified he did not recall how many cases he had transferred onto the pallet prior to feeling his left knee pop. (T. 20). He testified that the case was about stomach high, or 3 feet, off of the ground when he picked it up. (T. 21). Petitioner testified that he placed it onto the pallet at approximately 2 ½ feet. He did not recall feeling a "pop" in his left knee prior to the incident on May 17, 2014. (T. 21).

Petitioner testified that he would disagree with the classification of accident in the St. Alexius Emergency Room record that he heard a pop while standing at work. (T. 21-22). Petitioner admitted that when he saw Dr. Jereb on May 21, 2014, he did not tell Dr. Jereb about his previous two workers' compensation cases relative to a left knee injury. He also admitted that he did not tell him he had previously undergone an MRI of the left knee on September 20, 2010. (T. 22-23). Petitioner testified that he was not sure if he told Dr. Jereb that he had come under the care of Dr. Christos Giannoulias for the left knee condition, but that he believed he had a conversation with Dr. Jereb about Dr. Giannoulias' prior surgical recommendation on the left knee as of September 28, 2010. (T. 23). Petitioner testified that if the conversation was not included in Dr. Jereb's medical records, he had no reason to disagree with Dr. Jereb's note taking. Petitioner testified that he believed he told Dr. Jereb that he had treated with Dr. Telly Psaradellis for the left knee condition, but likewise he did not disagree with Dr. Jereb's note taking. (T. 24). Petitioner testified that no options other than surgery were discussed with Dr. Jereb. (T. 26). He admitted that he had not told Dr. Jereb about prior knee injuries. (T. 27).

Petitioner testified that he recalled going to an independent medical evaluation scheduled by Respondent, but he did not recall Dr. John Cherf by name. (T. 28). He testified that his group medical insurance, which paid for the left knee surgery, was Blue Cross/Blue Shield as paid through his union, Central States Joint and Welfare. (T. 29). Petitioner testified that Fresh Express made payments for his insurance to the union. (T. 29).

Petitioner testified that he previously testified before Arbitrator Cronin on July 17, 2013 for three prior workers' compensation cases. He admitted that all of these cases were for left and right knee conditions. (T. 33).

Petitioner testified he recalled previously testifying that he needed to constantly stretch his legs or get up and walk, and that he could not walk more than two or three blocks without starting to feel discomfort in his knees. (T. 34). He testified that he also recalled previously testifying going up and down stairs gave him pain and that he had stiffness every day. (T. 34). Petitioner admitted that just prior to the alleged accident on May 17, 2014, he had stiffness similar to his testimony on July 17, 2013. (T. 34-35). He also admitted to receiving a prior award for the prior three claims before the Commission. (T. 36).

Petitioner testified that he recalled alleging accidental injuries to his left knee while picking a case and twisting on or about October 12, 2011. (T. 38). He also recalled alleging an injury to his right knee on February 25, 2012 while picking cases. (T. 38). Petitioner testified that he had treated with Dr. Jereb recently for his right knee, starting in October 2015. (T. 38). He testified that he underwent surgery for the right knee. Petitioner testified that he originally alleged a work accident with regard to a pivoting motion to his right knee. (T. 38-39). Petitioner admitted that he later said that his right knee condition was not due to a work-related accident, and that "we just left that alone without being at work." (T. 39).

Petitioner testified on cross-examination that as he sat for testimony, his left knee condition was "better" than it was when he last testified on July 17, 2013. (T. 39). He testified that his left knee was better because he had the surgery and therapy, and that he has had consistent exercise to keep his knee strengthened. (T. 39). Petitioner testified that he did not have the same amount of stiffness as previously. (T. 39-40). Petitioner testified that he was currently 5'7" tall and weighed 226 pounds.

On re-direct examination, Petitioner testified that he reported to St. Alexius Medical Center on May 17, 2014 that he was picking cases and heard and felt a pop when he turned to put a case on a pallet. (T. 41). Petitioner testified that he did undergo an independent medical examination with a doctor for the first injury. (T. 42-43). He testified that he had not treated with either Dr. Giannoulias or Dr. Psaradellis for more than a year prior to the alleged accident on May 17, 2014. (T. 43). Petitioner testified that his symptoms increased in his left knee after the May 2014 occurrence because he needed crutches to get around. (T. 43-44).

The Arbitrator reviewed Petitioner's Exhibit 1, which were certified records from St. Alexius Medical Center. The nursing intake noted that the left knee was painful and swollen, and that range of motion was limited secondary to pain. This entry was input by GW at 4:08 p.m. The triage narrative recorded by VHR at 3:30 p.m. indicates "Pt states he heard a "pop" while standing at work today." Petitioner was examined by Nathan D. Rud, PA. He underwent x-rays of the left knee, which showed no acute fracture or dislocation. PA Rud diagnosed a left knee sprain and prescribed Norco 5/325, crutches, and a knee immobilizer. (PX1).

The Arbitrator notes that Respondent's Exhibit 2 is a more complete copy of Petitioner's medical treatment with Barrington Orthopedic Specialists, as it was prepared on May 18, 2017. (RX2). Petitioner presented to Dr. Sean Jereb on May 21, 2014, complaining of moderate medial left knee pain. (RX2, pg. 12). Petitioner reported moving boxes at work and twisted his left knee, developing immediate left medial knee pain. (RX2, pg. 12). On examination, Dr. Jereb noted swelling, decreased mobility, and medial joint line tenderness of the left knee. Petitioner had a guarded McMurray's test. (RX2, pg. 13). Dr. Jereb ordered x-rays of the left knee and an MRI without contrast of the left knee. (RX2, pg. 14). He placed Petitioner on seated duty.

Petitioner underwent a left knee MRI at Salt Creek Medical Imaging of Hinsdale on May 29, 2014. The radiologist interpreted increased signal within the menisci that appeared predominantly degenerative and reactive. (RX2, pg. 114). He noted abnormal signal within the posterior horn of the medial meniscus consistent with degeneration and subtle tear. He did not appreciate a definitive lateral meniscal tear. The radiologist also appreciated bipartite appearance of the patella, as well as infrapatellar and distal quadriceps tendinopathy. The radiologist noted a mild sprain of the medial collateral ligament. (RX2, pg. 115). Finally, the radiologist appreciated mild tricompartmental degenerative changes, most prominently involving the patellofemoral joint, with a joint effusion which could be related to prepatellar bursitis or reactive. (RX2, pg. 115).

Petitioner returned to Dr. Jereb on June 2, 2014. (RX2, pg. 16). The Arbitrator notes that Petitioner made no reference to any prior injuries to his left knee in either the May 21, 2014 report or the June 2, 2014 report. Dr. Jereb reviewed the MRI and diagnosed a medial meniscal tear. On examination, he now noted a positive McMurray's on the medial side. (RX2, pg. 17).

Dr. Jereb indicated that he discussed nonsurgical and surgical treatment, and ultimately recommended a left knee arthroscopy for the meniscal tear. Dr. Jereb maintained seated duty restrictions. (RX2, pg. 17). On June 16, 2014, Petitioner reported ongoing left knee pain and that his surgery had been denied by workers' compensation. (RX2, pg. 19). Dr. Jereb noted that Petitioner wished to proceed with surgery under his health insurance. Dr. Jereb agreed to proceed with surgery, which was conducted at St. Alexius Medical Center on July 10, 2014.

The Arbitrator reviewed the operative report, noting a preoperative diagnosis of left knee medial meniscal tear and post-operative diagnosis of left knee medial meniscal tear, lateral meniscal tear. Dr. Jereb noted a small flap tear of the body of the lateral meniscus which was saucerized to a stable rim using basket forceps as well as a full resector. (RX2, pg. 110). Dr. Jereb also appreciated a flap tear of the medial meniscus at the junction of the body in the posterior horn, which was saucerized to a stable rim using basket forceps as well as a full resector.

The Arbitrator reviewed a rehabilitation evaluation prepared by Neha N. Chavda, PT, DPT, dated July 15, 2014. This record is the *first time* Petitioner made any reference to his initial injury approximately 4 years earlier. (RX2, pg. 22). Petitioner returned to Dr. Jereb on July 16, 2014 for his post-operative examination. Again, no past medical history was relayed to Dr. Jereb as to the left knee condition. Dr. Jereb recommended physical therapy and kept Petitioner off work. (RX2, pg. 25-27).

On August 13, 2014, Petitioner returned to Dr. Jereb, reporting good improvement with physical therapy and home exercises 4 weeks post-operatively. (RX2, pg. 41). Dr. Jereb recommended 2 more weeks of physical therapy with transition to 2 weeks of work conditioning, and kept Petitioner off work. (RX2, pg. 43). On August 25, 2014, Mr. Stanley returned to Dr. Jereb, who released him to regular work without restrictions. (RX2, pg. 50). The Arbitrator notes that Petitioner was discharged after 18 sessions of physical therapy at Barrington Orthopedic Specialists on August 29, 2014. (RX2, pg. 52-53).

Petitioner returned to Dr. Jereb on September 22, 2014, reporting good improvement with physical therapy and home exercises. He reported returning to work without problems. (RX2, pg. 54). On examination, Dr. Jereb noted no tenderness about the left knee, with mild crepitation of the left patella. Range of motion was 0 to 130 degrees with no pain, and passive range of motion was likewise pain free. (RX2, pg. 55). Dr. Jereb released Petitioner from care and placed him at MMI. (RX2, pg. 56).

Petitioner did not seek treatment with Dr. Jereb again until June 15, 2015, again complaining of left knee pain. (RX2, pg. 57). He reported his symptoms were nontraumatic and began 5 days earlier, and were sharp and throbbing. He reported noticing pain and swelling. (RX2, pg. 57). Dr. Jereb ordered x-rays of the left knee, and diagnosed bilateral bipartite patellae, mild to moderate tricompartmental osteoarthritis on the left. (RX2, pg. 59). Dr. Jereb again discharged Petitioner PRN and provided a home exercise program. (RX2, pg. 60).

On October 24, 2015, Petitioner returned to Dr. Jereb, reporting a work injury to his right knee as a result of a pivoting motion. (RX2, pg. 61). He complained of pain in the medial aspect of the right knee. Dr. Jereb's physician's assistant, James Weston, ordered an MRI of the right knee, which was performed on October 26, 2015 at Hoffman Estates MRI. (RX2, pg. 64,112). The radiologist diagnosed a horizontal cleavage tear of the posterior horn of the medial meniscus with a moderate joint effusion, as well as cartilaginous fissure at the talar apex. (RX2, pg. 112). On October 28, 2015, Petitioner returned to Dr. Jereb who recommended surgery. (RX2, pg. 65-67). Of note, Dr. Jereb recorded that Mr. Stanley's right knee condition was acute nontraumatic on the October 28, 2015 report. (RX2, pg. 65).

Dr. Jereb performed surgery at Hoffman Estates Surgery Center on November 3, 2015. (RX2, pg. 108). Dr. Jereb performed a partial medial meniscectomy as well as a partial lateral meniscectomy. Of note, in the rehabilitation evaluation by Nausheen Haroon, PT, DPT, Petitioner stated he had swelling in his knee one day and then went to work like normal the next day. (RX2, pg. 68). Petitioner reported that after the week was over, his knee kept buckling, resulting in his seeking medical treatment. (RX2, pg. 68). Petitioner underwent a course of therapy and was discharged by Dr. Jereb on December 16, 2015. (RX2, pg. 103).

Prior Medical Treatment

The Arbitrator reviewed the medical records from G&T Orthopedics and Sports Medicine, as well as an MRI from Athletic Imaging dated September 20, 2010. (RX4). The MRI of the left knee was interpreted by the radiologist as showing a nondisplaced horizontal oblique tear of the posterior horn of the medial meniscus communicating with the inferior articular surface in the medial compartment. (PX7). The radiologist noted mild bony edema of the anterior and posterior aspect of the medial tibial plateau, which was consistent with bony contusions. (PX7). The radiologist also noted a bipartite patella with some edema at its articulation with the lateral femoral trochlea. There was also a moderate joint effusion. (PX7).

On September 28, 2010, Petitioner presented to Dr. Christos Giannoulias complaining of a crush injury between a forklift and pallet. (RX4). Petitioner complained of swelling and pain in the medial aspect of his knee, with a catching sensation and pain and swelling. Dr. Giannoulias conducted an examination, noting tenderness over the medial joint line, pain with circumduction and pain with McMurray's maneuver. He reviewed the MRI and noted soft tissue edema posteriorly as well as a medial meniscal tear. Dr. Giannoulias recommended starting physical therapy to get swelling under control and range of motion. He noted that ultimately, Petitioner would need arthroscopy to address the medial meniscus as his symptoms have been symptomatic and painful with circumduction, as well as with flexion and extension. (RX4).

The Arbitrator additionally reviewed medical records from Midland Orthopedic. (RX5). On November 2, 2010, Petitioner presented to Dr. Telly Psaradellis complaining of injuries to his bilateral lower extremities. He complained of bilateral knee pain, left worse than right, as well as left lower extremity swelling that was activity related. On examination, Dr. Psaradellis noted hypersensitivity to touch involving both lower legs with subjective feelings of numbness to light touch involving the medial aspect of the left lower leg. Dr. Psaradellis reviewed MRIs of the right and left knee. He appreciated bone contusions involving the tibial plateau on the right knee. Reviewing the MRI of the left knee, Dr. Psaradellis visualized a nondisplaced tear involving the posterior horn of the medial meniscus, as well as bony contusions involving the femur and tibia. Dr. Psaradellis did not believe Petitioner's medial meniscal tear on the left knee was responsible for his symptoms, as he felt the most troublesome symptoms were probably neurogenic in nature. He prescribed Lyrica as well as thigh high TED hose to help with the left lower extremity edema. He ordered Petitioner off work with a follow-up in one month. (RX5).

Petitioner returned to Dr. Psaradellis on November 30, 2010, reporting that he was getting stronger with physical therapy and that the TED hose was helping. On January 4, 2011, Dr. Psaradellis appreciated 1+ pitting edema on the right lower extremity and 2+ pitting edema on the left lower extremity. He opined that Petitioner likely sustained some venous injuries as a result of the crush accident and that the swelling in his legs could be permanent. He recommended continued use of the TED hose and finishing physical therapy, with tapering off of Lyrica. (RX5).

On February 8, 2011, Petitioner reported returning to work 8 hours a day and was doing well for the most part. On March 8, 2011, Dr. Psaradellis released Petitioner to full-time full duty work. He noted that Petitioner continued to have stiffness and swelling in his knees, particularly the left knee.

Petitioner returned to Dr. Psaradellis on April 5, 2011, complaining of left knee pain which got bad enough to take a Vicodin. Dr. Psaradellis appreciated a trace effusion in both knees. He offered a cortisone injection, but Petitioner rejected it at this time. He recommended Aleve in addition to Tramadol.

On October 18, 2011, Petitioner returned to Dr. Psaradellis reporting that the week prior, he was lifting something at work and experienced a severe sharp pain in his left knee. He took one week off of work, as he was unable to continue working when he experienced the left knee pain. Dr. Psaradellis indicated that Petitioner simply had a flare up of his knee problem, which seemed as if it was subsiding, and he released Petitioner to full duty work on October 20, 2011. On March 6, 2012, Petitioner returned to Dr. Psaradellis reporting a new injury with regard to his right knee, when he felt a pop in the right knee and felt his right knee buckle. Dr. Psaradellis indicated that Petitioner has *simply exacerbated his pre-existing right knee arthritis*. He indicated that the condition would calm down with a period of rest and oral anti-inflammatories. Dr. Psaradellis injected the right knee with a cortisone injection on March 13, 2012. Petitioner returned to Dr. Psaradellis complaining of bilateral knee pain, right worse than left, on March 12, 2013. He reported taking a lot of Ibuprofen to attempt to control the pain. Dr. Psaradellis opined that the condition was likely consistent with patellofemoral arthritis. He recommended cortisone shots to each knee. (RX5).

Testimony of Dr. John Cherf

On April 14, 2015, the parties participated in the evidence deposition of Dr. John Cherf. He was Board Certified in Orthopedic Surgery, and that he did Sports Medicine including knee and shoulder surgeries. (RX1, pg. 6). Dr. Cherf indicated that he examined Mr. Stanley twice, first on July 21, 2014 and then on October 15, 2014.

Dr. Cherf testified that he first examined Petitioner on July 21, 2014. (RX1, pg. 13). He indicated that Petitioner relayed a history of picking up cases of lettuce weighing approximately 20 pounds and moving them from his right to his left, when he noticed or felt a pop in his left knee. Dr. Cherf indicated that he was aware of the prior 2010 work injury and an MRI from September 20, 2010. (RX1, pg. 15). Petitioner reported to Dr. Cherf that his left knee pain was 3/10 with function of 70%. Dr. Cherf testified that the Petitioner relayed working as a forklift driver for Respondent. (RX2, pg. 16). Dr. Cherf testified that he performed an examination, noting approximately 20 ml of effusion of the left knee with range of motion from 0 to 100 degrees. He also noted tenderness along the heel, posterior lateral joint line tenderness. (RX1, pg. 17). Dr. Cherf testified that the examination was somewhat limited due to Petitioner's undergoing surgery on July 10, 2014. (RX1, pg. 18).

Dr. Cherf ordered an x-ray series and appreciated a bipartite patella bilaterally, with early osteoarthritis of both knees, greater in the left. (RX1, pg. 19-20). He noted Petitioner had primary idiopathic osteoarthritis. Dr. Cherf testified that he reviewed the MRI scan from May 29, 2014, and that he agreed with the radiologist's report that Petitioner had a bipartite patella, osteoarthritis, and possible medial meniscus tear. He testified that the mild sprain of the MCL on the MRI was not supported by clinical examination. (RX1, pg. 21-22). He also noted that tendinopathy was age appropriate and likely asymptomatic. Dr. Cherf testified that he also reviewed both the MRI scan and report from September 20, 2010. He interpreted soft tissue edema, a bony contusion, meniscal tear, bipartite patella, and extensor mechanism tendinosis. (RX1, pg. 22-23). He testified that he diagnosed Petitioner status post left knee sprain/strain and 11 days post-op from arthroscopic surgery. (RX1, pg. 26).

Dr. Cherf testified that there was "not a ton of difference" between the two MRIs, and that if anything, the May 29, 2014 MRI showed less pathology because there was no soft tissue edema and bony edema from the crush injury. He testified that Petitioner had a sprain/strain of the left knee based upon the mechanism of injury relayed, and that it was unlikely that the injury would have caused a permanent aggravation. (RX1, pg. 27-28).

Dr. Cherf testified that popping in the knee was very common in patients with osteoarthritis, that they would experience catching and popping with low energy injuries such as standing and twisting. He indicated that these conditions usually settled down, and that he would treat them with a cortisone injection. (RX1, pg. 28). He also testified that the older the patient, the longer it would take for an individual's exacerbation to calm down. (RX1, pg. 28-29). He felt that in Petitioner's age bracket, an individual with a sprain/strain of the knee would reach MMI in 3-4 months or sooner. (RX1, pg. 29).

Dr. Cherf testified that individuals such as Petitioner rarely respond nicely to surgical intervention in such circumstances. (RX1, pg. 29-30). Dr. Cherf testified, "There is more and more data coming out that patients such as Mr. Stanley, known osteoarthritis, degenerative meniscal tear do very well without surgery as he had been doing. We know he had this pathology for a minimum of 3 ½ years pre this injury based on the MRI from 2010." (RX1, pg. 31-32). Dr. Cherf also testified that the crush injury in 2010 likely did not cause the arthritis identified in the MRI. (RX1, pg. 32). He testified that had Petitioner not undergone arthroscopic surgery, he would have been able to return to work relatively quickly. (RX1, pg. 33).

Dr. Cherf testified that he also performed an independent medical reevaluation and impairment rating on Petitioner on October 15, 2014. (RX1, pg. 33). He testified he had an opportunity to review additional medical documentation, including the operative report from July 10, 2014. Dr. Cherf testified that none of the additional information or the examination of Petitioner on October 15, 2014 changed his opinions from July 21, 2014. (RX1, pg. 37). He testified that he performed an impairment rating according to the AMA Guides Sixth Edition. Dr. Cherf diagnosed a muscle tendon strain based upon the knee regional grid, and as the class was zero, there were no grade modifications to make. He therefore arrived at a 0% impairment.

Dr. Cherf testified that recent studies are showing that partial meniscectomies do not offer a lot of benefit with individuals with a bucket handle tear and locked knee. (RX1, pg. 53-54). He testified that he would probably not have operated on Petitioner. (RX1, pg. 54). He testified that he did not evaluate Petitioner in 2010, so he could not indicate whether the meniscal tear noted on MRI was symptomatic or asymptomatic at the time of the MRI. (RX1, pg. 55). He testified that he was not convinced that Petitioner sustained any meniscal injury on May 17, 2014. (RX1, pg. 56). He testified that recommending surgery 2 weeks post-injury from a low energy minor injury on a 51-year-old with arthritis and meniscal pathology was pretty aggressive. (RX1, pg. 56-57). He indicated that his concern was whether Petitioner had enough time for his knee condition to settle down prior to a recommendation of surgery. (RX1, pg. 57). Dr. Cherf testified that it would be extremely unlikely that the injury alleged on May 17, 2014 would aggravate the prior knee condition. He felt it was possible it had exacerbated temporarily the knee condition. (RX1, pg. 58).

Dr. Cherf testified that it was 100% inappropriate for a physician to opine on disability, and that a physician should only determine impairment based upon the AMA Guidelines. (RX1, pg. 60).

Testimony from Dr. G. Klaud Miller

The Arbitrator also reviewed the evidence deposition transcript from Dr. G. Klaud Miller dated October 15, 2012. (RX6). Dr. Miller testified that Petitioner demonstrated inconsistencies during his examination. (RX6, pg. 19-21). He diagnosed Petitioner with a non-physiologic pain syndrome which made no anatomical sense. (RX6, pg. 23). He testified that Petitioner suffered a left knee laceration and a contusion, and possibly a sprain. (RX6, pg. 24). He testified on cross-examination that Petitioner's age pre-disposed him to a meniscal tear, and that he did not note objective evidence of a tear. (RX6, pg. 32-34).

He testified that as of his examination, he did not believe Petitioner had a permanent venous injury as he noted no swelling on examination. (RX6, pg. 37-38). Dr. Miller testified that he reviewed the MRI of September 20, 2010, and diagnosed Grade 2 signal of the medial meniscus, which he did not believe was consistent with a tear. (RX6, pg. 45-46).

Procedural History of Prior Cases

The Arbitrator also had an opportunity to review the Commission's Decisions for the matters tried before Arbitrator Cronin on July 17, 2013. With regard to Case 15 IWCC 0400, the Commission found that Petitioner clearly sustained a crush injury to both legs, a posterior left knee laceration, and bilateral knees strains on September 12, 2010. (RX7, pg. 3). The Commission specifically determined that a preponderance of the evidence did not support a finding that Petitioner's symptoms were related to any meniscal tears he possessed in either knee as it pertained to an accident of September 12, 2010. The Commission indicated that a "chain of events" analysis was difficult in this circumstance as there could be multiple possible involved pathologies. (RX7, pg. 4). The Commission ultimately held, "Here, we believe the preponderance of the evidence indicates that while Petitioner may have strained both knees, we do not believe the evidence supports that his symptoms are the result of meniscal tears, and as such do not believe the evidence supports the causal relationship of any meniscal tears to the accident." (RX7, pg. 4). The Commission modified the permanency award of the Arbitrator, finding 10% loss of use of the left leg and 5% loss of use of the right leg. (RX7, pg. 4).

With regard to Case 15 IWCC 0401, the Commission reversed the Arbitrator and found that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on October 12, 2011. (RX8). The Commission found that the history of accident changed from a right knee injury when stepping off of a forklift to an injury while simply standing on a forklift. The Commission found that given the variety of histories of accident noted by Petitioner in his own testimony as well as the medical records, Petitioner lacked credibility and failed to prove an October 12, 2011 accident. (RX8, pg. 2).

The Arbitrator also reviewed the Commission's Decision on Case 15 IWCC 0402, where the Commission reversed the Arbitrator and found that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on February 25, 2012. Petitioner testified that he thought he was picking cases when he injured his right knee, and that his right knee did not twist with him. He then indicated he did not disagree with the medical record which stated he "transferred his weight wrong" while standing on a forklift.

The Commission found that Petitioner did not testify about whether it was something about the lift itself or its motion which caused his weight to shift, and as such, Petitioner has not proven accident by a preponderance of the evidence. (RX9, pg. 2).

The Arbitrator also reviewed the claimed outstanding medical benefits as referenced in Arbitrator's Exhibit 1. The Arbitrator notes that Petitioner claimed outstanding balances of $13,988.00 from Barrington Orthopedic Specialists, $12,808.97 from St. Alexius Medical Center, and $1,150.00 from Medical Center Anesthesia. Reviewing the medical bills in evidence shows that Petitioner's allegations of outstanding balances are inaccurate. RX2 shows that for treatment by Barrington Orthopedic Specialists related to the left knee, an outstanding balance of $154.91 remained owing as of May 18, 2017. Additionally, PX4 shows that St. Alexius Medical Center had an outstanding balance of $44.03 after taking into account all payments and adjustments. Additionally, PX5 showed that Medical Center Anesthesia had a $0.00 balance as of the statement dated November 6, 2014. Respondent introduced RX11, an itemization of benefits paid by Central States Joint Board dated May 22, 2017, which showed total benefits paid of $5,782.11. The Arbitrator notes that the final entry to "Compass Healthcare Cons" for date of service of November 3, 2015 appears to be related to the surgery on the unrelated right knee, so the $367.20 paid should not be included. As such, it appears that $5,414.91 was paid for treatment related to the alleged May 17, 2014 accident.

Conclusions of Law

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

Based upon the totality of the evidence, including the testimony of Petitioner, Dr. Cherf, and the medical documentation included into evidence, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on May 17, 2014. Dr. Miller's opinion is not held as persuasive in the case at bar.

The Arbitrator notes that Petitioner testified that he experienced a pop in his left knee while transferring a 15-20 pound case of lettuce from one pallet to another. The Arbitrator notes that PX6 referenced Mr. Stanley's statement as follows, "I was picking Item 56292's when I felt my left knee "pop." At the time, the pain was sharp so I contacted my Supervisor who had me sit down and put ice on it." Petitioner's statement of accident does not reference a twisting of his knee, as he alleged at trial.

The Arbitrator also notes that Pat DeDio, Petitioner's supervisor, dictated a statement of accident in PX6. Mr. DeDio indicated, "James Stanley approached me and informed me that while picking Item 56292's he felt his left knee "pop". When James got off his lift he winced in pain. He told me he didn't do anything out of the ordinary, he was just picking product like he does every day." (PX6). Mr. DeDio also noted in event type, "The left knee is the same knee that James previously injured. James did not bump or bang his knee, he was making the same movements he does each day except this time he felt a "pop" in it." (PX6).

The Arbitrator notes that the initial medical report pertaining to the alleged accident of May 17, 2014 references Petitioner hearing a "pop" while standing at work. This does not reference bending, twisting, lifting, or any activities that are beyond the daily activities of the general public. Additionally, while questioned on the nature of the lifting and twisting of a case of lettuce, Petitioner testified that he moved the lettuce from a height of 3 feet to a height of 2 ½ feet.

Petitioner's testimony was not bolstered by any medical opinion attributing a causal connection between the alleged activities and the resulting meniscal tear. Dr. Jereb's medical records were silent on the issue of causation, while Dr. Cherf opined that the alleged twisting activity did not cause the meniscal tear. The Arbitrator finds as a matter of law the Petitioner did not sustain an accident that arose out of and in the course of his employment in the case at bar by a preponderance of the evidence.

After review of the evidence presented at trial, the Arbitrator finds that Respondent is due a credit for TTD paid of $2,638.38. Additionally, Respondent is entitled to its 8(j) credit of $5,414.91 based upon Petitioner's testimony that Respondent makes payments of premium toward the group medical insurance procured through his union. Finally, with regard to medical paid, the Arbitrator finds that Respondent is entitled to a credit of $7,145.78.

All other issues are moot.

14 of 14.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Almanza,
Petitioner,

vs. No. 12 WC 24285

19IWCC0396

Caterpillar, Inc.
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, nature and extent of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decision of the Arbitrator filed January 17, 2018, is hereby affirmed and adopted.

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

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

19IWCC0396

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

DATED: JUL 30 2019

Marc Parker

mp/wj
07-17-19
68

Deborah L. Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALMANZA, JOSE
Employee/Petitioner

Case# **12WC024285**

CATERPILLAR INC
Employer/Respondent

19IWCC0396

On 1/17/2018, 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 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:

2333 WOODRUFF JOHNSON & EVANS
LYNN TAYLOR
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2851 CATERPILLAR INC
ELIZABETH C LeBARON
PO BOX 348 A-11
AURORA, IL 60507-4340

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jose Almanza
Employee/Petitioner

v.

Caterpillar, Inc.
Employer/Respondent

Case # **12** WC **24285**

Consolidated cases: **N/A**

19IWCC0396

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 **Geneva**, on **December 6, 2017**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On April 19, 2012, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $33,424.04; the average weekly wage was $642.77.

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

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

Respondent *has* 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 $9,592.80 for other benefits, for a total credit of $9,592.80. AX1.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that he sustained a compensable accident at work on April 19, 2012.

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $428.51/week for 21 weeks, commencing July 16, 2012 through December 9, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 16, 2012 through December 6, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, based on the factors delineated in Section 8.1b of the Act, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $385.66/week for 43 weeks, because the injuries sustained caused Petitioner 20% loss of use of the left leg (knee) pursuant to Section 8(e) of the Act.

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

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

Signature of Arbitrator

January 16, 2018
Date

JAN 17 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Jose Almanza
Employee/Petitioner

v.

Case # 12 WC 24285

Consolidated cases: N/A

Caterpillar, Inc.
Employer/Respondent

19IWCC0396

FINDINGS OF FACT

A hearing was held in Petitioner's above-captioned case. Arbitrator's Exhibit[1] ("AX") 1. The issues in dispute in this case include whether Petitioner sustained a compensable accident on April 19, 2012 or April 20, 2012, Petitioner's entitlement to temporary total disability benefits commencing July 16, 2012 through December 9, 2012, and the nature and extent of Petitioner's injury. AX1. Specifically, Petitioner claims that his injury occurred on April 20, 2012, which Respondent disputes that date asserting that the incident, whether a compensable accident or not, occurred on April 19, 2012. *Id.* The parties have stipulated to all other issues. *Id.*

Background

Jose Almanza (Petitioner) testified that he was working for Caterpillar, Inc. (Respondent) as an Assembler on April 20, 2012. Tr. at 15-16. On that date, he was working in Zone Two. Tr. at 16. Petitioner had only been working in Zone Two for two or three weeks, so he was new to that zone. *Id.* Petitioner had been transferred to work in that zone due to an extended absence of another employee. *Id.* He was working in Zone Two with another employee, Crystal Aguilar ("Ms. Aguilar"). Tr. at 33-34. Although Respondent's records indicate that there was also another employee, Adrian Carrera-Cavada ("Mr. Carrera-Cavada"), working in Zone Two on that date, Petitioner did not recall working with another employee, or even know who Mr. Carrera-Cavada was. Tr. at 34.

Petitioner explained that he was falling behind while working in Zone Two. Tr. at 19. Petitioner was having difficulty hooking up and installing machine parts on the hydraulic tank. Tr. at 32. Anthony Propst ("Mr. Propst"), who had trained Petitioner in that zone, happened to be walking by Petitioner. Tr. at 16, 19. Petitioner asked Mr. Propst if he would help Petitioner, since he was new in Zone Two and was falling behind. Tr. at 19. Petitioner testified that Mr. Propst indicated he could briefly help Petitioner, but that he would have to hurry, as Mr. Propst had his own work to complete. *Id.*

As Mr. Propst began assisting Petitioner, who was on the factory floor working with a 25-pound manifold on a nearby table, Mr. Propst was up on the platform installing hoses. Tr. at 19-20. Petitioner testified that there were a couple of steps between where the table was located and the stairs used to get up on the platform. Tr. at 20; RX2. Petitioner testified that Mr. Propst told Petitioner that they needed to hurry up to complete the work on the platform. Tr. at 20. Petitioner testified that he needed to hurry to assist Mr. Propst so that they could keep up with the line. Tr. at 21. Petitioner then placed the manifold down on the table, and turned to hurry up

[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. Exhibits attached to depositions will be further denominated with "(Dep. Ex. _)."

over to the stairs and up onto the platform. Tr. at 20-21. As Petitioner was turning to rush up the stairs, he felt a pop and pain in his left knee. Tr. at 20-23.

Petitioner informed his supervisor, Josh Goodwin ("Mr. Goodwin") about the accident later that day. Tr. at 23. Petitioner testified that Mr. Goodwin asked whether Petitioner wanted to be seen by Respondent's medical staff. Tr. at 35-36. Petitioner declined and indicated he would take the weekend to see if his injury resolved. Tr. at 23. Petitioner thereafter filled out an accident report consistent with his testimony. RX1. An incident report filled out on May 1, 2012 also provided this same method of injury. RX4.

Petitioner's Employee Records, Incident Report, and Respondent's Medical Department Records

Respondent offered an "Employee Incident Log" into evidence with notes beginning on April 19, 2012 through June 4, 2012. RX3. An entry from Josh Goodwin ("Mr. Goodwin") dated April 19, 2012 reflects the following:

> On Thursday 4/19/2012 Jose Almanza came up to me at 2:45pm and said that he wanted to talk to me about his knee bothering him. I asked him what was wrong and he said that he walking and he felt a pop. I asked him what he was doing and he said just walking. Jose then said that he didn't need anything else and that he was going to go back to work. I asked him if he needed to go to medical and he said no. Jose stated that he wanted to see how things felt and keep working through it. I told him that he needed to go just to get checked out and he said that he was fine.

Id. The following day, Mr. Goodwin noted that he "followed up with Jose around 9:30am in zone 2 to see how he was feeling. Jose told me that he was sore but he was fine and that he would be able to still perform his job. I told him that I would continue to check up on him and see how things were progressing throughout the day and he said he would be ok." *Id.* Mr. Goodwin noted his discussions with Petitioner on April 20, April 23, April 26, and April 30, 2012. *Id.* On each date, Petitioner reported that he was sore, but still able to work. *Id.* Petitioner declined offers to be examined at Respondent's medical department. *Id.*

On May 1, 2012, Petitioner completed a Caterpillar Employee Incident Report. RX1 at 1, 8. In the report, Petitioner reported that the incident happened on April 20, 2012, while he was working in Zone 2, Building H. *Id.* Petitioner described the incident as follows:

> Zone 2, Going to walk back-up stairs platform, before reaching stairs left knee went backwards and snap[p]ed, felt pain on my knee, kept working told supervisor at end of shift, told him wait to see if pain would go away over weekend, he asked a few times during last wk. how was I doing, I told him still sore and hurts, he said keep him informed, then today he asked and I told him it still hurts and it bothers me when going-up and down stairs and kneeling and getting up, if I sit down then when I get up it bothers me but I can still walk ok. just uncomfortable. he sent me here today for those reasons.

Id.

On May 1, 2012, Petitioner also presented to Respondent's on-site medical department and saw a nurse, Susan Russell, R.N. ("Nurse Russell"). RX1 at 2. She noted the following in the narrative section of the "Initial Licensed Health Care Professional Assessment" report:

> Employee was walking + went to turn around + walk up some stairs when he stated that his left knee made a "popping noise" + it gave out – weakened on him. Noticed it on 4/20/12 + told his supervisor. Has had problems [with] soreness + stiffness ever since 4/20/12. Seeing Dr. Neu. S. Russell RN

19IWCC0396

Id. Petitioner was then examined by Dr. Neu[2], who noted that Petitioner's left knee hyperextended when walking normally across smooth concrete factory floor on April 20, 2012 and that he had taken multiple steps on the floor before the event. *Id.* Dr. Neu noted crepitus, but no effusion or swelling, full range of motion, negative McMurray's for pain, and stable ligaments. *Id.* Dr. Neu diagnosed Petitioner with left knee pain and imposed work restrictions. *Id.* He also instructed Petitioner to return on May 4, 2012 for x-rays. *Id.*

In connection with a safety investigation, Petitioner completed a second description of the incident on May 1, 2012. (RX 4) He again wrote that before he reached the stairs to the platform, his left knee went backwards and snapped. (RX 4) Respondent's Exhibit 2 contains photographs of the area taken by Respondent's safety investigator, Barry Quane. The photographs demonstrate that the floor between the work table (top left corner of photograph 1) and the stairs was smooth, level and without any defect.

Medical Treatment

On May 1, 2012, Petitioner presented for treatment with Respondent's medical staff. RX1. Petitioner provided a history on the initial assessment that he sustained the injury when he turned around and went to walk up a set of stairs. RX1. Examination revealed left knee pain and crepitus. RX1. Petitioner was placed on light duty restrictions. RX1. Petitioner followed up with Respondent's medical staff until he was referred for a consultation with an orthopedic surgeon. RX1.

Petitioner first presented for treatment with Dr. Steven Chudik ("Dr. Chudik") of Hinsdale Orthopaedics on June 1, 2012. PX2. Petitioner provided a history of injuring his left knee at work on April 20, 2012. *Id.* Petitioner indicated that his work was very fast paced and that he must hustle to get his job completed. *Id.* Petitioner indicated that he turned to walk back up a set of stairs when his knee buckled. *Id.* Petitioner attempted to take the weekend to see if his injury would resolve, but his knee pain continued. *Id.* Petitioner complained of persistent left knee pain, particularly with weight bearing, as well as trouble climbing and descending stairs. *Id.* Examination revealed tenderness to palpation of the left knee, pain with range of motion testing, and a positive McMurray's sign. *Id.* Dr. Chudik recommended an MRI and continued Petitioner's light duty work restrictions. *Id.*

Petitioner had an MRI of his left knee performed on June 5, 2012, at Hinsdale Orthopaedics. PX2. The MRI revealed a complex horizontal tear of the posterior body and posterior horn of the medial meniscus, as well as tendonitis of the distal per anserine tendons and slight joint effusion. *Id.*

Petitioner followed up with Dr. Chudik on June 11, 2012. PX2. Given the MRI findings, Dr. Chudik recommended arthroscopic surgery for the left knee medial meniscus tear. *Id.* Dr. Chudik continued Petitioner on light duty until the date of surgery. *Id.* Dr. Chudik further opined that Petitioner's left knee injury was caused by the April 20, 2012 work accident. *Id.*

Dr. Chudik performed Petitioner's left knee arthroscopy and partial medical meniscectomy on July 19, 2012, at Salt Creek Surgical Center. PX5. Dr. Chudik took Petitioner off work. PX2. Petitioner thereafter began a course of physical therapy at Advanced Physical Medicine of Yorkville. PX7. Petitioner thereafter continued

[2] Dr. Neu's credentials and full name are not identified in the record. RX1. However, the progress notes are initials by "MN[.]" *Id.*

the course of physical therapy with ATI. PX6. Petitioner continued to follow up with Dr. Chudik during this time, and was continued off work. PX2.

On October 16, 2012, Petitioner began a course of work hardening with ATI. PX6. At the completion of the work hardening program, Petitioner completed a functional capacity assessment, which determined he could lift at the very heavy demand level. *Id.*

Petitioner returned for a final evaluation with Dr. Chudik on December 5, 2012. PX2. Petitioner continued to note some left knee pain. *Id.* Dr. Chudik opined that Petitioner was at maximum medical improvement and was released to return to work full duty. *Id.*

Narrative Letter – Dr. Chudik

In a letter dated December 29, 2014, Dr. Chudik reiterated the treatment he rendered to Petitioner since June 1, 2012. PX3; PX4 (Dep. Ex. 2). Dr. Chudik opined that Petitioner's injury at work on April 20, 2012 caused a left knee medial meniscus tear that required surgery. *Id.* He further stated that Petitioner's history, mechanism of injury, MRI and the objective findings on physical examination supported his opinion that there was a causal connection. *Id.*

Evidence Deposition Testimony – Dr. Chudik

On May 18, 2015, Petitioner called Dr. Chudik as a witness. PX4. He provided testimony regarding the treatment rendered to Petitioner and his various opinions. *Id.* Dr. Chudik is a board-certified orthopedic surgeon. *Id.*, at 2-3; PX4 (Dep. Ex. 1).

Dr. Chudik understood Petitioner's mechanism of injury as follows: "He was standing on a platform, assembling hoses to put them on a fuel tank. He stated that assembly work required him to kind of hustle and work efficiently. He was going down the stairs from the platform to get a few co-workers to evaluate his work, he was moving quickly, and as he was going back up the stairs, he turned, took an awkward step, and stumbled. He felt his left knee buckle and felt a snap in his knee and had immediate pain." PX4 at 4. Dr. Chudik maintained his opinion that this mechanism of injury is competent to cause Petitioner's injury. *Id.*, at 4-5, 8-9.

On cross-examination, Dr. Chudik testified that the left knee MRI showed an acute meniscus tear that would be consistent with the mechanism of injury described. PX4 at 13-14. He stated that whether Petitioner was on a flat surface or stairs did not change his opinion. *Id.*, at 14. Dr. Chudik understood that Petitioner "had an awkward movement with his knee that gave him sudden pain and symptoms that on [Dr. Chudik's] objective findings on physical exam and MRI were all consistent with [Petitioner's] history and presentation to [Dr. Chudik], and even the objective evidence at surgery was consistent with an acute meniscus tear that happened in the time frame as this injury did." *Id.*, at 15-16.

Mr. Propst

Petitioner called Mr. Propst as a witness. Mr. Propst is currently employed at as a Shop Technician for BluCo. Tr. at 43. He previously worked for Comp Com, and prior to that, for Respondent. Tr. at 44. Mr. Propst testified that he began working for Caterpillar in 2010. Tr. at 44. He initially started working on the assembly line, but was later moved to a role as a non-traditional employee. Tr. at 44-45. During his time with Respondent, Mr. Propst explained that he had an opportunity to work on most, if not all, of the assembly zones. Tr. at 44-45.

19IWCC0396

On April 20, 2012, Mr. Propst was working as a non-traditional employee in the office. Tr. at 45. As he was crossing the assembly floor, Petitioner flagged him down and asked Mr. Propst to assist him to speed up his work on the line. Tr. at 45-46. Petitioner was concerned about the speed of his work as he was fairly new to Zone Two and was falling behind and unable to keep up with the other employees on the assembly line. Tr. at 46. Mr. Propst testified that Respondent was manufacturing between two to three tractors per day at that time. Tr. at 52. Mr. Propst testified that Aguilar was working with Petitioner in Zone Two on that date, and that because she was experienced in that zone, Petitioner was unable to keep pace with her. Tr. at 46-47. Prospt did not see Carrera-Cavada working in Zone Two while he was assisting Petitioner. Tr. at 56.

Mr. Propst agreed to help Petitioner brush up on how to do a few tasks so that Petitioner would be able to get up to speed. Tr. at 47. However, Mr. Propst indicated that he could only assist Petitioner for a few minutes so that he could return to his assigned duties. Tr. at 47. Mr. Propst helped Petitioner assemble a manifold and then began to show Petitioner what hoses were needed to finish the assembly up on the platform. Tr. at 47. Mr. Propst testified that he and Petitioner were working at a fairly quick pace. Tr. at 50.

While Mr. Propst was on the platform with his back turned toward Petitioner, he heard Petitioner make a noise as if he was in pain. Tr. at 49. Petitioner indicated that he felt a popping sensation in his knee, but wanted to continue working. Tr. at 49. Mr. Propst did not see exactly where Petitioner's knee injury occurred, but thought it may have occurred on the first step of the stairs up to the platform. Tr. at 49.

Mr. Propst testified that he was acquainted with Petitioner through work. Tr. at 45, 50. Prospt testified that he may speak with Petitioner "once in a blue moon," but he does not see Petitioner on a social basis. Tr. at 50.

Josh Goodwin

Mr. Goodwin testified on behalf of Respondent. Mr. Goodwin is employed as the employee relations manager for Respondent. Tr. at 58. He has worked for Respondent for about 12 years. Tr. at 58.

Around the time of Petitioner's accident, Mr. Goodwin was employed as the Section Manager for the assembly line. Tr. at 58. His job duties included managing production, which included ensuring that employees met their production goals. Tr. at 58-59. Employees could be disciplined if they fell behind on their production requirements. Tr. at 60. Mr. Goodwin testified that, at the time, the typical build schedule would result in building three-and-a-half tractors one day, and three-and-a-half tractors the next day, essentially completing three tractors on one day and four on the next day. Tr. at 78. On April 19, 2012, the assembly line built three tractors. Tr. at 65. On April 20, 2012, the assembly line built four tractors. Tr. at 65.

Mr. Goodwin testified that Petitioner informed him of an injury on April 19, 2012. Tr. at 68. Mr. Goodwin indicated that Petitioner told him that he was walking when he felt a pop in his knee. Tr. at 72. Mr. Goodwin testified that he did not know whether Petitioner was rushing or hurrying when the incident happened, as he did not witness the incident. Tr. at 72. He did not know how long Petitioner had been working in Zone Two when the accident occurred. Tr. at 82. He also did not know whether Mr. Propst had trained Petitioner in Zone Two, or if he assisted Petitioner with his work that day. Tr. at 82.

On May 1, 2012, Mr. Goodwin directed Petitioner to seek medical attention with Respondent's medical staff. Tr. at 74-75.

Additional Information

Petitioner testified that none of the medical bills related to care and treatment for his left knee injury were paid by Respondent. Tr. at 27. Petitioner testified that he hired an attorney to assist him with filing bankruptcy. Tr. at 27-28. A Discharge of Joint Debtors, naming both Petitioner and his wife, Maria Almanza, entered by The United States Bankruptcy Court, Northern District of Illinois, in Case Number 13-02202, on April 16, 2013, was submitted into evidence. PX10. Petitioner additionally submitted into evidence a letter from his bankruptcy attorney, Emi Morales Salazar, indicating that all debts incurred by Petitioner prior to the entry of the discharge of debtor's order were considered to be discharged, even if a debt had not been included on the matrix filed with the bankruptcy court. PX11. Petitioner testified that it was his understanding that the medical bills had been wiped out as a result of his bankruptcy. Tr. at 28.

Petitioner submitted into evidence work status notes from his treating physician indicating that he was to remain off work or on light duty restrictions following his left knee surgery on July 16, 2012 through December 9, 2012. PX9. Petitioner testified that he remained off work during this period. Tr. at 26. Petitioner further testified that although he was paid no benefits by workers' compensation while he was off work, he did receive disability benefits to cover his time off work. Tr. at 26, 41; RX5.

Petitioner testified that he had never suffered an injury to his left knee prior to the April 20, 2012 accident while working for Respondent. Tr. at 28. Petitioner also testified that since that accident, he has not suffered any subsequent injury to his left knee. Tr. at 28.

Since the accident, Petitioner testified that he cannot run or play basketball like he used to, since his left knee bothers him when he runs. Tr. at 29-30. When the weather becomes cold, his left knee also can become sore. Tr. at 29. In the morning, if his knee is stiff, he will descend the stairs sideways to prevent another injury. Tr. at 29. When he carries five-gallon water containers at home, he carries them on his right side to avoid putting the added weight on his left knee. Tr. at 29-30. He testified that hot showers can help, and that he also uses Ben-Gay under a knee sleeve when his symptoms flare up. Tr. at 29.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2003). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. Ill. Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co.*

v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

First, the Arbitrator addresses the parties' dispute as to the alleged date of accident. Petitioner asserts that he sustained an injury on April 20, 2012. Respondent disputes that the incident, whether compensable or not, occurred on that date. Petitioner testified that his accident occurred on April 20, 2012. The first written incident report from Petitioner is dated May 1, 2012. Respondent contends that Petitioner's left knee incident occurred on April 19, 2012 as reflected in notes from Mr. Goodwin. On that date, Mr. Goodwin noted a discussion with Petitioner that he felt a pop in his knee while walking. Petitioner called Mr. Propst, a former supervisor and employee of Respondent, to testify. He explained that he helped Petitioner on one day with some work at Petitioner's request. Specifically, Mr. Propst testified that Petitioner asked him for help while he was walking across the floor. Petitioner was fairly new to the assigned zone and he was falling behind. Petitioner was unable to keep up with the other employees on the assembly line and Mr. Propst assisted him briefly. Mr. Propst was unable to recall the exact date, but recalled that Petitioner make a noise as if he was in pain and Petitioner's statement that he felt a popping sensation in his knee. Given the foregoing, the Arbitrator finds that it is most likely that Petitioner's incident at work occurred on April 19, 2012 as noted in the most contemporaneously recorded note of any complaint of left knee pain by Petitioner.

Next, the Arbitrator addresses whether the alleged incident involving the left knee is a compensable accident. Petitioner testified that he was falling behind at work on an assembly line that he had only worked for approximately two-to-three weeks. He saw Mr. Propst, a supervisor, and asked him for assistance. Mr. Propst agreed to help. While working on a manifold, Petitioner testified that he turned to hurry up onto the platform and felt a pop and pain in his left knee.

Petitioner eventually saw an on-site nurse in Respondent's medical department on May 1, 2012 after completing an incident report that he was "[g]oing to walk back-up stairs platform, before reaching stairs left knee went backwards and snap[p]ed, felt pain on my knee...." Nurse Russell later noted Petitioner's report that he was "walking + went to turn around + walk up some stairs when he stated that his left knee made a 'popping noise' + it gave out – weakened on him." Dr. Neu, Respondent's on-site physician, noted Petitioner's report that his left knee hyperextended when "walking normally" across smooth concrete factory floor. Dr. Neu's notation is in direct conflict with the notation of Nurse Russell, Respondent's on-site nurse, that Petitioner was ascending stairs at the time of the incident, not walking across a smooth factory floor. Dr. Neu's notation is also in direct conflict with the history taken by Petitioner's treating physician, Dr. Chudik, and the testimony of Mr. Propst, who was present at the time of the incident. The Arbitrator finds Dr. Neu's understanding of the mechanism of injury to be unreliable.

Dr. Chudik's medical records confirm Petitioner's testimony regarding the mechanism of injury, specifically involving hurrying to complete a task at work. On June 1, 2012, Petitioner reported that he turned to walk back up a set of stairs when his knee buckled followed by an onset of pain. At his deposition, Dr. Chudik explained that he understood Petitioner's specific mechanism of injury to involve "assembly work required him to kind of hustle and work efficiently. He was going down the stairs from the platform to get a few co-workers to evaluate his work, he was moving quickly, and as he was going back up the stairs, he turned, took an awkward step, and stumbled. He felt his left knee buckle and felt a snap in his knee and had immediate pain." PX4.

The other two witnesses that testified at the hearing were Mr. Propst and Mr. Goodwin. Mr. Propst's testimony confirms Petitioner's recitation of events involving hurrying. He testified that he helped Petitioner at the time of

the alleged accident and that Petitioner was working at a fairly quick pace. Mr. Propst's testimony corroborates Petitioner's testimony that he had an immediate onset of symptoms while on the stairs and that he was hurrying while performing his duties at the time. Mr. Propst heard Petitioner made a noise as if he was in pain, and he testified that Petitioner stated that he felt a popping sensation in his knee. By contrast, Mr. Goodwin was not present at the time of the incident. He acknowledged that he did not know whether Petitioner was rushing or hurrying when the incident happened. Mr. Goodwin also acknowledged that an employee could be disciplined for falling behind in their work production. He further admitted that he did not know how long Petitioner had been working in Zone Two or whether Mr. Propst had assisted Petitioner with his work at the time of the alleged accident.

With regard to the "arising out of" element required to establish a compensable accident, a claimant must demonstrate that the risk of injury was peculiar to or increased by his work duties and the "increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1014 (*citations* omitted). The mechanism of injury described by Petitioner at the hearing (i.e., hurrying up stairs to complete a task on a backed-up assembly line causing him to ask a supervisor for assistance) is corroborated by the testimony of the supervisor, Mr. Propst. The medical records of Dr. Chudik further corroborate Petitioner's recitation of the mechanism of injury. Even Respondent's internal records, with the exception of those of Dr. Neu, corroborate Petitioner's report of a pop in his knee and immediate onset of pain at work.

Based on the foregoing, the Arbitrator finds that Petitioner has established that he sustained a compensable accident involving his left knee at work on April 19, 2012.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator's findings and conclusions relating to the issues of accident are incorporated herein. Petitioner requests temporary partial disability benefits from July 16, 2012 through December 9, 2012.

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

The record reflects that Petitioner either wholly unable to work or placed on light duty work restrictions from July 16, 2012 through December 9, 2012 related to his left knee injury. Petitioner testified that he remained off work during this period, which is corroborated by the treatment records. He further testified that, although he

did not receive workers' compensation benefits while off work, he did receive disability benefits[3] to cover his time off work. No evidence was submitted to the contrary.

Therefore, the Arbitrator finds that Petitioner has established that he is entitled to temporary partial disability benefits from July 16, 2012 through December 9, 2012 as claimed.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was offered into evidence. Thus, the Arbitrator assigns no weight to this factor.

[3] The parties stipulated that Petitioner was paid disability benefits by Respondent in the amount of $9,592.80 for the time he was off work due to his injury. AX1.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as an Assembler the time of his accident. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 51 years old at the time of the accident. This fact is stipulated by the parties. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), the future earning capacity of the employee, the Arbitrator notes that there was no evidence of any diminishment in Petitioner's future earnings capacity as a result of his accident. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained a left knee medial meniscus tear that required surgery. Dr. Chudik opined that Petitioner's left knee condition was caused by the accident at work. No medical opinion was offered in contravention of Dr. Chudik's opinion. Petitioner explained that he continues to experience symptoms and cannot engage in various recreational activities as he could before his accident. Thus, the Arbitrator assigns significant weight to this factor.

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 20% loss of use of the left leg (knee) pursuant to Section 8(e) 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

Randy Hardy,

Petitioner,

vs. NO: 17 WC 17490

The Sherwin Williams Company,

19IWCC0397

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, medical expenses, prospective medical care, and temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons 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).

At the Arbitration hearing the parties stipulated to the issues of accident and causal connection regarding injuries to Petitioner's low back injury only through November 16, 2017.

Petitioner was a 53 year old cart picker employed by Respondent Sherwin Williams Company on May 1, 2017. Petitioner testified that he felt a "pop" in his back while pulling a cart that was fully loaded with boxes. Prior to commencing employment Petitioner had undergone a pre-employment physical examination with Dr. Paul Oltman on May 27, 2016 and was cleared to begin work for Respondent. There is no evidence that Petitioner had any symptoms or ever sought medical treatment for his back, neck or shoulder prior to the work accident.

19IWCC0397

Petitioner saw his primary care physician Dr. Gautam Jha on May 2, 2017 for complaints of back pain that began on the previous day. He was tender over his lumbar spine. An x-ray of the lumbar spine was performed which did not show any abnormality. Dr. Jha prescribed a Medrol Dose Pak and Flexeril and recommended sitting job duties for one week. A clinical note by Dr. Jha dated May 3, 2017 reflected that Petitioner was not getting adequate pain relief and Tramadol and physical therapy were prescribed.

On May 9, 2017 Petitioner returned to Dr. Jha again expressing complaints of back pain which now extended into the thoracic spine. The note on the physical examination performed did not document any findings for the neck or right shoulder. Respondent was unable to accommodate Petitioner's work restrictions so he had been off work since May 1, 2017. Dr. Jha prescribed Neurontin and referred Petitioner to a spine specialist

The first medical documentation pertaining to Petitioner's neck pain appears on May 11, 2017 in the Physical Therapy Initial Evaluation performed at St. Mary's Hospital. The note documents the sudden onset of back pain on May 1, 2017 with worsening of pain and progression to Petitioner's upper back and neck.

Petitioner saw Dr. Ahmed Mohamed M.D. on May 25, 2017 on referral from Dr. Jha. He complained of neck pain in his posterior cervical spine that radiated to his right shoulder. Dr. Mohamed ordered an MRI of the cervical and lumbar spine. The MRI studies were performed on June 6, 2017 and reported a broad-based protrusion of disc material left C7-T1 with moderate foraminal encroachment, left disc herniation at C6-7, and midline protrusion of disc-osteophyte complex at C5-6. The lumbar MRI showed some degenerative disc disease.

Dr. Mohamed found Petitioner's history, physical examination, and radiographic findings to be compatible with his expressed complaints of neck and right arm and lower back pain. He determined that the injury at work significantly aggravated a chronic problem in Petitioner's cervical spine. Dr. Mohamed noted that Petitioner was a candidate for an ADCF (anterior cervical discectomy and fusion) at C5-6 and C6-7 to relieve pressure on the spinal cord. He also presented the option of non-operative conservative management to Petitioner for consideration. Dr. Mohamed ordered that Petitioner remain off work until further notice.

Petitioner consulted Dr. Matthew Gornet, an orthopedic spine specialist, on August 24, 2017 for a second opinion. Petitioner reported that the onset of pain began acutely on May 1, 2017 while he was pulling a cart loaded with boxes. His immediate pain was located in his low back and into his buttock and hip. The pain in Petitioner's neck and shoulder began sometime later.

Dr. Gornet ordered a second set of MRIs of the cervical and lumbar spine. The cervical MRI performed on October 24, 2017 revealed a large disc herniation at C5-6 and to a lesser extent at C6-7. The herniations were described as having increased in size compared to the previous films of June 6, 2017. Dr. Gornet's clinical note states that Petitioner's current

symptoms of low back pain, and neck pain to his right trapezius, and right shoulder pain were causally connected to his May 1, 2017 work injury.

Dr. Gornet concurred with Dr. Mohamed's evaluation of Petitioner's cervical pathology but ordered a course of conservative treatment prior to embarking upon surgery. He recommended additional physical therapy, cervical steroid injections, and referral to Dr. George Paletta for evaluation of Petitioner's right shoulder. Dr. Gornet placed Petitioner on light duty restrictions which Respondent was not able to accommodate so he remained off work.

Petitioner had an evaluation of his right shoulder by Dr. Paletta on September 11, 2017. Dr. Paletta commented that the right shoulder pain could be secondary to the cervical pathology previously identified. He endorsed the work restrictions recommended by Dr. Gornet. Dr. Paletta deferred any opinion regarding causal connection to the shoulder pain pending further work-up. Diagnostic testing was performed on Petitioner's right shoulder but treatment was deferred due to his cervical condition.

Petitioner attended physical therapy from September 21, 2017 through October 17, 2017. He had a right epidural steroid injection at C5-6 in September 2017, and a second epidural steroid injection at C6-7 on October 3, 2017. During this period Petitioner experienced some improvement in his low back pain but his neck pain continued.

On October 18, 2017 a Section 12 evaluation was performed by Dr. Timothy VanFleet at the request of Respondent. Dr. VanFleet opined that Petitioner had chronic degenerative cervical spinal stenosis that preexisted Petitioner's May 1, 2017 work injury. According to Dr. VanFleet the cervical MRI findings at C5-6 and C6-7 did not match up to Petitioner's complaints, with the exception of numbness in his right middle finger. In Dr. VanFleet's opinion the only complaint related to the work-accident was nonspecific low back pain.

Dr. VanFleet stated that Petitioner was at MMI for his lumbar and mid-thoracic issues and required no further medical treatment for the May 1, 2017 work injury. It is notable that Dr. Van Fleet commented that Petitioner could return to work with a 10 lb. lifting restriction.

At deposition Dr. VanFleet identified Petitioner's failure to express complaints of neck pain at the time of the work injury or soon thereafter as a basis for his opinion that there the cervical issues were unrelated to the work accident. He testified that Petitioner's neck complaints did not come to light until "many weeks" following the work accident.

Petitioner returned to Dr. Gornet in follow-up on November 6, 2017 for continuing pain in his low back and neck. Dr. Gornet testified that the second cervical MRI performed on October 24, 2017 was of a much higher resolution than the prior study and clearly showed the cervical pathology. The second MRI also showed an acute fragment of disc at C4-5.

Dr. Gornet determined that Petitioner had failed a course of conservative therapy which included physical therapy and epidural steroid injections and recommended a three-level cervical disc replacement surgery at C4-5, C5-6 and C6-7. Dr. Gornet states in his medical records and deposition that Petitioner's condition of ill-being in his cervical spine and the need for surgery are causally connected to the May 1, 2017 work accident.

Petitioner saw Dr. Gornet again on March 27, 2018. Dr. Gornet reiterated his recommendation for a three- level cervical disc replacement at C4-5, C5-6, and C6-7. Dr. Gornet prescribed Meloxicam and continued Petitioner's restriction for sedentary work. He noted that surgery was on hold pending authorization.

Dr. Gornet agreed with Dr. VanFleet that Petitioner had cervical pathology that preexisted the work accident. He noted however that Petitioner's pre-accident "state of well-being" as evidenced by his lack of complaints, pre-employment physical, and his full-duty status that required lifting up to 87 lbs. was incompatible with Dr. VanFleet's opinion that his neck complaints were not related to the work accident.

Dr. Gornet testified that the administration of a Medrol Dosepak by Dr. Jha on Petitioner's first medical visit on May 2, 2017 was a significant element in his history. Steroids are used to treat inflammation and could alter the clinical presentation of Petitioner's cervical spine symptoms as they were evolving. In Dr. Gornet's opinion the thoracic pain documented by Dr. Jha on May 9, 2017 was probably a manifestation of Petitioner's cervical injury.

The Arbitrator in her Decision relied upon Dr. VanFleet's opinion and concluded that there was no causal connection between Petitioner's current condition of ill-being and the work accident of May 1, 2017. She denied prospective medical care, specifically the cervical spine surgery recommended by Dr. Gornet. The Arbitrator similarly denied prospective medical care directed to Petitioner's right shoulder and temporary total disability benefits commencing November 7, 2017.

The Commission disagrees with the Arbitrator's denial of prospective medical care for Petitioner's cervical spine and the denial of temporary total disability benefits commencing November 7, 2017. We find that at present Dr. Gornet has made no treatment recommendations concerning Petitioner's lower back symptoms. We make no award for prospective medical care for the right shoulder as no specific care has been recommended or requested.

The Arbitrator leads off her analysis on the causal connection issue with the statement; "The Arbitrator found the details as to the injury very critical." She goes on to comment that "Petitioner's testimony as to how the accident occurred was never accurately presented to his treating physicians. Dr. Gornet, Dr. Paletta, and Dr. Mohamed all had a different understanding as to how the accident occurred."

The Arbitrator's characterization is not supported by the medical histories reflected in the records of the treaters. In fact, the variations in Petitioner's histories are minor and not unusual to any reader with experience in reviewing medical records. In sequential recordation there is natural variance. This is a function of not only the patient's report but also the medical provider's note taking. Every report by Petitioner describes the same basic event.

The Arbitrator discounts the causation opinions of Dr. Gornet and Dr. Mohamed based upon these perceived variations. Both Dr. Mohamed and Dr. Gornet support causal connection between the work accident and the injuries to Petitioner's back and neck. The Arbitrator's opinion on the 'criticality' of the mechanism of injury to the establishment of causation is not supported anywhere in the record by any medical opinion.

The Arbitrator erred in basing her causation assessment on mechanism of injury without any medical opinion to support that relationship. This is not an assessment that can be made by a lay person. Dr. Van Fleet does not base his causation opinion on mechanism of injury but rather upon the failure by Petitioner to report neck pain to Dr. Jha on May 2, 2017 or May 9, 2017.

Dr. Van Fleet misapprehends the medical records when he incorrectly states in his deposition testimony that Petitioner's complaints of neck pain did not "come to light until many weeks after the work accident." On May 9, 2017, Dr. Jha's note records that petitioner's pain was now also in the thoracic region. On May 11, 2017 the initial physical therapy report documents complaints of neck pain. The Commission finds that Dr. Van Fleet's opinion regarding causation reflects a misstatement of the medical chronology and is therefore not persuasive.

Dr. Gornet testified on cross examination that an acute cervical disc herniation may or may not cause immediate pain. On May 2, 2017 Dr. Jha prescribed a Medrol DosePak. The standard Dosepak is a seven-day course of treatment. Steroids are a very potent anti-inflammatory. Dr. Jha's medical record shows that he saw Petitioner in the early afternoon. It is therefore likely Petitioner started on the Medrol on May 2 in the afternoon.

Dr. Gornet posits that the early introduction of steroidal therapy (within 24 hours of the work accident which occurred at 4:30 pm on May 1st) would treat the inflammatory response to acute disc herniation. The change in the inflammatory response suppressed the onset of symptoms. This, in Dr. Gornet's opinion, explains why Petitioner was not expressing complaints of neck pain in the immediate post-accident period. Dr. Gornet believes the thoracic spine pain recorded by Dr. Jha on May 9th was referred pain from the cervical spine.

Dr. Van Fleet admitted on cross examination that the thoracic spine is contiguous with the cervical spine. He acknowledged that steroids can reduce inflammation and make the patient feel better. Dr. VanFleet agreed with Dr. Gornet's recommendation for cervical surgery.

The Commission finds the opinions of Dr. Gornet that Petitioner's current condition of ill-being is causally connected to the work accident, that he remains unable to return to employment, and that he requires surgery on his cervical spine persuasive.

The issues regarding Petitioner's continued low back pain and shoulder injury cannot presently be resolved. Petitioner is continuing treatment and definitive treatment, if indeed it becomes necessary, cannot be rendered until the cervical spine is treated.

The Commission disagrees with the Arbitrator's denial of temporary total disability benefits commencing November 7, 2017. The sedentary work restrictions made by Dr. Gornet remain in effect until Petitioner has undergone the recommended surgery on his cervical spine and completed any appropriate and necessary recovery and rehabilitation thereafter.

The Commission finds based upon the forgoing analysis that all medical expenses claimed by Petitioner in PX1 are reasonable and necessary and awards same.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $373.70 per week for a period of 40 3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $11,327.22 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for all prospective diagnostic and medical procedures recommended by Dr. Gornet, as well as all reasonable and necessary rehabilitation, pursuant to Sections 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 $20,000.00. 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: JUL 3 0 2019
o-6/05/19
SM/msb
44

Stephen Mathis

Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywood 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. 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 holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

HARDY, RANDY
Employee/Petitioner

Case# **17WC017490**

THE SHERWIN WILLIAMS COMPANY
Employer/Respondent

19IWCC0397

On 10/18/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1459 LEVENHAGEN LAW FIRM PC
CHRISTOPHER T TUCKER
216 W POINTE DR SUITE B
SWANSEA, IL 62226

2593 GANAN & SHAPIRO PC
DRU A DENNIS
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

19IWCC0397

☐ 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)

Randy Hardy
Employee/Petitioner

v.

The Sherwin Williams Company
Employer/Respondent

Case # **17 WC 17490**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **5/1/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,300.39**; the average weekly wage was $**560.54**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of $**10,090.02** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**10,090.02**.

Respondent is entitled to a general credit of $**-0-** for any medical bills paid by a group medical plan for which credit is allowed under Section 8(j) of the Act. Respondent is entitled to a general credit for any medical bills it has paid.

ORDER

Petitioner failed to prove his current condition of ill-being in his lumbar spine, cervical spine or right shoulder is causally connected to the work accident. Petitioner did prove he sustained a lumbar strain as a result of his work accident; however, he has failed to prove ongoing causation for the lumbar spine. Petitioner's claim for prospective medical care and payment of bills related to his cervical spine and right shoulder is denied.

Respondent shall pay Petitioner temporary total disability benefits of **$373.70/week** for **27** weeks, commencing **05/02/2017** through **11/6/17**, as provided in Section 8(b) of the Act. Respondent is entitled to a credit in the amount of $10,090.02 against this award.

Respondent shall pay the following reasonable and necessary medical services pertaining to treatment for his lumbar spine as set forth in Petitioner's Exhibit 1: **(1) the bill to Dr. Jha for $238.00; (2) St. Mary's Health for therapy ($2,670.00 and $1470.00); and (3) Dr. Gornet's initial visit of August 24, 2017. Petitioner is also awarded prescription reimbursements in the amount of $32.00.** Said bills are awarded pursuant to the Medical Fee Schedule and Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

October 13, 2018
Date

OCT 18 2018

FINDINGS OF FACT & CONCLUSIONS OF LAW

Petitioner was involved in an undisputed accident on May 1, 2017. He contends that he has sustained low back, neck and right shoulder injuries as a result of the accident. Respondent disputes causation for these alleged injuries. Petitioner is currently seeking an award for prospective medical care in the form of a cervical disc replacement procedure as recommended by his treating surgeon Dr. Gornet, medical bills, and temporary total disability benefits.

The Arbitrator Finds:

Petitioner began working for Respondent on May 31, 2016. Prior to Petitioner's employment with Respondent, Petitioner underwent a pre-employment physical with Dr. Paul Oltman on May 27, 2016. At that time, Petitioner was cleared to begin work for Respondent. (PX 8).

The Employer's First Report of Injury or Illness was completed by P. Bushur on May 2, 2017. The First Report of Injury notes that Petitioner was pulling a picking cart full of boxes from a sideways stance on May 1, 2017, when he injured his low back (lumbar or lumbosacral). The type of injury was noted as a strain. (RX 4)

Following the May 1, 2017, work accident, Petitioner presented to Dr. Gautam Jha on May 2, 2017. Dr. Jha's medical record notes Petitioner complained of hurting his back at work while pulling a cart. Dr. Jha noted Petitioner "heard a pop" in his low back. Petitioner had no leg pain or numbness, but mild tenderness in the lumbar spine was noted. Dr. Jha did not note any right shoulder or neck pain complaints. Dr. Jha prescribed a Medrol Dose Pak and Flexeril, while also recommending sitting job duties for one week. (RX 3)

Petitioner underwent lumbar spine x-rays on May 2, 2017. The x-rays revealed a normal lumbar spine exam. The diagnosis noted on the x-ray was unspecified back pain laterally. (RX 3)

On May 3, 2017 Dr. Jha made a note on his 5/2/17 office note that Petitioner was not getting relief from the pain. He was on (or started on) Tramadol and physical therapy. (RX 3)

Petitioner returned to see Dr. Jha on May 9, 2017. The doctor noted he had previously given him a Medrol dose pack and flexeril. Work could not accommodate the restrictions, so Petitioiner was at home. Petitioner's neck exam was normal, his back had no signs of tenderness. At that time, Dr. Jha noted Petitioner's continued complaints of back pain, with minimal tenderness to the lumbar spine. Dr. Jha's handwritten notes indicate Petitioner's back pain had moved to the thoracic spine. However, Dr. Jha's exam did not reveal any abnormal findings for the neck or right shoulder. Dr. Jha recommended physical therapy and prescribed Neurontin. Dr. Jha's prescription note indicates Petitioner's diagnosis of back pain and a referral to a specialist (RX 3).

The initial physical therapy evaluation occurred at St. Mary's Centralia Hospital on May 11, 2017. The therapist noted Petitioner's chief complaint was back pain. The history indicated a sudden onset of back pain after reaching to grab a cart on May 1, 2017. Since the onset of pain, Petitioner advised his symptoms had worsened, with his pain initially beginning in the low back, but spreading to the upper back between his shoulder blades and into his neck. Petitioner reported pain in the center of the spine and in the left buttock. His current level of pain was rated as a "6/10." Petitioner's signs and symptoms were consistent with a lumbar strain and spine pain due to muscle

guarding. Petitioner reported tingling down both legs to the knees on the front and back side. Petitioner was given soft tissue massage to the neck, trapezius, thoracic and lumbar spine. Petitioner was felt to have signs and symptoms consistent with a lumbar strain and spine pain due to muscle guarding. It was felt he would benefit from skilled therapy to decrease the pain and increase mobility/function two to three times per week for four weeks. Petitioner was given exercises to perform at home – (1) the pelvic tilt with legs bent; (2) knee-to-chest stretches; (3) lumbar rotation; (4) scapular elevation – shoulder circles; and (5) neck lateral flexion stretches. (PX 4)

Petitioner attended physical therapy on May 15, 2017. He reported no change, overall. He had been performing his home exercise program and the pelvic tilts hurt the worst. Petitioner was given soft tissue myofascial release to the neck, trapezius, thoracic and lumbar spine. Moist heat was provided to the left lumbar region and right shoulder. (PX 4)

Petitioner attended physical therapy on, May 17, 2017. Petitioner reported lower back pain up to his shoulder blades and into his neck. He was taking muscle relaxers only at bedtime and sleeping 3 -4 hours before waking up with back pain. Petitioner was reportedly sorer after therapy and was trying a TENS unit at home without results. He described himself as "struggling" with back exercises. (PX 4)

Petitioner attended physical therapy on May 19, 2017. He reported no change in his symptoms. Further therapy was held up pending further doctor's instructions. (PX 4)

Petitioner was first seen by Dr. Ahmed Mohamed at Egyptian Spine Clinic on May 25, 2017. Dr. Mohamed noted Petitioner's chief complaint was neck pain and right arm and hand numbness, as well as low back pain and right leg pain. Dr. Mohamed's history notes Petitioner was complaining of the onset of neck pain as of May 1, 2017, which gradually worsened. Petitioner's pain was located over the posterior cervical spine with radiation into the right shoulder blades and arms. Dr. Mohamed noted Petitioner described low back and right leg pain following a work accident while pulling a cart with 700-800 pounds, when the cart turned wrong. The associated symptoms included arm pain, numbness, paresthesia, and tingling. Dr. Mohamed's exam findings revealed a positive right Spurling's sign, but no tenderness to palpation to the cervical, thoracic, or lumbar spine. Petitioner had a positive straight leg test on the right, but contralateral straight leg tests did not produce any symptoms. Petitioner also had a positive Faber test on the right side. Dr. Mohamed diagnosed Petitioner with back pain, neck pain, paresthesia, and right arm pain. Dr. Mohamed recommended an MRI of the cervical and lumbar spine and advised Petitioner to follow up after the diagnostic tests. Based on Petitioner's history, in combination with Dr. Mohamed's exam and radiographic findings, Dr. Mohamed opined Petitioner's findings were compatible with neck, right arm, low back, and right leg pain following an injury at work. (PX 5)

According to the Application for Adjustment of Claim signed on June 5, 2017, Petitioner was alleging a work accident on May 1, 2017. Specifically, Petitioner alleges he was "injured during the course and scope of employment". Petitioner noted he had multiple injuries as a result of the alleged accident. (AX 2).

Petitioner underwent a cervical spine MRI on June 6, 2017, at St. Mary's Centralia Hospital. The history notes neck pain and back pain for a month. The MRI revealed a broad-based protrusion of disc material on the left at C7-T1 with moderate foraminal encroachment, left para mid-line disc herniation at C6-7, mid-line protrusion of a disc osteophyte complex at C5-6, and other incidental levels of narrowing relating to a disc osteophyte complex. (PX 4; PX 5)

Petitioner also underwent an MRI of the lumbar spine on June 6, 2017. The lumbar spine MRI revealed a two-level degenerative disc disease at L4-5 and L5-S1, with no significant degree of canal or foraminal encroachment and no anatomic cause for Petitioner's acute back symptoms. (PX 4; PX 5)

Petitioner returned to Dr. Salem Mohamed on June 15, 2017, for follow-up for low back pain and right leg pain, as well as right arm and hand numbness. The history notes Petitioner complained of neck and low back pain with an onset of symptoms on May 1, 2017, after pulling an 800-pound cart at work, when it turned wrong. Petitioner described his pain as severe and shooting, especially in his right arm. Dr. Mohamed reviewed Petitioner's cervical and lumbar spine MRIs, with noted findings of a C5-6 mid-line protrusion of the disc and disc osteophyte complex flattening the cord, causing bilateral foraminal encroachment, more so on the left to the disc osteophyte complex. Dr. Mohamed also noted a left medium disc herniation at C6-7 with moderate severe left foraminal encroachment. Dr. Mohamed opined the lumbar spine MRI revealed degenerative disc disease at L4-5 and L5-S1 with no significant discrimination or general foraminal encroachment. Dr. Mohamed noted this was a chronic problem that the injury at work could have substantially aggravated. Dr. Mohamed diagnosed Petitioner with a herniated cervical disc and stenosis of the cervical spine. Dr. Mohamed opined Petitioner was a good candidate for an anterior cervical discectomy and fusion (ACDF) at C5-6 and C6-7 to relieve the pressure on the spinal cord and nerve roots in order to alleviate Petitioner's arm and neck pain and hand numbness. Dr. Mohamed recommended Petitioner remain off work until further notice in order to discuss surgical recommendations. (PX 5)

Petitioner followed up with Dr. Salem Mohamed on June 19, 2017, as a follow-up for low back pain, right leg pain, neck pain, and right arm and hand numbness. Dr. Mohamed noted the same findings on the MRI studies and working diagnosis. Dr. Mohamed noted Petitioner was a good candidate for an anterior cervical discectomy and fusion at C5-6 and C6-7. Petitioner indicated he would consider surgical intervention as a final resort. (PX 5)

Petitioner returned to Dr. Jha on June 23, 2017. Dr. Jha referenced "Dr. Salem's note" and that Petitioner wanted a second opinion. Dr. Jha noted Petitioner complained of neck pain, low back pain, as well as right hand fingertip numbness since the accident. Dr. Jha referred Petitioner to a specialist for a second opinion. On July 5, 2017, Dr. Jha recommended Petitioner remain off work until evaluated by Dr. Gornet. (RX 3)

Petitioner was first evaluated by Dr. Gornet at the Orthopedic Center of St. Louis on August 24, 2017. Dr. Gornet noted Petitioner was referred by Dr. Jha for low back and neck pain. Dr. Gornet noted Petitioner complained of low back pain going into his left buttock, left hip, and, intermittently, down his left leg. Petitioner also complained of neck pain to the right trapezius, right shoulder, and down the right arm to the elbow with numbness and tingling in the forearm into the middle finger. Petitioner stated his current problem began on or about May 1, 2017, while working for Respondent in their distribution center. Petitioner advised he was pulling a cart full of boxes of paint that weighed approximately 800 pounds when he twisted and felt pain in his low back into this buttock and hip. Dr. Gornet acknowledged that Petitioner's neck and shoulder pain began sometime after the May 1, 2017, accident. Dr. Gornet further noted Petitioner underwent physical therapy and was referred to Dr. Mohammed, who recommended a cervical fusion at C5-6 and C6-7. Petitioner denied any previous problems of significance requiring treatment to his neck or low back; however, he admitted to a work injury two to three years earlier, where he fell backwards, but no significant treatment was performed in relation to the previous accident.

Petitioner indicated his symptoms were constant and worse with reaching, pulling, or lifting, but better with change in positions. Petitioner further complained of right arm pain but denied any left arm pain. Petitioner also had intermittent left leg pain. On examination, Petitioner had motion pain into his low back, buttock, and left side, but was able to bend and forward flex and return to standing in a smooth rhythm. In regard to his neck,

Petitioner had discomfort with forward flexion and rotation to the right. Dr. Gornet took x-rays of Petitioner's cervical and lumbar spine. The cervical spine x-rays revealed a loss of disc height at C5-6, with no evidence of significant foraminal stenosis on the right side, but foraminal narrowing on the left side. The lumbar spine films revealed well preserved disc height at all levels with normal findings at the hip and coronal alignment. Dr. Gornet reviewed Petitioner's cervical and lumbar spine MRIs. Dr. Gornet opined the lumbar spine MRI revealed a central disc protrusion and leaking at L5-S1, which Dr. Gornet felt might be of significance. The cervical spine MRI revealed an extruded disc central to the left at C6-7, disc osteophytes at C5-6, and a foraminal disc herniation at C5-6 on the right. Dr. Gornet opined Petitioner's current symptoms were causally connected to his work-related injury. Dr. Gornet noted in his record that he explained to Petitioner that the shoulder region could manifest symptoms that were coming from the shoulder or the cervical spine. Dr. Gornet agreed with Dr. Mohamed's findings of cervical pathology, specifically a problem at C5-6 and C6-7. Dr. Gornet recommended physical therapy, as well as injections at C5-6 and C6-7. Dr. Gornet also recommended a new MRI with foraminal views. Petitioner was referred to Dr. Paletta for evaluation of his shoulder. He was advised to cut down his smoking by half. If Petitioner failed injections and physical therapy consideration would be given to disc replacement surgery at C5-6 and C6-7. Petitioner's low back was placed "on hold." He was given light duty restrictions. (PX 2, Dep. Exhibit #3)

A second cervical spine MRI was obtained on August 24, 2017. The radiologist's impression revealed a disc herniation with degenerative changes at C5-6, more prominent on the left, creating central and left greater than right foraminal stenosis. There was a left-sided disc herniation at C6-7, likely impacting the left C7 root. There was a smaller left herniation at C7-T1 without cord compression or root involvement. (PX 2, Dep. Exhibit #3)

Dr. Gornet added an Addendum to his August 24, 2017 office note after reviewing the updated cervical spine MRI. Dr. Gornet opined that the MRI "clearly shows a large disc herniation at C5-6 and to a lesser extent at C6-7". Dr. Gornet noted the herniations increased in size compared to the previous films. There was an acute disc herniation on the left at C6-7, disc osteophyte at C5-6, and acute foramen at C4-5. Furthermore, Dr. Gornet opined the MRI revealed a large acute disc herniation on the right at C5-6, which best correlated with Petitioner's shoulder complaints, but also central protrusions at C4-5, C5-6, and C6-7, as well as a subtle disc fragment on the right at C3-4. Dr. Gornet referred Petitioner to Dr. Paletta for evaluation on his right shoulder. In the event the cervical spine injections and physical therapy failed, Dr. Gornet indicated consideration would be given to a disc replacement surgery at C5-6 and C6-7. His recommendation for steroid injections remained unchanged. Dr. Gornet advised Petitioner to follow up in six weeks following steroid injections and his evaluation with Dr. Paletta. (PX2, Dep. Exhibit #3)

Petitioner presented for more physical therapy on September 6, 2017. Per the instructions of Dr. Gornet, therapy was to focus on Petitioner's neck. Petitioner gave a history of pulling a cart at work on May 1, 2017 when he felt a sharp pain. Mobility and sleep were disturbed, and prior therapy efforts had not been very effective. Petitioner's medical history included a possibility of sleep apnea; however, Petitioner had not yet undergone a sleep study. Objectively, he described neck pain going into his right shoulder, elbow and index finger. His middle finger was reportedly numb. The therapist examined Petitioner and concluded he had signs and symptoms consistent with cervical disc and neck pain. Petitioner completed both low back and neck pain disability questionnaires. (PX 4)

Petitioner attended physical therapy on September 8, 2017. Notes regarding this visit are minimal. (PX 4)

Petitioner was evaluated by Dr. Paletta on September 11, 2017, at the request of Dr. Gornet. Dr. Paletta noted Petitioner worked for Respondent as a picker in a warehouse. Petitioner advised he was injured on May 1, 2017, while pulling a cart with 600-900 pounds of books on the cart with his right arm. Petitioner indicated he was

walking forward and dragging the cart from behind him so his right arm was extended to the side and slightly backwards. As Petitioner did this, Petitioner advised he felt pain in the cervical spine and into the right shoulder. Dr. Paletta noted Petitioner was apparently diagnosed with cervical disc issues. Petitioner stated since the injury, he had numbness involving the tip of this right middle finger. Additionally, Petitioner had complaints of ongoing right shoulder pain radiating into the upper arm, but not below the level of the elbow. Petitioner noted difficulty lifting anything in front of him and pain with the arm in overhead positions. Petitioner denied any prior history of right shoulder problems.

Dr. Paletta's exam of the right shoulder noted mild atrophy of the supraspinatus, but no asymmetry, muscle atrophy, or deformity. There was no focal tenderness at the AC joint, SC joint, or bicipital group. Petitioner had a painful arc of motion, with pain at end ranges of range of motion testing. Impingement signs were positive, but with pain at the end of each motion, so they were difficult to assess. X-rays of the right shoulder were taken, which revealed normal bony anatomy and a well-maintained glenohumeral joint without significant osteoarthritis, with age-related degenerative changes of the AC joint, but no evidence of any acute pathology. Dr. Paletta diagnosed Petitioner with right shoulder pain of uncertain etiology, with possible primary shoulder pathology versus referred pain from the neck, and atypical radiculopathy versus carpal tunnel. Dr. Paletta noted the difficulty in determining whether the source of pain was referred from the neck or from any specific shoulder injury. Dr. Paletta recommended Petitioner undergo an MRI arthrogram of the right shoulder to evaluate any structural injury, as well as an EMG and nerve conduction study to evaluate cervical radiculopathy. Dr. Paletta opined that if there was evidence of primary shoulder pathology which was contributing to Petitioner's current condition, he would recommend directing treatment to the shoulder. However, if the studies were negative with Petitioner's complaints appearing to be referred from the neck, he would return Petitioner to Dr. Gornet for future neck treatment. Dr. Paletta indicated if there was no determination with regard to the presence of shoulder pathology, then Petitioner's complaints were referred from the neck, and Dr. Paletta would defer to Dr. Gornet with regard to opinions on causation and treatment for the cervical spine. However, if there was evidence of shoulder pathology, then it "might" be related to a work injury. Dr. Paletta agreed with the restrictions and advised Petitioner to follow up following the MR arthrogram, as well as the EMG and nerve conduction studies. (PX 6)

An MRI and arthrogram of the right shoulder were taken on September 11, 2017. The impression revealed a small partial thickness, articular surface tear of the conjoined supraspinatus and infraspinatus tendons. The radiologist, Dr. Dusek, noted the partial thickness tear involved approximately 10% of the insertional tendon thickness, with no full thickness rotator cuff tear noted. There was a non-displaced tear of the undersurface of the superior glenoid labrum. (PX 6)

On September 13, 2017 Dr. Paletta authored a record following his review of the MRI. Dr. Paletta noted the MRI scan demonstrated a partial thickness articular sided tear with conjoined tendon and supraspinatus and infraspinatus, which appeared to be a low-grade tear involving less than 50% of the thickness of the rotator cuff. There was also evidence of a superior labrum tear, but the anterior and posterior labrums were intact. The bicep tendon was also intact. Dr. Paletta diagnosed Petitioner with a partial thickness articular-sided supraspinatus tendon tear and small labral tear. Dr. Paletta opined the MRI of the shoulder revealed subtle findings, but nothing that would explain Petitioner's atypical radiculopathy or the severity of shoulder pain. Dr. Paletta recommended an MRI scan of the cervical spine to further evaluate for cervical disc pathology. Dr. Paletta indicated that if the cervical spine MRI study was normal and the EMG and nerve conductions studies were normal, consideration for an ultrasound guided injection to the glenohumeral joint would be given. (PX 6)

Petitioner attended physical therapy on September 13, 2017 reporting no change in his symptoms and stating he didn't understand why he had to do therapy because he "doesn't feel it's going to help". As of September 18, 2017, Petitioner was not feeling much better. His main complaints were his neck and shoulder. (PX 4)

An epidural steroid injection was performed on September 19, 2017. The operation was right C5-6 epidural steroid injection with fluoroscopy. The pre-operative and post-operative diagnoses were right cervical radiculopathy. Petitioner was recommended for no change in his previous work restrictions as recommended by Dr. Gornet. (PX 7)

Petitioner underwent additional physical therapy from September 21st through October 2nd, 2017. On September 21st, Petitioner reported an increase in soreness due to the previous neck injection. Petitioner indicated he did not feel he could perform upper extremity exercises due to his increase in pain. Petitioner noted the injections did not help and his shoulder and back pain were worse. On September 22, 2017, Petitioner reported that he did not feel any better and that the injection "'just chased the pain to other spots". His pain was "9/10" and he did not feel he could do the exercises that day because he was hurting too badly. On September 25th, Petitioner reported that both his neck and shoulder were worse. On September 27th Petitioner reported that he had reached across his body with his right upper extremity, causing an increase in pain with tingling into the right hand. Petitioner also reported his right hand was very cold. On September 29th he reported increased shoulder pain. On October 2, 2017, Petitioner stated that the exercises from Friday "killed his neck and shoulder", so he requested skipping those that day. Overall, he felt no better. Petitioner also reported getting a letter in the mail from "WC" indicating it might not cover therapy so he was going to call his doctor and see if he should continue. (PX 4)

A second epidural steroid injection was performed on October 3, 2017. The second injection occurred at the C6-7 level. The pre-operative and post-operative diagnoses were right cervical radiculopathy. Petitioner's post procedure pain scores were 7-8/10. (PX 7)

Petitioner continued physical therapy from October 4, 2017, through October 17, 2017. The physical therapy record from October 4th states that Petitioner complained of increased pain following the second injection. Furthermore, Petitioner reported that his physician advised him that if the exercises were bothering him, Petitioner should not perform exercises. Petitioner reported his neck pain continued, but his low back pain would come and go "but wasn't too bad." The October 11, 2017, therapy note indicates no exercises were performed that day due to increased pain and Petitioner's continued difficulty in turning his head side-to-side. (PX 4)

A physical therapy communication form was completed at St. Mary's Centralia Hospital on October 17, 2017. The record notes Petitioner started with light upper extremity range of motion and strengthening that was not tolerated. Petitioner was using a treadmill and bike for only 20 minutes over the last several visits due to pain tolerance. Petitioner's objective findings were neck pain into the right shoulder and elbow with index and middle finger numbness. Petitioner had tenderness to palpation of the right cervical spine, as well as upper and mid-trapezius. Due to no significant improvement in Petitioner's pain persisting, Petitioner was discharged from physical therapy. (PX 4)

Dr. VanFleet performed a Section 12 independent medical examination on October 18, 2017, at the request of Respondent. At that time, Petitioner reported he was employed with Respondent as a picker for approximately one year. Petitioner indicated on May 1, 2017, he was pulling a cart, which was approximately 10 to 15 feet long, with boxes of owner manuals on the cart. Petitioner advised that the cart weighed between 600 and 1000 pounds. Petitioner noted the cart was easy to pull, as he was pulling it with his right arm and walking forward without difficulty. Dr. VanFleet noted the cart was not motorized but was provided a picture of an individual pulling a

similar cart. Petitioner noted he pulled the cart with his right arm, when he rotated and turned, at which time he experienced pain across his low back. Dr. VanFleet noted Petitioner was initially evaluated by Dr. Jha on May 2, 2017, after hearing a pop in his low back and experiencing low back pain from pulling the cart. However, Dr. VanFleet acknowledged Dr. Jha did not note any leg pain or numbness. Dr. VanFleet's report indicates Petitioner described numbness at the tip of his right middle finger and pain in the right shoulder, but no pain in the arm. Petitioner also described pain across the neck, pain across the back, as well as pain across the thoracic spine.

In his report Dr. VanFleet summarized Petitioner's initial physical examination at SSM Health St. Mary's in Centralia from May 11, 2017. He noted a referral diagnosis of "back pain, unspecified back location" and further stated that Petitioner's chief complaints at that time was back pain. He noted Petitioner's assessment stating that Petitioner had presented with signs and symptoms consistent with lumbar strain and spine pain due to muscle guarding and that the patient would benefit from skilled physical therapy to decrease pain and increase mobility and function." Dr. VanFleet also reviewed Petitioner's MRIs, and he performed a physical examination, which was extensively outlined in his October 18, 2017, report. Dr. VanFleet noted Dr. Mohamed's cervical spine diagnosis and treatment recommendations, as well as Petitioner's previous epidural steroid injections at C5-6 and C6-7. He also had records from Dr. Paletta and a note from Dr. Helen Blake; however, he did not have Dr. Gornet's records. (RX 1)

According to Dr. VanFleet's report Petitioner's current complaints included numbness at the tip of his right middle finger and pain in his right shoulder. He denied any arm pain and also described pain across his neck, across his back and across the thoracic spine. Dr. Van Fleet examined Petitioner's neck noting no incisional scars and the ability to flex his chin nearly to his chest. He could also extend about 20 degrees and rotate to 45 degrees bilaterally. Petitioner had diminished overhead abduction at the right shoulder, positive impingement signs, and a positive supraspinatus stress test. He also had giving away in multiple myotomes of the right arm in strength testing. Hoffman's sign was negative. He had difficulty with forward bending. (RX 1)

Dr. VanFleet diagnosed Petitioner with non-specific neck and back pain, as well as cervical spinal stenosis and cervical degenerative disc disease. Dr. VanFleet further opined any symptoms or injuries having to do with the neck were pre-existing and degenerative, and unrelated to the May 1, 2017, injury. To support his opinions, Dr. VanFleet opined there were no objective physical exam findings other than Petitioner's restricted range of motion. Dr. VanFleet noted Petitioner had significant mechanical findings in the right shoulder, although apparently a paucity of findings on the right shoulder MRI scan. Dr. VanFleet acknowledged that Petitioner had cervical spine stenosis; however, he did not believe this was related to the May 1, 2017, injury and was a pre-existing condition.

Dr. VanFleet opined Petitioner's non-specific low back pain was related to the alleged work injury, but Petitioner continued to have back pain which was concerning for malingering behaviors. Dr. VanFleet opined that "anything above the waist in the spine, such as the thoracic or cervical spine, is unrelated to the alleged work accident, as there were no corroborating findings on physical exam or in Petitioner's early visits to Dr. Jha immediately after the injury or even a week after the injury." (RX 1, p. 5) Dr. VanFleet noted the shoulder complaints were difficult to provide a causal relationship, due to the fact Petitioner was not complaining of any initial shoulder pain. Petitioner did not have any findings that Dr. Paletta would feel were consistent with internal derangement of the shoulder. Dr. VanFleet specifically noted Petitioner's neck condition was not related to the injury date of May 1, 2017.

Dr. VanFleet further opined that Petitioner had no objective findings on examination, other than the fact Petitioner had a non-myotomal weakness in the right upper extremity, which was a "global finding". Dr. VanFleet's findings were consistent with impingement signs in the right shoulder, although he believed Petitioner's symptoms were

quite exaggerated. Dr. VanFleet indicated the C5-6 and C6-7 findings on the cervical spine MRI did not match Petitioner's complaints, other than numbness in the right middle finger. Dr. VanFleet noted Petitioner had no pain in the arm other than the right shoulder. Dr. VanFleet opined Petitioner was likely able to return to work with a 10-pound lifting restriction, but Dr. VanFleet did not feel the restriction was related to the work injury. Alternatively, Dr. VanFleet opined the restrictions were related to Petitioner's underlying degenerative condition within the cervical spine. Dr. VanFleet noted Petitioner's restrictions were in place until the cervical spine stenosis was addressed, which was an underlying and pre-existing problem and not related to the workplace injury. However, Dr. VanFleet indicated Petitioner's workplace restrictions could be appropriate based on Petitioner's inability to function at the level needed for his occupational requirements. Dr. VanFleet opined that Petitioner was at maximum medical improvement in relation to the low back and mid-thoracic area. Dr. VanFleet recommended Petitioner continue with home exercises on his own, but no further treatment would be recommended in relation to the injury of May 1, 2017. (RX 1)

Following Dr. VanFleet's Section 12 independent medical examination, Petitioner returned to Dr. Gornet on November 6, 2017, with continued complaints of low back and neck pain. Dr. Gornet noted Petitioner's low back pain was on the left side, left buttock, and left leg, but his neck pain was to the right side, right trapezius, and right arm. Dr. Gornet indicated Petitioner's symptoms were related to the May 1, 2017, work accident. Dr. Gornet noted Dr. Paletta evaluated Petitioner and felt there were subtle issues in the right shoulder but recommended treating the cervical spine first. Dr. Gornet reviewed Dr. VanFleet's October 18, 2017, report, but disagreed with Dr. VanFleet's findings. Dr. Gornet agreed Petitioner had pre-existing degeneration, noting many large population studies support disc degeneration being completely asymptomatic. Dr. Gornet indicated Dr. VanFleet's opinion that Petitioner's condition related to pre-existing degeneration was inconsistent, as Petitioner's "state of well-being" did not indicate any significant issues with his neck or back. Dr. Gornet advised that according to Dr. VanFleet's logic, any indication for pre-existing degeneration cannot result in a work-related injury. Dr. Gornet noted Dr. VanFleet indicated Petitioner had cervical stenosis which can relate to shoulder pain and discomfort. However, Dr. VanFleet believed Petitioner could return to work with work restrictions, which Dr. Gornet believed was illogical and inconsistent, as that would support Petitioner's physical condition changed. Dr. Gornet indicated he believed Petitioner was significantly impaired and the likelihood of Petitioner improving in his neck or back with further conservative treatment and physical therapy as recommended by Dr. VanFleet was "essentially zero". Dr. Gornet noted Petitioner had a large herniation at C5-6 and smaller ones at C6-7 and C4-5. Dr. Gornet opined in order to successfully treat Petitioner's neck, he would require a three-level cervical disc replacement at C4-5, C5-6, and C6-7. Dr. Gornet recommended that Petitioner maintain his work restrictions and continue light duty work. Dr. Gornet continued to believe Petitioner's symptoms and requirement for treatment were causally connected to his work-related accident. (PX 2, Dep. Exhibit #3)

Petitioner was last seen by Dr. Gornet on March 26, 2018. Dr. Gornet again recommended a three-level disc replacement surgery from C4 to C7. Dr. Gornet noted Petitioner was being seen by Dr. Paletta for a shoulder problem, so Petitioner would require treatment for both the neck and shoulder. Dr. Gornet recommended proceeding with surgery and maintaining Petitioner's work restrictions (PX 2, Dep. exhibit #3)

Deposition of Dr. Matthew Gornet

Dr. Gornet testified by way of his evidence deposition on May 24, 2018. Dr. Gornet is a board certified orthopedic surgeon with a specialty in spine surgery. Dr. Gornet was first board certified in 1987. Dr. Gornet testified he evaluated Petitioner on August 24, 2017, November 6, 2017, and March 26, 2018. Dr. Gornet's testimony regarding his examination of Petitioner on those dates was consistent with his office notes and medical records. Dr. Gornet testified Petitioner aggravated his underlying degenerative disc degeneration at C5-6, as well as

produced an acute disc herniation at C4-5, C5-6, and C6-7 as a result of the alleged work accident. Dr. Gornet opined this was Petitioner's main source of pain, including his shoulder complaints retrospectively after Dr. Paletta provided his opinions. Dr. Gornet testified Petitioner had some pre-existing degeneration at C5-6 but believed there was an acute disc herniation on top of the degenerative disc disease. Dr. Gornet testified Petitioner's symptoms were causally connected to his work-related injury on May 1, 2017. Dr. Gornet testified he agreed with Dr. VanFleet that Petitioner had pre-existing disc degeneration at C5-6, but there was no indication from the medical records that would indicate a previous symptomatic or active problem at or near the time of Petitioner's work-related injury. Therefore, Dr. Gornet testified the present pathology and the active neck and shoulder problems and symptoms were all related to the work-related injury and correlated with the objective findings on physical exam and MRI studies. Dr. Gornet noted since Petitioner failed physical therapy and cervical spine epidural injections, he recommended a three-level cervical disc replacement surgery at C4-5, C5-6, and C6-7. (PX 2)

In regard to the lumbar spine, Dr. Gornet testified the initial MRI may have revealed a structural problem at L5-S1, but the significance of that issue would have to be worked up more fully before he could determine a treatment plan. Dr. Gornet further testified the back treatment was on hold, as he wanted to treat the neck first. (PX 2)

In regard to the right shoulder, Dr. Gornet testified Petitioner has a problem in his right shoulder, but Dr. Paletta wanted the neck to be addressed first. (PX 2)

Dr. Gornet testified he believed he could significantly help Petitioner with surgical intervention to the cervical spine. Dr. Gornet testified if Petitioner treats his neck alone, he would expect full duty or very little restrictions in regard to the cervical spine. Dr. Gornet further testified the right shoulder and low back might need to be addressed, but that would be after the cervical spine disc replacement surgery. Dr. Gornet testified the treatment to date and recommended restrictions were reasonable and necessary in relation to the alleged May 1, 2017, work accident. (PX 2)

On cross-examination, Dr. Gornet testified he reviewed Dr. Jha and Dr. Mohamed's treatment records prior to his evaluations. Specifically, Dr. Gornet testified he reviewed Dr. Jha's May 2, 2017, record. Dr. Gornet testified Dr. Jha noted Petitioner's low back complaints after pulling a cart at work. Dr. Gornet admitted Dr. Jha's May 2, 2017, record revealed Petitioner heard a pop with subsequent low back pain. Dr. Gornet further testified Dr. Jha's record revealed mild tenderness to the lumbar spine, but no indications of neck or cervical spine pain. (PX 2)

In relation to Petitioner's cervical spine diagnosis, Dr. Gornet testified the cervical spine was directly related to the described work injury. Dr. Gornet admitted there was nothing on the MRI to date the lesions. Dr. Gornet testified Petitioner indicated his neck pain wasn't immediate like his low back pain but began over a period of days after the injury. Dr. Gornet testified Petitioner had an inflammatory process that developed over time and he believed that was the source of pain. Dr. Gornet testified the acute cervical disc herniation would not cause immediate pain. Dr. Gornet indicated if a patient had another body part affected, that might take predominance, but if that body part symptoms start to calm down, it is normal for a patient to then see other symptoms. Dr. Gornet further testified that a disc herniation that compresses on the nerve root doesn't necessarily correlate with pain. Dr. Gornet admitted disc herniations can exist and be asymptomatic, but usually become symptomatic following an inciting event. (PX 2)

When addressing cervical disc degeneration, Dr. Gornet testified Petitioner had disc degeneration at C5-6, with some loss of disc height and mild spurring. Dr. Gornet testified disc degenerations are a progressive problem that occur throughout our life, so degeneration progresses as we age. (PX 2)

Dr. Gornet admitted Dr. Jha's May 9, 2017, record did not mention cervical spine or neck pain. Dr. Gornet testified Petitioner complained of upper back pain, but Dr. Jha did not specifically mention cervical spine pain as of November 9, 2017. Dr. Gornet testified Petitioner's initial upper back pain began nine days following the accident. Dr. Gornet testified since Petitioner was on a Medrol Dose Pak, he was taking steroids at that point, which calmed down the environment of Petitioner's pain and changed the clinical course. Dr. Gornet testified based on Petitioner's steroid prescription, that would explain why the cervical spine was not symptomatic, but Petitioner started to see thoracic spine pain for the first time. Dr. Gornet testified that Petitioner had received a surgical recommendation six weeks after the injury, so there was no other plausible explanation then to associate the work event with Petitioner's cervical spine injuries and necessity for treatment. (PX 2)

Dr. Gornet testified a disc herniation can be caused by anything that mechanically exceeds what the disc can handle, so the causes for disc herniations are infinite. Based on Petitioner's work event and multiple doctor visits and assessments, Dr. Gornet opined the explanation of spontaneous degeneration causing Petitioner's pain is inconsistent with the medical records. Dr. Gornet further testified that to speculate on the amount of causes that could cause a patient to have a disc herniation is not within a degree of medical certainty. Based on his assessment, Dr. Gornet testified Petitioner was pulling an 800-pound cart and experienced pain, which caused him to seek medical care and there were no other medical records that would indicate any other plausible causation explanation. Dr. Gornet admitted Petitioner indicated he felt a pop and immediate pain in his back at the time of the accident, but no immediate pain in his arm or neck. (PX 2)

Dr. Gornet testified he reviewed the August 24, 2017, cervical spine MRI, which showed an increased size in the disc herniations at C5-6 and C6-7. Dr. Gornet testified he could not state the disc herniations increased dramatically between the two June 6, 2017, MRI and August 24, 2017, MRI. However, Dr. Gornet testified the disc herniations looked larger, but that might simply be due to the more accurate sampling of the disc herniations. Dr. Gornet testified a disc herniation can become worse or progress without intervening traumas. Dr. Gornet opined once a disc is injured, it can progress. (PX 2)

On cross-examination, in regard to the lumbar spine, Dr. Gornet testified he has not obtained a new MRI, as he recommended addressing the cervical spine prior to the lumbar spine. Dr. Gornet testified if the cervical spine was treated and the low back is tolerable, no further treatment might be necessary. However, Dr. Gornet testified Petitioner may still require treatment on his shoulder following cervical spine surgery, but he would defer to Dr. Paletta for the shoulder treatment. Dr. Gornet testified Dr. Paletta verbally advised Petitioner to treat his neck first and then he would determine whether the shoulder had any residual issues. Dr. Gornet further testified Petitioner may not require any treatment on his shoulder or low back following the cervical spine surgery. (PX 2)

Dr. Gornet testified Petitioner's disc herniation at C6-7 is more to the left, but the disc herniation at C4-5 is right-sided and the disc herniation at C5-6 is more central. Dr. Gornet testified left-sided and right-sided disc herniations can cause neck pain, but they generally do not cause radicular pain on the opposite side. However, Dr. Gornet testified central disc herniations can cause radicular pain on both sides. (PX 2)

On re-direct examination, Dr. Gornet testified Petitioner was given a surgical recommendation for an anterior cervical discectomy and fusion by Dr. Mohamed at C5 to C7. Dr. Gornet further testified he reviewed Petitioner's

pre-employment physical with Dr. Oltman, which did not reveal any concerning issues with the cervical, thoracic, or lumbar spine. (PX 2)

Furthermore, Dr. Gornet testified that Petitioner was prescribed a Medrol Dose Pak by Dr. Jha on May 2, 2017, which would calm down the inflammatory process in the spine, in particular disc herniations at C4 to C7. Dr. Gornet testified steroids are typical treatment for inflammation and could alter Petitioner's clinical presentation of his symptoms in the cervical spine if those symptoms were evolving. Dr. Gornet testified Petitioner's cervical spine pain evolved in a short period of time based on Dr. Jha's medical records. Dr. Gornet testified Dr. Jha's records speak for themselves, but there is nothing in the medical records that would change his opinions. Dr. Gornet testified since Petitioner's cervical spine process evolved rapidly, there was no plausible explanation other than to associate it with a work-related injury.

On re-cross-examination, Dr. Gornet admitted that if a patient advised him he was having back pain, he would treat the low back. Dr. Gornet testified if a patient complained of thoracic pain, he would be more concerned about the cervical spine, but low back issues are generally centered to the low back. In regard to the Medrol Dose Pak, Dr. Gornet testified he would expect the steroid to calm down both Petitioner's low back and cervical spine pain. However, Dr. Gornet admitted the Medrol Dose Pak did not completely alleviate Petitioner's symptoms. Dr. Gornet testified he assumed the Medrol Dose Pak was prescribed by Dr. Jha based on Petitioner's initial low back complaints. (PX 2)

Deposition of Dr. Timothy VanFleet

Dr. VanFleet, Respondent's Section 12 examiner, testified by way of his evidence deposition on June 20, 2018. Dr. VanFleet is a board certified orthopedic surgeon with a specialty in spine surgery. Dr. VanFleet was initially board certified in 2000 and re-certified in 2009. Dr. VanFleet testified he performed an independent medical evaluation of Petitioner on October 18, 2017.

Dr. VanFleet testified that he reviewed certain records as part of his examination. Those records were detailed in pages 1 – 3 of his written report. (RX 2, p. 16) Dr. VanFleet testified that he reviewed Dr. Jha's May 2 and May 9, 2017 reports and that the only complaints contained therein referred to back pain and not neck pain. He also testified that he reviewed medical records from St. Mary's in Centralia of Dr. Mohamed and a cervical MRI. Dr. VanFleet testified that the cervical MRI revealed changes in the spine that were not acute but were consistent with chronic degenerative disc disease of the cervical spine. (RX 2, pp. 17 – 18) He also reviewed a lumbar spine MRI that he described as "unremarkable." (RX 2, p. 18)

Dr. VanFleet further testified that after his initial examination of Petitioner he was provided with Dr. Gornet's records, including a blank disc for an MRI performed on August 24, 2017 (however, he had the report). He noted that Dr. Gornet had recommended a three-level cervical disc replacement for Petitioner and that his November 6, 2017 report/office note was an attempt to refute any of his positions as set forth in his IME report. (RX 2, pp. 19-20)

Dr. VanFleet testified that he disagreed with Dr. Gornet's comments as set forth in the November 6, 2017 report as he felt the doctor had mischaracterized his statements. More specifically, he took issue with Dr. Gornet's comment that "I [Dr. Gornet] explained to [Petitioner] that according to Dr. VanFleet's logic, any patient who has preexisting degeneration by definition cannot have a work-related injury." (RX 2, p. 20) Dr. VanFleet explained that what he was meaning in this instance was that Petitioner had a pre-existing condition as noted on his MRI but he only had back complaints following his injury and any additional complaints specifically regarding

his neck did not come to light for many weeks after the injury, which is not consistent with an injury to the neck at the time of an injury. Dr. VanFleet testified, "If you have an injury, the injury creates symptoms at the time of the injury or soon thereafter, not many weeks thereafter." (RX 2, pp. 20-21)

Dr. VanFleet further testified that he diagnosed Petitioner with non-specific neck and back pain, as well as cervical spine stenosis and cervical degenerative disc disease. Dr. VanFleet noted Petitioner complained essentially of neck, thoracic, and lumbar spine pain. However, Dr. VanFleet opined Petitioner's pain was not well delineated or vocalized, so the nature of the diagnosis was non-specific neck and back pain. Dr. VanFleet testified Petitioner's back pain was not objectified by his physical exam findings, nor any imaging studies consistent with a long-term process. Dr. VanFleet testified Petitioner's lumbar spine MRI was unremarkable, so there is no good medical diagnosis attached to Petitioner's persistent low back and thoracic complaints. (RX 2)

Dr. VanFleet testified the cervical spine stenosis and degenerative disc disease was objectified by the findings on the MRI, which clearly showed a long-standing process with no acute findings in the neck. Dr. VanFleet testified there was nothing acute about the cervical spine MRI findings consistent with an injury, as the findings supported long-standing changes within the cervical spine. (RX 2)

In regard to causation, Dr. VanFleet testified he did not believe Petitioner's neck complaints were related to the work accident. Dr. VanFleet testified a patient can possess a pre-existing condition that can be exacerbated or aggravated by a work injury. However, Dr. VanFleet testified this was not the cause in this case as his presenting complaint for several weeks had nothing to do with his neck. Dr. VanFleet testified there was nothing about Petitioner's presentation that had anything to do with his cervical spine, and if Petitioner had a cervical spine injury at the time of the work accident, it would be evident within days thereafter. He added, "There's no medical record reflecting the fact that he had any kind of cervical complaints for many weeks after the accident." (RX 2, p. 23)

Dr. VanFleet testified that there were no objective findings from the examination he performed, as Petitioner had no reflex changes and he was not hyper reflexive or hypo reflexive. He further testified that Petitioner had non-myotomal weakness in the right upper extremity, which he explained "is always a concerning feature on examination, ..., for kind of a fictitious type of presentation." (RX 2, p. 25) Dr. VanFleet acknowledged that Petitioner had findings consistent with right shoulder impingement "although they were quite exaggerated" which meant "there was, again, a little bit of embellishment being placed upon the examination." (RX 2, p. 26)

Dr. VanFleet also testified that the findings on the cervical spine MRI at C5-6 and C6-7 did not match up to Petitioner's complaints, other than numbness in the right middle finger. Petitioner had no pain in the arm, other than the shoulder, which would be more at C4-5, with no real good radicular type of pain presentation at the time of his exam. Dr. VanFleet testified Petitioner's previous cervical spine stenosis could be a part of his symptom complex in terms of his presentation, but he did not feel the cervical stenosis was related to the occupational exposure. (RX 2, p. 26)

In regard to Petitioner's lumbar spine, Dr. VanFleet testified Petitioner had a multitude of complaints in his spine axially, meaning along the spine. Dr. VanFleet testified Petitioner's back pain was not objectified by physical examination, nor any imaging studies consistent with a long-term process. Dr. VanFleet noted Petitioner was diagnosed with a lumbar strain by Dr. Jha in May, which should have been resolved in six to eight weeks, maybe ten to twelve weeks, at the latest for a work-related injury. Therefore, Dr. VanFleet testified that with non-specific low back pain and no objective findings he was concerned about malingering, as there was no medical reason why Petitioner had continued persistent lumbar spine pain. Dr. VanFleet testified that when a patient has a

manifestation of a condition that persists over a period of time without any objective medical evidence, especially in a setting such a workers' compensation case with obvious secondary gain interests at risk, there is always a potential for malingering as a possible differential diagnosis. Dr. VanFleet testified the only diagnosis related to the work-related injury was a low back strain. (RX 2, pp. 23 - 25)

In regard to Petitioner's alleged shoulder injury, Dr. VanFleet testified he did not believe the shoulder injury was causally related to the alleged May 1, 2017, accident. Dr. VanFleet testified Petitioner did not complain of any shoulder pain initially and it took a while to develop these symptoms. Therefore, Dr. VanFleet testified it would be difficult to make an argument causally relating Petitioner's shoulder injury to the alleged work accident. Dr. Van Fleet admitted he did not have a firm opinion on the shoulder, but he had concerns for the shoulder complaints being related to the alleged work accident. (RX 2, pp. 24 - 26)

Dr. VanFleet testified Petitioner would require a 10-pound lifting restriction due to his cervical spine condition, but not his lumbar spine condition, which he felt was resolved. Dr. VanFleet testified the restriction was not a result of the work injury Petitioner possessed, but rather an unrelated and underlying pre-existing condition in the neck that needed treatment. (RX 2)

Dr. VanFleet testified Petitioner did not require any additional testing or treatment in relation to the May 1, 2017, work accident and that he was at maximum medical improvement regarding any alleged work injuries. (RX 2, pp. 27-28, 29)

Dr. VanFleet was asked about Dr. Gornet's recommended three-level procedure. The doctor felt two levels would be appropriate and, more specifically, he didn't think surgery at C4-5 was necessary. Dr. VanFleet testified Petitioner's disc space at C5-6 and C6-7 were stenotic, so doing a disc replacement in the setting of an essentially stenotic canal would be the choice of the surgeon, but not Dr. VanFleet's first choice. Dr. VanFleet indicated he would prefer doing a fusion at that level, as he opined doing a disc replacement surgery for an essentially stenotic canal with worn out facet joints would be a controversial procedure. However, Dr. Van Fleet testified doing a procedure would be left to the judgment of the surgeon. Dr. VanFleet specifically testified the necessity for cervical spine surgery was not related to the alleged May 1, 2017, work accident. Dr. VanFleet testified Petitioner reached maximum medical improvement in regard to his alleged work injuries and required no additional treatment in relation to the work accident. (RX 2, pp. 28 - 29)

On cross-examination, Dr. VanFleet acknowledged that he had only seen Petitioner on one occasion, namely October 18, 2017. (RX 2, p. 31) He acknowledged that the history Petitioner provided to him was that he was pulling a cart with his right arm and was facing forward as he pulled the cart and his right arm was rotated and turned at that time and he began experiencing pain across his low back. (RX 2, p. 32) He also acknowledged that Dr. Jha's record of May 2, 2017, noted a history of Petitioner pulling a cart with a subsequent pop and low back pain. Dr. VanFleet also acknowledged that Dr. Jha's May 9, 2017, record noted Petitioner's back pain extended into the thoracic spine and that the May 15th record indicated he was undergoing massage to his neck as well as his trapezius, thoracic and lumbar spine. Furthermore, Dr. VanFleet testified he reviewed the St. Mary's Centralia Hospital records from May 11, 2017, which noted Petitioner's pain had spread to his upper back and neck. Dr. VanFleet admitted the thoracic spine anatomically extends all of the way from the cervical spine at the base of the neck to the low back or lumbar spine. Dr. Van Fleet testified that he was unaware, by the histories, of any other accidents Petitioner may have sustained between May 1st and May 11, 2017. Dr. VanFleet further testified that he reviewed the medical records of Dr. Mohamed, which revealed a surgical recommendation for a fusion from C5-6 to C6-7. (RX 2, pp. 32 – 38)

Dr. VanFleet was asked if Petitioner's complaints of pain across the neck, back, and thoracic spine along with numbness at the tip of his right middle finger were consistent with problems experienced by people with spinal injuries and complaints. He acknowledged that there can be complaints of pain in the shoulder. Dr. VanFleet testified those complaints of pain could be related to the shoulder or the C4-5 level. Dr. VanFleet testified the C5-6 and C6-7 levels create pain down the arm, but Dr. Mohamed did not make mention of the C4-5 problem. Dr. VanFleet testified there was nothing wrong with the C4-5 disc level in Petitioner's spine and he would not anticipate C4-5 would need to be addressed surgically. Dr. VanFleet testified the C6-7 disc space would cause some symptoms into the middle or ring finger, with C6 causing more symptoms in the thumb and first web space. Dr. VanFleet acknowledged that he did not review any records pre-dating May 1, 2017. (RX 2, pp. 38 - 39)

In regard to his review of the diagnostic studies, Dr. VanFleet testified that one cannot put a date on the findings of the MRI, but one can obtain a general understanding about the timing of certain events. Dr. VanFleet testified that one can determine whether MRI findings are acute or chronic. Dr. VanFleet testified he could review an MRI and determine whether the findings occurred two weeks or two years prior. Dr. VanFleet testified soft disc herniations are not present very long, so they are normally absorbed by the body. However, basic degenerative changes around the end plates have signal changes consistent with Mobic end plate changes and osteophyte formation, with neuroforaminal narrowing and incontrovertible spurring. Therefore, Dr. VanFleet opined he could determine if there are long-standing issues. Dr. VanFleet testified the conditions identified on the MRI studies would be subject to further degeneration, as long as the patient continues to live. (RX 2, pp. 39 - 42)

Dr. VanFleet admitted a 10-pound weight restriction was necessary in regard to Petitioner's cervical condition. Furthermore, Dr. Van Fleet testified that he would proceed with a cervical spine fusion at C5-6 and C6-7 as opposed to a disc replacement. (RX 2, p. 42)

On re-direct examination, Dr. VanFleet testified it is unnatural for a low back injury to have complaints spread to the neck. (RX 2, p. 43) Dr. VanFleet further testified that if Petitioner was pulling a 600 to 1000 pound cart, he would expect even a degenerative condition to become symptomatic immediately thereafter. Dr. VanFleet testified that if it was an exacerbation or an aggravation of an underlying spinal stenosis it would cause neurologic symptoms and complaints but not neck pain. However, Petitioner's presentation to the physical therapist revealed no neurological complaints, just axial pain with no complaints about nerves, weakness or numbness in the arms. Therefore, if any injury took place to the neck, he would have expected to see Petitioner experiencing symptoms within 48 hours. Dr. VanFleet admitted it is not uncommon for patients to have an injury and perhaps not have symptoms for 24 to 48 hours when it pertains to a soft tissue injury, like muscles or actual tissues. However, Dr. VanFleet testified if the patient had a disc prolapse, disc rupture, acute disc rupture, or some kind of traumatic injury to the nerve, many times the patient will have symptoms right away, at the moment, especially when it comes to spinal cord compression. Dr. VanFleet testified he would expect to see symptoms at the time of the injury, if it is related to the incident. Dr. VanFleet agreed that degenerative conditions can continue to progress without any acute trauma, especially as the patients age. Dr. VanFleet testified the older the patient is, the more likely they are to possess degenerative changes within the spine and he would expect an older patient to have more degeneration than a younger patient. (RX 2, pp. 43 - 46)

On re-cross-examination, Dr. VanFleet testified that a Medrol Dose Pak, such as the one prescribed by Dr. Jha on May 2nd, is designed to relieve an inflammatory process. He explained that they assist with inflammation within soft tissue but not so much in the disc itself. Its effectiveness in this type of injury is dependent upon what it is being used for. Dr. VanFleet testified the steroids can make you feel better all over, as they do work well as an anti-inflammatory. However, Dr. VanFleet testified steroids do not necessarily mask symptoms of discogenic

pain, but rather alleviate inflammation and make the patient feel better by easing the symptoms. Dr. VanFleet testified he would not prescribe steroid medications for asymptomatic conditions. (RX 2, pp. 46 - 50)

Dr. VanFleet acknowledged seeing a picture of the cart Petitioner pulled although Petitioner was not in the photograph. He could not find the picture in his electronic file; however, he recalled seeing it as he dictated about it. (RX 2, pp. 49-50) He further testified that he doesn't prescribe Medrol Dosepaks for asymptomatic conditions. (RX 2, p. 5)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on August 16, 2018 pursuant to a 19(b) Petition. The disputed issues were causal connection, medical bills, temporary total disability, and prospective medical care (more specifically, cervical spine surgery as recommended by Dr. Gornet). Petitioner was the sole witness testifying at the hearing.

Petitioner testified that on May 1, 2017, he was employed by Respondent as a cart picker. Petitioner testified he would put together boxes and put them on a cart, as well as pick brochures as part of his job duties. Petitioner testified once the cart was filled, he would tape the boxes and put the boxes on pallets to be shipped out. Petitioner testified there were 30 pamphlets to a box and each box weighed anywhere from 20 to 40 pounds. Petitioner testified his lifting requirements as of May 1, 2017, were up to 87 pounds at certain times, including lifting buckets of zinc and paint.

Petitioner testified that on May 1, 2017, he was picking up pamphlets and filling up his cart with 30 boxes. Petitioner turned to reach behind him to pull the cart and he felt a pop in his back. Petitioner testified the cart weighed 600-800 pounds. (See PX 11) Petitioner testified that he reached back with his right hand to pull the car. Petitioner testified the cart was completely stopped before he tried to pull it, but admitted it was hard to pull to begin with whenever it was fully loaded. Petitioner further testified the cart moves a lot easier once it gets rolling.

In regard to his complaints, Petitioner testified he had low back pain and numbness on his right middle finger at the time of the accident. Petitioner further testified he later had neck and right shoulder pain five days later. When his neck and right shoulder pain began, Petitioner testified there was tightness in his back, as well as pain in his neck. He further testified he had difficulty turning his head back and forth and raising his right arm above his head or shoulder.

Petitioner testified he notified Jake Spannagel on May 1, 2017. Petitioner testified Respondent advised Petitioner to ice his back in the break room. Petitioner testified that he saw Dr. Jha on May 2, 2017 and told him about his back and right middle finger.

Petitioner testified regarding his visits and medical treatment with Dr. Jha, Dr. Mohamed, Dr. Paletta, and Dr. Gornet. In particular, Petitioner testified he advised Dr. Jha on May 2, 2017, in regard to his back pain and the numbness in his right middle finger. Furthermore, Petitioner testified he advised Dr. Jha on May 9, 2017, that his back pain increased into his thoracic spine. Petitioner also testified that he saw Dr. Mohamed on May 25, 2017 and told him he had neck pain radiating into his right shoulder. Petitioner testified he underwent physical therapy and injections into the cervical spine, as well as a right shoulder evaluation with Dr. Paletta. Petitioner testified the cervical spine injections did not provide significant relief, so he was recommended for neck surgery by Dr. Gornet. Petitioner testified he would like to proceed with the surgical recommendation from Dr. Gornet.

Petitioner testified he did not have any injuries or conditions to his neck, mid back, low back, spine, or right shoulder prior to May 1, 2017. Subsequent to the May 1, 2017, accident, Petitioner testified he did not have any additional accidents or injuries to his neck, mid back, low back, spine, or right shoulder. Petitioner further testified he did not have any medical restrictions prior to May 1, 2017.

Furthermore, Petitioner testified he did not return to work subsequent to May 1, 2017, at the time of arbitration. Petitioner admitted he was paid temporary total disability benefits from May 2, 2017, through November 6, 2017, but has not received TTD benefits since that date. Petitioner testified he has not returned to work for Respondent since May 1, 2017, nor returned to work for any other employer since the alleged accident.

Petitioner testified the medical treatment provided minimal relief in regard to his neck, low back, and right shoulder. Petitioner testified he has continued low back and neck pain, as well as pain into the right shoulder. Petitioner testified he had numbness in his right middle finger since the alleged accident, as well as low back pain when standing. Petitioner testified his current neck pain was 6/10 with constant pain and numbness. Petitioner testified he had to make frequent postural changes from sitting to standing throughout the day and usually sits in his recliner. Petitioner further testified he has range of motion issues with his neck and right shoulder, advising he could not raise his right arm above his head or turn his neck left or right. Petitioner further testified he had impaired strength in his right arm and difficulty sleeping due to neck and back pain.

On cross-examination, Petitioner admitted that he did not experience a pop in his shoulder or neck at the time of the May 1, 2017, accident. Rather, Petitioner testified he only felt a pop in his low back. Furthermore, Petitioner testified he reviewed the medical records with his counsel and did not have any reason to question the validity of the records. Petitioner admitted he was not on any medications at the time of his initial evaluation on May 2, 2017. When presented with the First Report of Injury or Illness on cross-examination, Petitioner testified that everything on the report was accurate and he had no reason to question the validity of the First Report of Injury or Illness.

In regard to treatment, Petitioner admitted he last saw Dr. Paletta in September of 2017 for his right shoulder and no additional right shoulder treatment has been recommended. In regard to his low back, Petitioner testified he has not been recommended for any low back treatment but was continuing treatment with Dr. Gornet with the next evaluation in November of 2018.

The Arbitrator concludes:

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

Although the parties stipulated that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 1, 2017, Petitioner failed to prove that his current condition of ill-being in his cervical spine, low back and/or right shoulder is causally related to that work accident. Based on the opinions of Dr. VanFleet and Dr. Gornet, Petitioner did prove that he sustained a low back strain as a result of the May 1, 2017, work accident.

In assessing the issue of causation the Arbitrator found the details as to the injury very critical. Petitioner testified that that the cart was stopped and that he turned to reach behind himself to pull the cart when he felt a pop in his back. Thus, the cart was not moving and was not being pulled by Petitioner when he felt his low back pop. Petitioner's testimony as to how the accident occurred was never accurately presented to his treating doctors. Dr. Gornet, Dr. Paletta, and Dr. Mohamed all had a different understanding of how the accident occurred. Petitioner

told Dr. Mohamed that his neck pain began on May 1st, the day of the accident. He also told him that the injury occurred while he was "pulling" a cart and "it turned wrong." Petitioner told Dr. Gornet that he was "pulling" a cart and twisted and felt low back and hip pain. Finally, Petitioner told Dr. Paletta that he was "walking forward and dragging the cart from behind him so his right arm was extended to the side and slightly backwards" and that "As [he] did this, ..he felt pain in the cervical spine and into the right shoulder." (PX 6). None of these histories were corroborated by Petitioner's testimony as to how the accident occurred and, therefore, all of the doctor's opinions are based on an incorrect understanding as to the mechanics/details of the accident.

In regard to the cervical spine injury, Petitioner admitted at arbitration that he did not have any pain in his neck or right shoulder at the time of the May 1, 2017, work accident. Petitioner specifically testified he felt a pop and immediate pain in his low back, but his neck and right shoulder pain did not begin for approximately five days. While he testified that he had numbness in his right middle fingertip, there was no objective corroboration for this. The First Report of Injury doesn't state that. Petitioner further testified that he told Dr. Jha at their May 2nd meeting about the numbness; however, the doctor's records don't corroborate that. The medical records from Dr. Jha show that Petitioner did not have any neck pain or right shoulder pain within proximity to the alleged accident. Petitioner's first report of neck pain was at his May 11, 2017, physical therapy evaluation at St. Mary's Centralia Hospital. While on May 9, 2017, Dr. Jha noted Petitioner's symptoms moved into the thoracic spine, this was ten days after the accident. Petitioner had not been working since the accident as Respondent could not accommodate the restrictions. Petitioner provided no testimony as to his level of activity while off work during this time. While Petitioner testified he advised Dr. Jha of experiencing numbness in his right middle finger at the time of the accident, Dr. Jha's medical records do not note any such symptoms on May 2, 2017, or May 9, 2017. In fact, Dr. Jha's records specifically deny any numbness symptoms at the time of either exam. Petitioner could have deposed Dr. Jha to corroborate his testimony; however, he didn't.

Dr. Gornet testified Petitioner aggravated his underlying degenerative disc condition at C5-6, as well as experiencing acute disc herniation at C4-5, C5-6, and C6-7 as a result of the work accident. However, Dr. Gornet admitted that Petitioner advised him he felt only low back pain at the time of the accident, and that his neck pain wasn't immediate, but rather began over a period of days afterwards. Dr. Gornet testified that an acute disc herniation may not cause immediate pain, as other injured body parts may take predominance, thereby making additional symptoms. Furthermore, Dr. Gornet testified that since Petitioner was taking anti-inflammatory steroids, it likely temporarily alleviated his symptoms, which would explain the delay in the cervical spine complaints. However, Petitioner admitted at arbitration he was not taking any steroids or pain medications at the time of his initial evaluation with Dr. Jha on May 2, 2017. Also, Petitioner admitted the steroidal medications only helped "some" but not a lot. Therefore, Dr. Gornet's explanation for why Petitioner's cervical spine complaints were delayed and not immediate is not supported by the facts of this case, especially in light of Petitioner's admissions.

The Arbitrator also again notes that Petitioner was not an accurate historian when presenting to both Dr. Gornet and Dr. Paletta. When initially seen by Dr. Gornet, Petitioner's pain complaints included pain going down his right arm to the elbow with tingling in the forearm and into the medial finger. This is the only medical provider to whom Petitioner related such extensive radiating right arm pain. To all other providers, including Dr. VanFleet, he denied same. Additionally, Petitioner described the mechanism of injury as "pulling." When presenting to Dr. Paletta, Petitioner told the doctor that he was walking forward and dragging the cart with his right arm extended to the side and slightly backwards and that as he did that maneuver, he felt pain in his cervical spine and into his right shoulder. Prior to this visit Petitioner had never related such a history/mechanism of injury. Thus, both Dr. Gornet and Dr. Paletta have based their recommendations and opinions on inaccurate information from Petitioner.

Petitioner also gave a different history to Dr. Mohamed as he told him he was pulling a cart at work and it "turned wrong." Petitioner did not testify to this nor do early records suggest this.

The Arbitrator is unable to conclude that Petitioner's current low back complaints are causally related to the accident. Respondent stipulated to causation for Petitioner's low back injury through November 6, 2017. It was at that time that Petitioner returned to see Dr. Gornet after having been examined by Dr. VanFleet. Dr. VanFleet was of the opinion Petitioner's low back strain had reached maximum medical improvement. When Petitioner returned to see Dr. Gornet on November 6, 2017 Dr. Gornet made no notes or recommendations regarding Petitioner's low back at that visit. He focused solely on Petitioner's cervical spine.

Petitioner also failed to prove that any current condition of ill-being in his right shoulder is causally related to the work accident. In so concluding, the Arbitrator notes the incorrect histories provided to both Dr. Paletta. Petitioner told Dr. Paletta that he was walking forward and dragging the cart from behind him so his right arm was extended to the side and slightly backwards. He also told the doctor he felt pain in his neck and into the right shoulder at that time. Both the description of the accident and the claimed onset of the right shoulder and neck pain was incorrect. Therefore, any causation opinion of Dr. Paletta is not persuasive.

Issue (J): "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges of all reasonable and necessary medical charges?"

As indicated above, Petitioner failed to prove his current cervical spine and right shoulder conditions of ill-being are causally related to the work accident. Therefore, the issue of the medical bills in relation to the cervical spine and right shoulder injury are moot and no bills regarding those conditions are awarded.

Based on Dr. VanFleet's opinion regarding the lumbar spine, the Arbitrator finds that Petitioner suffered a lumbar spine strain and subsequently reached maximum medical improvement. Dr. VanFleet agreed that Petitioner's treatment for the low back had been reasonable and necessary. Therefore, Petitioner is awarded the medical bills found in PX 1 that solely relate to treatment for Petitioner's lumbar spine. This would include the bill to Dr. Jha for $238.00, St. Mary's Health for therapy ($2,670.00 and $1470.00), and Dr. Gornet's initial visit of August 24, 2017. Petitioner is also awarded prescription reimbursements in the amount of $32.00.

Respondent shall receive a credit for any previously paid medical bills.

Issue (K): "Is Petitioner entitled to any prospective medical care?"

The only prospective medical care sought by Petitioner was an award of cervical spine surgery as recommended by Dr. Gornet. As indicated above, Petitioner failed to prove his current cervical spine and right shoulder conditions are causally related to the May 1, 2017, work accident. Therefore, Petitioner's claim for any prospective cervical spine and right shoulder medical care is denied, including, but not limited to, the cervical spine surgery recommended by Dr. Gornet.

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

Petitioner is awarded temporary total disability benefits from May 2, 2017 through November 6, 2017, consistent with Respondent's stipulation. (See AX 1). Consistent with her causation determination, any additional TTD benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry E. LeVault,
Petitioner,

vs. NO: 17 WC 06265

Knight Hawk Coal, LLC,
Respondent.

19IWCC0398

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decision of the Arbitrator filed May 14, 2018, is hereby affirmed and adopted.

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

19IWCC0398

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

DATED: JUL 30 2019

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
07-11-19
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEVAULT, LARRY E
Employee/Petitioner

Case# **17WC006265**

KNIGHT HAWK COAL LLC
Employer/Respondent

19IWCC0398

On 5/14/2018, 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 2.00% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5236 CULLEY FEIST KUPPART & JORDAN
KYLEE J JORDAN
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

5990 LITCHFIELD CAVO LLC
GREGORY KELTNER
222 S CENTRAL AVE SUITE 200
ST LOUIS, MO 63105

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

LARRY E. LEVAULT
Employee/Petitioner

Case # **17 WC 06265**

v.

Consolidated cases: **N/A**

KNIGHT HAWK COAL, LLC.
Employer/Respondent

19IWCC0398

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 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. ☒ 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 10, 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 $**76,075.48**; the average weekly wage was $**1,462.99**.

On the date of accident, Petitioner was **51** 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 $**5,068.14** for other benefits, for a total credit of $**5,068.14**.

Respondent is entitled to a general credit of $**42,082.60** for medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that his current condition of ill-being is causally related to his accident of July 10, 2015. Petitioner's claim for compensation is denied and 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.

Nancy Lindsay
Signature of Arbitrator

May 9, 2018
Date

MAY 14 2018

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner is an employee of Respondent. The parties stipulated that Petitioner sustained an accident on July 10, 2015. As a result of said accident, Petitioner claims he sustained a left inguinal hernia. Respondent disputes causation and liability for medical bills, lost time and alleged permanency.

The Arbitrator finds:

On July 10, 2015, an Incident/Accident Report was completed for Petitioner. (PX1, RX3) The specific activity Petitioner was engaged in was listed as "[r]epairing chunk breaker in feeder". The description of the incident was,

> Larry was breaking loose the bolts on the coupler from the motor to the chunk breaker. He was using a ¾ ratchet and cheater pipe. As he was pulling back on the ratchet he felt a pull in his lower left grouing (sic) area. Continued feeling on uncomfortableness through out the rest of the shift.

The body part injured was listed as "[l]ower left grouing (sic) area". The names of the witnesses listed were Ryan Pedigo, Bob Ridings, and Mike Davis. Petitioner's supervisor, Robert Ridings, signed the report.

Petitioner underwent no medical treatment and continued working full duty.

On May 9, 2016, Petitioner presented to the Emergency Room at Herrin Hospital with complaints of high blood pressure and "my hearts beating out of my chest". (PX5) Petitioner was given medication and fluids. On physical examination, Petitioner's abdomen was soft and non-tender. No distension, mass, or hernia was noted. Petitioner was assessed with hypertension and referred to his primary care physician. He was discharged on May 10, 2016.

On May 31, 2016, Petitioner presented to Logan Primary Care in follow up after he went to the emergency room with an elevated blood pressure. (PX3) Petitioner was diagnosed with hypertension. Micah Oakley, PA-C, recommended that Petitioner top smoking, and advised Petitioner to follow up if his symptoms persisted or worsened. Petitioner's abdominal examination revealed no hepatosplenomegaly or masses, guarding or rebound tenderness. The abdomen was soft, nontender, and nondistended.

On July 1, 2016, Petitioner presented to Micah Oakley, PA-C, at Logan Primary Care Services for his hypertension. (PX3) Petitioner's medication was changed and he was advised to monitor his blood pressure. No other complaints were noted. (PX 3)

On October 11, 2016, Petitioner presented to Elizabeth Parks, PA-C, at Logan Primary Care Services reporting "I think I have a hernia". (PX3) Petitioner advised that the onset was July 2015. Petitioner advised that he was at work and that "it swelled up a little bit. Keeps coming and going". Ms. Parks noted that it was located on his left lower stomach region. Petitioner reported that he "filed it yesterday as work comp". Ms. Parks noted that Petitioner had a history of RIH and repair more than ten years ago. Ms. Parks ordered a CT of Petitioner's abdomen/pelvis. Petitioner declined a surgical referral or pain medication at that time. He was assisted in scheduling an appointment with work care for the next week.

On October 20, 2016, Petitioner presented to Micah Oakley, PA-C regarding a hernia. Ms. Oakley noted that Petitioner's problem started in July 2015, at work. Petitioner advised that he had filled out an incident report, and that it had been bothering him off and on ever since but it seemed to be getting worse. On examination of the abdomen, the left inguinal region had tenderness and bulging. PA-C Oakley noted that Petitioner would undergo a CT of the abdomen and, pending the results, Petitioner might need a surgical evaluation. The diagnosis was that of a unilateral inguinal hernia without obstruction or gangrene "recurrent." (PX 3)

On November 2, 2016, Petitioner underwent a CT of his abdomen & pelvis with contrast. (PX5) This impression was:) moderate fat-containing left inguinal hernia. Mild haziness of the fat is present. Correlate for signs of incarceration. 2) Small fat-containing umbilical hernia. 3) Stable bilateral adrenal adenomas and right renal cysts, and 4) diverticulosis.

On November 18, 2016, Petitioner presented to Dr. Rodney Miller for a hernia, diverticulitis, and colon cancer screening, per the referral of Micah Oakley. (PX4) Dr. Miller noted Petitioner had a history of hernia with a duration of 18 months. Dr. Miller noted that Petitioner initially noticed the bulge while torqueing a wrench, and most recently while lifting an acetelone bottle. Petitioner reported that his symptoms were aggravated by lifting heavy weight, physical activity, and by coughing. Dr. Miller assessed Petitioner with a left inguinal hernia "from work activities" and discussed the risks and benefits of surgery.

On December 21, 2016 Petitioner filed his Application for Adjustment of Claim herein alleging a July 25, 2015 work accident resulting in a hernia. The accident was described as "fixing chunk breaker and while pulling on bolt it broke loose." (AX 2)

On March 6, 2017, Petitioner presented to Micah Oakley, PA-C, at Logan Primary Care Services. Petitioner was seeing Ms. Oakley regarding his hypertension. No other complaints were noted. On examination, Petitioner's abdomen was negative for hepatosplenomegaly or masses, guarding or rebound tenderness. Petitioner received a refill of his medications and was advised to follow up in six months. (PX 3)

On May 2, 2017, John Kramer wrote a letter stating,

> On July 7, 2015, Larry Levault and I were working on the feeder on Unit 1 changing out the chunk breaker due to bearing failure. Larry was squatted down, while bent over, trying to loosen the

bearing mount bolts on the bottom right-handed side when he said he felt a burning sensation in his groin. (PX2)

On May 16, 2017, Petitioner followed up with Dr. Miller for his left inguinal hernia. (PX4; PX 5) Dr. Miller noted the duration of Petitioner's condition was two years. He described the severity as mild to moderate and occurring constantly. Petitioner reported a worsening of his symptoms and pain. Dr. Miller noted that Petitioner reported to him that "...while working at coal mine, he was changing chunk breaker and experienced severe pain and warmth on the left groin. He continued to notice pain of the left groin but tolerated." Dr. Miller discussed the risks and benefits of surgery with Petitioner.

On June 1, 2017, Petitioner underwent surgery performed by Dr. Miller. (PX4; PX5) Dr. Miller performed a left open inguinal herniorrhapy, age greater than 5 initial, left inguinal Bard keyhole mesh placement, and left inguinal nerve resection.

On June 28, 2017, Petitioner followed up with Dr. Miller post-operatively. (PX4) Dr. Miller noted that Petitioner had some suture irritation of the left lateral incision site, bur he had normal range of motion and denied any inguinal pain, fullness, or foreign body sensation with bending. Petitioner was instructed to continue with weight restrictions and to follow up as needed.

On July 6, 2017, Dr. Miller wrote a note for Petitioner advising that he could return to work without restrictions on July 27, 2017. (PX4)

Petitioner has undergone no further treatment since July 27, 2017.

Deposition of Dr. Miller

On October 30, 2017, Dr. Miller testified via evidence deposition at Petitioner's request. (PX6) Dr. Miller testified that he is a general surgeon who holds a medical license in Illinois. Dr. Miller testified that his practice is a general surgical practice with a focus on endoscopy and hernias. Dr. Miller testified that he treats over 400 patients a year for hernias.

Dr. Miller testified that he began treating Petitioner in November of 2016, and that Petitioner gave a history of the onset of his pain beginning 18 months prior to his appointment. (PX6) Dr. Miller testified that Petitioner gave a history of torqueing a wrench on some equipment. Dr. Miller testified that "[h]e actually works in the coal mines, those really big, heavy wrenches that they carry". Dr. Miller testified that Petitioner reported experiencing inguinal pain following that incident, and after he had to lift an acetylene tank or bottle.

Dr. Miller testified that on physical examination Petitioner had tenderness in his left inguinal area and he had a hernia. Dr. Miller testified that he recommended that Petitioner not lift anything more than 25 lbs., and he scheduled him for surgery. However, Petitioner didn't undergo surgery right away and did not return to see the doctor until May 16, 2017 at which time he wished to pursue surgery.

Dr. Miller testified that he diagnosed Petitioner with a left inguinal hernia. (PX6) Dr. Miller explained that an inguinal hernia is in the groin area, a weakness between muscle layers in the groin area and that in men it's usually compromised by the spermatic cord. Dr. Miller explained that the two muscles should come together and close like a shutter, but if there's a weakness it leaves an opening and with pressure it causes it to bulge out. Dr. Miller testified that what is actually bulging out is anything from the lining of the abdominal wall to small bowel, colon, or bladder.

Dr. Miller testified that the common causes of inguinal hernias are usually straining, constipation, smoking, coughing, and chronic coughing. (PX6) Dr. Miller explained that the only way to fix a hernia is to repair it surgically. Dr. Miller testified that, "[o]ne you have a weakness there, like an old-fashioned tire or inner tube, it's going to bulge and keep on bulging". Dr. Miller testified that the incident Petitioner described to him is one that can cause or aggravate a hernia. Dr. Miller explained that, "...when you grab something and pull on it, you take a deep breath and you hold your breath and pull. That increases the pressure in your belly and it forces everything out. So if there's weakness in the bag, it's going to bulge in that area."

Dr. Miller testified that he performed a left inguinal hernia repair with mesh and a nerve resection on June 1, 2017. Dr. Miller testified that the mesh serves as a framework for scar tissue formation and it reinforces the inguinal area. Dr. Miller testified that following surgery, patients aren't supposed to lift more than 25 lbs. for eight weeks post procedure. Dr. Miller testified that he saw Petitioner in follow up on June 28, 2017. Dr. Miller testified that Petitioner had no complaints at that time and no pain in the area, but he had a little suture irritation along the incision site. Dr. Miller testified that he allowed Petitioner to return to work on July 27, 2017. Dr. Miller testified that Petitioner was at maximum medical improvement. Dr. Miller testified that he did not foresee any continued issues but there was a 2 – 10% risk of recurrence with any operation. (PX 6, pp. 1 – 15)

On cross-examination Dr. Miller testified that his causation opinion was based on the activity Petitioner described to him, specifically lifting and torqueing a 75-80 pound wrench. Dr. Miller also testified that Petitioner had a separate incident while lifting an acetylene tank that caused him pain. Dr. Miller testified that following the accident from torqueing a wrench, Petitioner had an exacerbation of his symptoms when he coughed or lifted. Dr. Miller testified that Petitioner reported noticing a bulge after torqueing the wrench. Dr. Miller testified that with small hernias the bulge can reduce spontaneously as, for example, when someone lays down the bulge goes away. Dr. Miller testified that Petitioner reported to him that changing his position and lying down reduced his symptoms, which would be consistent with the course of an inguinal hernia. Dr. Miller testified that he had no reason to doubt Petitioner's honesty or forthrightness.

Dr. Miller further testified on cross-examination that a bulge can go away, depending upon its size. If it's a small hernia it can reduce spontaneously. The doctor reiterated that a hernia, such as Petitioner's, could be caused by coughing, constipation, or anything with increased abdominal pressure. Dr. Miller did not know if Petitioner's symptoms after the torqueing incident were ongoing or waxed and waned. He knew of no medical treatment between the first visit and their initial office visit of November 18, 2016. (PX6, pp. 15-21).

The Arbitration Hearing

Petitioner's case proceeded to arbitration on March 14, 2018. Petitioner was the sole witness testifying at the hearing and the disputed issues were causal connection, medical bills, temporary total disability and the nature and extent of any injury. At the commencement of the hearing Petitioner amended the date of accident on the Application for Adjustment of Claim to allege an accident date of July 10, 2015, without objection.

Petitioner testified that he works as an outby repairman, electrician, and mine examiner at Respondent's coal mine. Petitioner testified that he has worked for Respondent for almost ten years. He is presently 54 years old.

Petitioner testified that on July 10, 2015, he and his supervisor were changing the chunk breaker out on the feeder, taking bolts out of the bearing on one side of it. Petitioner explained that he was using a three-quarters ratchet with a cheater pipe, breaking the bolts loose, and that's when he noticed that he had "come up with another hernia."

Petitioner testified that while performing this activity he was sitting down, using his leg and arms to break the nuts loose. Petitioner testified they were big nuts, and it was very hard to break them loose. He testified that he was pushing. Petitioner testified that he believed it was a hernia because he'd had one on the opposite side about 14-15 years earlier, and it was the same sensation, feeling and pain. Petitioner described the sensation as a "warm pulling tear". Petitioner testified that it occurred in his left groin. Petitioner testified that, in addition to his supervisor, John Kramer and Ryan Pedigo were both there. Petitioner testified that he completed an accident report that day. (PX 1) Petitioner identified PX 2 as the statement from John Kramer stating what happened that night.

Petitioner testified that he did not seek treatment immediately because he didn't want to be off work and lose financial stability for his children. Petitioner also testified that since he'd had the surgery before, he would rather deal with a little bit of pain "here and there" than the surgical pain. Petitioner testified that, "[p]lus where I'm employed at, at the end of the year you have a $5,000 bonus there as Christmas time, but if you get hurt, they take it away from you." Petitioner testified that it is a safety bonus.

Petitioner testified that he eventually sought treatment because he "got tired of dealing with it." He explained that the pain remainied the same but seemed to be flaring up more often. Petitioner testified that he ultimately underwent surgery on June 1, 2017 and that he was off work from June 1, 2017, until he returned to work full duty on July 27, 2017.

Petitioner testified that since he's returned to full duty work he's noticed that he's not as strong as he used to be. Petitioner further testified that he watches what he does when trying to break loose big nuts and doesn't get in there "gung ho." Petitioner testified that he now has to get help with the bigger jobs. Petitioner testified that pushing on the coal hauler tires, breaking bolts loose, and lifting causes him discomfort. Petitioner testified that he feels uncomfortable in his groin area when he does those things. Petitioner testified that he doesn't get a lot of pain, but every once and a while it will let him know "[h]ey, you're going too far,

back off." Petitioner testified that when that happens it feels like a "7/10" on a pain scale. However, it's not really a pain; rather, it's a discomfort. He denied experiencing any pain with it currently. Petitioner denied taking any pain medication.

Petitioner testified that he has no immediate plans to retire and will probably continue working until he's 70 like his father did.

On cross-examination Petitioner testified that he has returned to work full duty without restriction. Petitioner testified that Bob Ridings completed the list of witnesses on the accident report that Petitioner signed. Petitioner agreed that John Kramer was not listed on the accident report as a witness; however, he recalled mentioning his name to Mr. Ridings. Petitioner testified that Mr. Kramer completed the witness statement dated May 2, 2017, at his request in 2017 when they were starting to go through "this workmen's comp procedure." Petitioner testified that he believed Mr. Kramer's wife had typed the document. Petitioner acknowledged that the statement references an accident date of July 7, 2015.

On further cross-examination Petitioner acknowledged he finished his shift on the day of the accident and he did not report having problems with his left hernia when he was at the emergency room for his blood pressure, nor did he complain about his hernia when he transitioned from care from the ER to Logan Primary Care on May 31, 2016. Petitioner agreed that the first time he reported his hernia to his doctor was on October 11, 2016.

Petitioner testified that when he saw Dr. Miller on November 18, 2016, the doctor noted he had lifted an acetylene bottle and that caused some hernia symptoms. Petitioner testified that it was actually an oxygen bottle. Petitioner believed that that occurred about three weeks before he saw his primary care doctor on October 11, 2016.

Petitioner agreed that he is able to perform all the essential requirements of his job.

On redirect examination Petitioner testified that when he first presented to Dr. Miller he reported to the doctor that the duration of his hernia had been eighteen months. He also agreed that he initially told the doctor he initially noticed the bulge while torqueing a wrench and then, more recently, while lifting an acetylene bottle. Petitioner testified that when he lifted the oxygen bottle he was working on the surface checking the fire suppression on the man trips. He was then asked if the lifting of the oxygen bottle was a completely new injury or new pain and he replied, "No, it wasn't brand new. It was more elevated." He then added, "You know, that's when I noticed I was going to have to do something different." Petitioner also testified that he uses a cheater pipe more frequently now.

Petitioner's medical bills are contained in Petitioner's Exhibit 7.

The Arbitrator concludes:

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

Petitioner failed to prove that his need for hernia surgery or his current condition of ill-being are causally related to the accident of July 10, 2015.

The parties stipulated that Petitioner sustained an accident on July 10, 2015. However, Petitioner finished his shift and continued working full duty until he was taken off work by Dr. Miller in conjunction with his hernia surgery, approximately sixteen months later. He sought no emergency treatment or treatment of any kind until early October of 2016. Prior to the appointment with Dr. Miller on November 18, 2016, Petitioner had several visits with Logan Primary Care. Two visits occurred on May 31, 2016 and July 1, 2016 and both pre-dated the oxygen bottle incident of October, 2016. During these two visits in May and July, Petitioner said absolutely nothing about an accident in July of 2015. Furthermore, he had no symptoms or complaints regarding his left groin/abdominal region. PA-C Oakley examined Petitioner's abdominal region on May 31, 2016 and found no evidence of a problem. Petitioner then presented to PA-C Parks on October 11, 2016 at which time Petitioner reported he thought he had a hernia. He further told Ms. Parks, PA-C, that he had filed it the day before as workers' compensation. Petitioner said nothing about an accident in July of 2015 or earlier in October of 2016 while at work. Petitioner then returned to Logan Primary on October 20, 2016. This time he reported that his problem began in July of 2015. However, he did not mention the more recent incident from October that he had reported on October 10, 2016.

Petitioner testified that he delayed any treatment in 2015 because he didn't want to be off work for financial reasons or lose out on his safety bonus, given if you don't get hurt. That doesn't completely make sense. If Petitioner didn't want to let Respondent know he was hurt (and thereby lose his safety bonus) why did he report an accident on July 10, 2015? Similarly, while he didn't wish to lose time off from work that doesn't mean he couldn't seek medical treatment for any complaints and symptoms. Indeed, he begins mentioning two accidents to providers in October of 2016 but didn't actually have any lost time from work until his surgery.

The Arbitrator further notes that it was only after the oxygen bottle lifting episode some three weeks before the October 11, 2016 visit at Logan Primary Care that Petitioner sought out medical treatment. Petitioner testified that the bottle lifting incident exacerbated his symptoms, yet it is not documented in the October 11, 2016 record or in any other documents until the November 18, 2016 encounter with Dr. Miller. The bottle incident also caused Petitioner to go to the doctor stating "I think I have a hernia," a statement/concern not noted in earlier records pre-dating the bottle episode.

The Arbitrator also notes that, in addition to the abdominal examination on May 31, 2016 (PX 3) Petitioner underwent a similar exam in the Emergency Room at Herrin Hospital on May 9, 2016. That exam was negative with the examiner noting "No distension, mass or hernia was noted." (PX 5) Thus, in May of 2016, regardless of the accident in July of 2015, no hernia was apparent on examination of Petitioner.

Although Dr. Miller opined that the July 10, 2015 accident might or could have caused or aggravated an existing inguinal hernia, he also testified that Petitioner experienced pain a second time when he lifted the acetylene tank (oxygen bottle). (PX.6 at 17). Dr. Miller noted that Petitioner reported that his symptoms were aggravated by coughing and lifting weight. (PX.6 at 17). He also

testified that coughing, constipation, and any activity that causes increased abdominal pressure can result in a hernia. (PX.6 at 19). Dr. Miller admitted that his causation opinion was based on Petitioner's history as provided to him which included symptom onset with an initial torqueing of a wrench. (PX.6 at 19). However, the doctor went on to acknowledge that, thereafter, Petitioner had exacerbations with coughing and lifting. The doctor also acknowledged not knowing what treatment Petitioner had received after the first episode with the torqueing of a wrench and their first visit. (PX 6, p. 20) The Arbitrator finds it significant that Dr. Miller was unfamiliar with Petitioner's medical treatment prior to their first visit. He assumed that the two incidents occurred in close proximity to one another (PX 6, p. 17) which is not the case. Dr. Miller was also of the belief that Petitioner's bulge had been present since the torqueing accident; however, as shown by normal abdominal examinations in early 2016, that was not the case. Dr. Miller was unaware of the normal abdominal exams from earlier in 2016 prior to the oxygen bottle lifting incident. He also acknowledged that a small hernia can spontaneously reduce and that coughing and constipation can cause hernias. Dr. Miller did not have a complete understanding of the events, including treatment and work, that occurred between July 10, 2015 and his first visit with Petitioner in November of 2016. As such, his causation opinion is not persuasive.

The Arbitrator is unable to find causation based upon a chain of events given Petitioner's lack of treatment post-accident for approximately sixteen months and the subsequent accident/incident of early October of 2016. While Petitioner attempted to provide an explanation for his gap in treatment, the Arbitrator was not persuaded by that explanation.

The Arbitrator is aware that Respondent did not have Petitioner examined by a doctor of its own choosing. However, the burden of proof on the issue of causal connection belongs to Petitioner herein. Based upon this record, Petitioner failed to prove that his need for hernia surgery or his current condition of ill-being as a result thereof is causally connected to his July 10, 2015 accident. Petitioner's claim for compensation is denied and no benefits are awarded.

J. Has Respondent paid all appropriate charges for reasonable and necessary medical expenses?

Consistent with the Arbitrator's finding regarding causation, Petitioner's claim for medical expenses is denied.

K. What temporary total disability benefits are in dispute?

Consistent with the Arbitrator's finding regarding causation, Petitioner's claim for temporary total disability is denied.

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

Consistent with the Arbitrator's finding regarding causation, this issue is moot.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

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

Gradie Yates,

Petitioner,

vs.

NO. 16 WC 16182

19IWCC0399

Kraft Foods,

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 medical expenses, causal connection, prospective medical care, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 16, 2018 is hereby affirmed and adopted.

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

No bond is required for the removal of this cause to the Circuit Court.

19IWCC0399

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: JUL 31 2019
SJM/sj
o-6/5/2019
44

Stephen J. Mathis

Douglas McCarthy

SPECIAL CONCURRENCE

I concur with the result reached by the majority. I write separately as I find not only did Petitioner fail to prove a causal relationship between his alleged accident and his right knee condition, he failed to prove he sustained an accident.

Petitioner testified at trial he sustained a hyperextension injury to his right knee on January 26, 2016 when he slipped on a wet ladder. T. 17-18. Petitioner's testimony was very specific regarding the circumstances of the accident as well as the subsequent pain he endured. Despite this pain, Petitioner fails to seek any medical treatment for three months, and upon his initial evaluation on April 21, 2016, he fails to provide a history as to this "accident." Instead Petitioner provides a history of bilateral ankle pain with no inciting event other than Petitioner's acknowledgement regarding his being overweight. PX1. Thereafter, Petitioner continues to seek medical treatment solely for his bilateral ankle pain. On May 2, 2016, Petitioner provides his initial history concerning his right knee- "Patient states lately has also been having pain in his medial right knee." *Id.* There is no mention of a hyperextension injury sustained at work. Given such, I find Petitioner failed to prove he sustained an accident which arose out of and occurred in the course of his employment.

L. Elizabeth Coppoletti

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

YATES, GRADIE
Employee/Petitioner

Case# **16WC016182**

19IWCC0399

KRAFT FOODS
Employer/Respondent

On 10/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICE
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PO BOX 99
E ALTON, IL 62024

1109 GAROFALO SCHREIBER STORM
JAMES CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

19IWCC0399

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)

Gradie Yates
Employee/Petitioner

v.

Kraft Foods
Employer/Respondent

Case # **16** WC **16182**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon** on **August 15, 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 **January 26, 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 **$53,201.20**; the average weekly wage was **$1,023.10.**

On the date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent child.

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.

Respondent ***is*** entitled to a general credit of $0 for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that his current condition of ill-being in his right knee is causally related to his work accident of January 26, 2016. Petitioner's claim for compensation is denied and 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.

Nancy Lindsay
Signature of Arbitrator

10-11-18
Date

OCT 16 2018

Findings of Fact and Conclusions of Law

Petitioner alleges that he injured his right knee on January 16, 2016 while working for Respondent. Respondent disputes accident as well as related issues of earnings, causation, medical bills, and prospective medical care.

The Arbitrator finds:

The record contains no evidence of Petitioner undergoing any medical treatment between January 16, 2016 (the alleged date of accident) and April 21, 2016.

Petitioner began treating with MultiCare Specialists on April 21, 2016. He presented at that time with complaints of bilateral posterior ankle pain, with the left side worse than the right. He reported it was worse in the morning and at the end of each day. Petitioner was noted to be 6'2" tall and weighed 421 lbs. Corey Voss' physical therapy note contains no reference to any knee complaints. (PX 1, p. 86/86) On that same date, Petitioner was examined by Dr. Eavenson regarding his bilateral achilles tendonitis. No knee complaints were noted. The doctor wrote, "He is an obese man who is trying to exercise more regularly however he states that he cannot because at the end of the work day [as] his ankles hurt too much and he just wants to sit on the couch." (PX 1, p. 83/86) A history of restless leg syndrome was noted. Dr. Eavenson did not record any knee complaints. Petitioner's medication history included the use of Naprosyn and Percocet since 2013 for pain and inflammation and the use of Gabapentin since 2014. (PX 1, pp. 83-86/86)

On April 25, 2016 Petitioner returned to see both Mr. Voss and Dr. Eavenson regarding his bilateral ankle pain. Again, no knee complaints were documented in the office notes. (PX 1, pp. 78-80/86)

On April 26, 2016 Petitioner returned to see both Mr. Voss and Dr. Eavenson regarding his bilateral ankle pain. Again, no knee complaints were documented in the office notes. Petitioner did mention that he had gone back to work on the 25th and his feet were "back to hurting the same." Regarding his ankles, Dr. Eavenson restricted Petitioner from repetitive stairs or climbing and no prolonged walking or standing. (PX 1, pp. 75-77/86)

Petitioner canceled his April 27th appointment with Dr. Eavenson as he was "having issues." (PX 1, p. 74/86)

On April 28, 2016 Petitioner returned to see both Mr. Voss and Dr. Eavenson regarding his bilateral ankle pain. Again, no knee complaints were documented in the office notes. Regarding his restrictions, Petitioner reported that his employer would not abide by them so he was off work. (PX 1, pp. 71 - 73/86)

Petitioner returned to see Mr. Voss on May 2, 2016. He reported that "lately" he had been having pain in his medial right knee. It seemed to be worse with stairs, weight-bearing and twisting activities. He rated his pain at "5/10." He also voiced ongoing ankle issues. No mention of any accident was included. He was tender to palpation along the medial joint line of his right knee. Mr. Voss felt Petitioner had a right medial meniscus tear. Petitioner was instructed to continue with his current treatment regimen although exercises for his right knee were to be added. Petitioner was not working at this time. (PX 1, p. 70)

Petitioner was also examined by Dr. Jonathan Brooks on May 2, 2016. In addition to his ankle complaints, Petitioner voiced complaints of right medial knee pain which "has been going on for quite some time." Petitioner reported that occasionally his right knee would "catch" or "pop" and he experienced pain with going up and down stairs, especially. (PX 1, p. 67) Petitioner had a positive McMurray's test. Dr. Brooks suspected a right medial meniscus tear and wished to have Petitioner undergo an MRI; however, Petitioner wished to try physical therapy first because he could not afford an MRI. (PX 1, p. 69, pp. 67 – 69) Petitioner remained off work on FMLA because Respondent couldn't accommodate the ankle restrictions. Petitioner was also examined by Dr. Rodney Lupardus who ordered digital x-rays of Petitioner's right knee. (PX 1, pp. 65-66)

Petitioner saw Dr. Eavenson on May 3, 2016 reporting that his ankles were not nearly as painful as they once were but he was now having right medial knee pain. "He states he started noticing that the last few months [and] that while at work he was getting off of a ladder when he 'tweaked' his knee. He states since then his knee has been popping and catching on him." (PX 1, p. 61) Petitioner rated his pain at 4/10 on the pain scale. "He states he did not mention this sooner because he thought that it would eventually go away however it has not." (PX 1, p. 61) Petitioner was advised to continue with therapy for his knee. He remained on FMLA due to the ankle restrictions. (PX 1, pp. 61 – 64)

Petitioner canceled his appointment with Dr. Eavenson on May 4th, as he had "some issues going on." (PX 1, p. 60)

Petitioner continued to treat at Multicare Specialists on May 5, 2016. Petitioner was released to return to work on a trial basis. (PX 1, pp. 56-59)

When Petitioner reported to Multicare Specialists on May 9, 2016 he stated he had gone back to work on Thursday (May 5th) and that he experienced increased pain in his ankles slightly; however, he was still in less pain that he was prior to his first visit. When Petitioner saw Mr. Voss, the therapist, he reported that his right knee pain was decreasing but he was still experiencing a popping in his right knee. He denied any ankle pain that day. (PX 1, pp. 52-55)

Petitioner cancelled his May 10th appointment with Dr. Eavenson as he had to work late. (PX 1, p. 51)

Petitioner returned to see Dr. Brooks at Multicare Specialists on May 11, 2016 reporting that his ankles felt significantly better and he could walk more normally; however, his right knee pain continued. Physical therapy was to continue. (PX 1, pp. 48 – 50) When seen by Mr. Voss, Petitioner reported he was able to work a full shift the day before with no right knee pain. He further reported that his knee did not "feel as weak." He was having some soreness in his achilles tendons at the end of the day. (PX 1, p. 47)

As of May 12, 2016, Petitioner was advising Dr. Brooks that his right knee pain was a "2/10." (PX 1, pp. 43 – 45) When seen by Mr. Voss he reported sore right knee and calf muscles which he felt was due to exercising. (PX 1, p. 46)

Petitioner saw Dr. Ashley Eavenson on May 16, 2016 reporting that his knee was hurting over the weekend and it started "popping again and sometimes gave out." He stated that it would give out occasionally and felt weak afterwards. He rated his pain at "4/10." (PX 1, p. 40) Petitioner was to continue with therapy. (PX 1, pp. 40-42) Petitioner voiced the same level of pain to Mr. Voss when seen for therapy. (PX 1, p. 39)

Petitioner signed his Application for Adjustment of Claim herein on May 17, 2016. He alleged that his foot slipped on a rung while spraying. (AX 2)

Dr. Brooks re-examined Petitioner on May 18, 2016 at which time Petitioner reported his feet were doing great but his right knee was bothering him quite significantly and was continuing to pop on him. All of his pain was located along the medial side of his knee and he also had 1+ swelling at the medial side. Petitioner felt his knee was going to give out on him. (PX 1, p. 35) Petitioner attended therapy with Mr. Voss. (PX 1, p. 38)

Petitioner saw Mr. Voss on May 19th. He reported popping and slight soreness in his knee (2/10). He also felt that the right knee pain was slowly decreasing. (PX 1, pp. 33-34)

Dr. Eavenson re-examined Petitioner on May 19th and recommended continued therapy. (PX 1, pp. 31-32)

Petitioner underwent a right knee MRI on May 20, 2016. The impression was: (1) No abnormal linear signal at the medial meniscal body extending to the lower surface of the meniscus, consistent with an undersurface horizontal oblique tear; (2) central weightbearing lateral condylar grade IV chondrosis with possible small chondral flap: and (3) a small medial popliteal cyst. (PX 2, pp. 2,3/3)

Petitioner attended physical therapy on May 23, 2016 reporting decreased knee pain but ongoing popping. (PX 1, p. 30) Dr. Eavenson also examined Petitioner that day noting Petitioner felt a "pop" in his right knee over the weekend which initiated "intense pain" but he was now feeling better and felt like something "was released." Petitioner also reported having undergone an MRI. He was to continue with physical therapy. (PX 1, pp. 28 -29)

Dr. Lupardus also examined Petitioner on May 23, 2016 with regard to an annual physical exam and follow-up for multiple problems. Petitioner voiced to the doctor that he was not feeling well and was tired of being obese and had pursued bariatric surgery options. He felt his ability to exercise was poor because of chronic low back and knee pain. He was continuing with therapy. Petitioner told the doctor he had excessive daytime sleepiness and chronic low back pain with lumbar disc disease and bilateral lumbar radiculopathy with pain into his buttocks bilaterally and pain in the left lower extremity to his knee. He also reported chronic numbness and tingling in his lower extremities and buttocks. Petitioner also reported chronic right knee pain with a probable meniscus injury. Some anxiety and depression were noted along with conflicts at work with his human resources person and work interference. Counseling was encouraged. Petitioner was currently off narcotic pain medicine but was hoping he could get a prescription for occasional pain assistance. He could not undergo back surgery until he lost over 100 lbs. An MRI had been taken the week before and the results were pending. Extensive treatment recommendations were discussed and given. He was told to continue with his chiropractic care and physical therapy. (PX 1, pp. 26-27)

Petitioner saw Dr. Brooks and Mr. Voss on May 24th with no significant changes or history noted. (PX 1, pp. 23 – 25)

Petitioner presented to Dr. George Paletta on May 25, 2016 at the referral of Dr. Brooks. His attorney was noted. Petitioner reported that he worked as a machine operator and lab tech and was experiencing right knee pain due to an injury on January 26, 2016 when he was on a ladder and his left foot slipped and he suffered a twisting and hyperextension injury to his right knee. Petitioner reported that he started to fall and reached for the ladder to control himself and his knee twisted and then hyperextended resulting in knee pain. Petitioner advised that he reported the incident to his associate lead, a co-worker, and his supervisor (a couple of days later). He sought no immediate medical attention and over the course of the following three months or so he had continued to experience pain and some popping (the latter beginning in late February). His symptoms had "waxed and waned" but never fully resolved. Petitioner also reported that in mid-April he changed jobs and went from being in the lab to being on the floor which required him to stand 8 to 12 hours resulting in increased symptoms of pain and giving away. His main area of pain was in the medial compartment. According to Petitioner he had been treating with Multicare Specialists and underwent an MRI that showed a medial meniscus tear. Petitioner denied any prior knee problems and was currently taking Naproxen and Hydrocodone. Petitioner reported pain with twisting, kneeling, and squatting. He denied any locking or giving away. Petitioner was continuing to work full duty. Dr. Paletta also noted that he had reviewed Petitioner's Intake Questionnaire. Dr. Paletta examined Petitioner and reviewed the MRI. He felt Petitioner had a symptomatic medial meniscus tear and small area of focal chondrosis in the lateral femoral condyle. Based upon the history provided by Petitioner he felt the tear was work-related. Petitioner's options included an intra-articular injection or an arthroscopy with partial medial meniscectomy, the latter of which the doctor recommended. Petitioner was advised he could continue working full duty until surgery. (PX 3, pp. 7 – 9)

Petitioner saw Mr. Voss on May 31, 2016 for therapy and advised that he believed he would be undergoing knee surgery "soon." (PX 1, p. 22) He also saw Dr. Mark Eavenson that day reporting his knee was still painful and felt swollen and unstable. Therapy and chiropractic manipulation were recommended. (PX 1, pp. 20-21)

Petitioner presented to Dr. Lupardus on June 22, 2016 with complaints of ongoing right knee pain and a feeling of instability and swelling. (PX 1, p. 19)

Petitioner returned to see Dr. Lupardus on August 24, 2016 regarding "follow-up of paperwork." Petitioner stated that he had injured his knee at work on January 26, 2016 and his knee pain became much worse when he moved out of the lab and into the warehouse which required him to be on his feet and climb ladders. "This occurred about two months later." Petitioner had been having right knee pain with swelling and instability. An MRI revealed a meniscus tear and he was referred to Dr. Paletta with recommendations made for surgery. Petitioner was waiting for workers' compensation to approve the surgery. In the meantime, Petitioner was continuing to work but needed paperwork for accommodations. He stated that he needed to be able to sit down intermittently to take pressure off of his knee when his knee pain flared up. He further indicated that this could happen several times during his work shift. Petitioner also reported that he needed FMLA for missing work usually for one day at a time up to two times each week because of flare-ups in knee pain. Petitioner had been taking Naprosyn twice a day and Norco four times a day as needed for pain. He had completed a course of chiropractic and physical therapy but was continuing to have pain. Petitioner's paperwork was completed and he was advised to follow up with the doctor as needed and to follow up with his orthopedic surgeon for surgical repair of his knee. The doctor felt Petitioner would need rehab therapy after his surgery. All other treatment was to continue. (PX 1, pp. 16 – 18)

Petitioner returned to see Dr. Lupardus on August 30, 2016 reporting that he needed a refill of his pain medication. He had been taking Norco sparingly for his low back pain, knee pain and ankle pain. Sometimes he didn't need any and other days he took it 3 – 4 times a day. His last prescription lasted about 3 months. Petitioner was also taking Naprosyn twice a day and had been prescribed Cymbalta three months earlier but didn't recall trying it. Petitioner reported that his right knee pain was "through Workmen's Comp" and "he's been starting to have pain in his left knee because of his change in gait with the right knee injury." Pain medication was prescribed along with vitamins and the Cymbalta. (PX 1, pp. 14 -15)

Petitioner stopped working for Respondent in September of 2016 and began working as a construction laborer.

At the request of Respondent, Dr. Glen Johnson examined Petitioner on November 11, 2016. While he agreed that the mechanism of injury described by Petitioner could cause a medial meniscus tear, he noted that the timeline found in the treating medical records, which Dr. Paletta had not reviewed, did not support, with reasonable medical certainty, the cause of the medial meniscus tear in that there was a

three month delay before knee pain was documented in the medical records. At the time Dr. Johnson saw Petitioner he noted that that there was no significant degenerative change in Petitioner's right knee. (RX 1)

Petitioner returned to see Dr. Lupardus on July 6, 2017 for his knee pain. He stated that it had begun in "approximately January 2016" while at work and resulted in a meniscus injury. He had been trying to get approval through workers' compensation and, because of his right knee pain, he was now compensating for his left leg and it was beginning to hurt. He denied any new acute injury to either leg. He reported pain in both knees, worse with movement and that because of pain, he has been unable to be physically active and was worried about his weight. Petitioner was diagnosed with bilateral knee pain, the right secondary to a meniscal tear and the left, likely due to compensation. He was also diagnosed with morbid obesity. He was advised to lose weight and given Percocet, Phentermine, Prednisone, and Meloxicam. He was told to rest and use heat compression for his knees. (PX 1, pp. 12 – 13)

Petitioner was examined by nurse practitioner Michael Kemp (Multicare Specialists) on August 3, 2017 due to problems at work. Petitioner reported dizziness and not feeling right over the last few days. He voiced no knee complaints. He was diagnosed with vertigo felt to be related to dehydration rather than medications. He was taken off work. He was also noted to be suffering from knee pain, which was being "poorly controlled." (PX 1, pp. 10 – 11)

Dr. Lupardus followed up with Petitioner on August 9, 2017 noting Petitioner's ongoing right knee pain from his work injury in January of 2016 and a resultant left knee problem due to his abnormal gait for the right knee. Petitioner reported trying to return to work but, due to taking high doses of Percocet four times a day, he could not continue working and had complications with lightheadedness and dizziness. Petitioner advised he was unable to work as of August 3, 2017 and when he stopped the pain medication, his symptoms improved. Petitioner reported no income or insurance and wished to be able to return to work. Litigation was pending over his right knee as he needed to have surgery. Dr. Lupardus' assessment was right knee pain from a meniscus tear and left knee pain which was "new without any injury" but felt to be due to his abnormal gait with the right knee. Dr. Lupardus felt Petitioner might benefit from a steroid injection to relieve some of the symptoms so that he could work without narcotic medication. Petitioner's vertigo had ceased with discontinuation of work and Percocet. Petitioner elected to try steroid injections into both knees to see if it would relieve some of his symptoms so he could return to work and he was going to pursue surgery through his attorney. He was encouraged to exercise in a swimming pool to get the weight off his joints. Petitioner's knees were injected. (PX 1, pp. 8-9)

Petitioner returned to see Dr. Lupardus on September 14, 2017 and knee digital x-rays were taken. No orders were noted. (PX 1, pp. 6-7) Petitioner also saw Dr. Mark Eavenson that day and he ordered an updated MRI. The doctor expressed confidence that he would be referring Petitioner back to Dr. Paletta. (PX 1, pp. 4 -5)

Petitioner underwent a right knee MRI on September 15, 2017. The impression was: (1) No meniscal or ligamentous tear; (2) Tricompartmental osteoarthritic changes with grade III/IV chondrosis and chondral fissuring; and (3) large joint effusion with Baker's cyst. (PX 2, p. 1/3)

Petitioner saw Mr. Voss, the therapist, on September 18, 2017 having last been seen by Mr. Voss in May of "2006. [sic]" Petitioner stated he was continuing to have pain in his right knee since his last visit with the pain extending from the medial and lateral compartment to the center of his knee. He stated it felt unsteady at times with catching and locking. Petitioner reported undergoing an MRI but not knowing the results. Petitioner's weight was 476 lbs. He was walking with a noticeable limp with decreased stance time on this right lower extremity. Mr. Voss felt Petitioner was suffering from internal derangement of his right knee and would be treated as such. Treatment ensued. (PX 1, p. 1)

Petitioner also saw Dr. Ashley Eavenson on September 18, 2017 for continued right knee complaints and review of the MRI. She noted that the MRI dated September 15, 2017 showed no meniscal or ligamentous tear but did indicate tri-compartmental osteoarthritic changes with grade III/IV chondrosis and chondral fissuring. A large joint effusion with Baker's cyst was also noted. Her impression was ongoing right knee pain consistent with severe arthritis. Petitioner was referred to Dr. Paletta for further recommendation which he might say included a total knee placement. In the interim, Petitioner was advised to use ice and moist heat. (PX 1, pp. 2- 3)

Petitioner returned to see Dr. Paletta on September 25, 2017, having last been seen in May of 2016. Since that time workers' compensation had denied the initial treatment recommendations and he was seen for a second opinion. He reported leaving Respondent's employment and attempting to work construction. He also tried to lose weight and thought construction work might help with that. It did but it also increased his knee problems. He reported being off work for the last year and taking Oxycodone and Meloxicam currently. Petitioner also reported ongoing left knee pain and denied any new trauma or injury to his knee. Dr. Paletta described Petitioner as being in no acute distress but significantly overweight. His gait was described as being in a mild right antalgic pattern and his right knee lacked any obvious asymmetry, muscle atrophy or deformity. No effusion or soft tissue swelling was noted. He did have pain along the medial joint line with flexion beyond 100 degrees and moderate medial joint line tenderness. Dr. Paletta reviewed the September 15, 2107 updated MRI and it was his impression Petitioner had moderately advanced patellofemoral arthrosis of the right knee, medial compartment degenerative joint disease, and an intra-meniscal signal abnormality without evidence of a persistent meniscus tear. Based upon the current MRI scan Dr. Paletta did not recommend any surgery but he did recommend an ultrasound or fluoroscopically guided injection of the right knee and an aggressive program of significant weight loss. If Petitioner underwent the injection, he was to return in eight weeks. He also recommended a non-steroidal anti-inflammatory in the meantime. Dr. Paletta also noted that Petitioner told him he had undergone a cortisone injection to both knees about a month earlier; however, it was not done under ultrasound guidance. Dr. Paletta still recommended the

injection but under ultrasound guidance. He did not feel surgery was appropriate at this time due to it being "highly unpredictable in this setting" and felt it should be a last option. Weight maintenance was discussed. (PX 1, pp. 3 - 5)

Petitioner has undergone no further medical treatment since the visit with Dr. Paletta.

Dr. Paletta's Deposition

Dr. Paletta testified by way of deposition taken on November 17, 2017. (PX 4)

Dr. Paletta, a board-certified orthopedic surgeon, testified that he first saw Petitioner on May 25, 2016. Petitioner told him he had injured his right knee when he stepped on a ladder, his left foot slipped and he "twisted and hyperextended his right knee." It was also Dr. Paletta's understanding that Petitioner's right knee began popping about one month later. Dr. Paletta testified that during that visit, he reviewed a right knee MRI performed on May 20, 2016 and performed a physical examination. The MRI revealed a right meniscus tear and thinning of the cartilage on the opposite side of the meniscus tear. (PX 4 pp. 1 - 8) Dr. Paletta diagnosed Petitioner with a symptomatic medial meniscus tear and chondroids involving the opposite side of the knee. Id. At that point, Dr. Paletta recommended arthroscopic repair of the meniscus tear and opined the injury described by Petitioner caused the meniscus tear. (PX 4 pg. 9) Dr. Paletta testified that Petitioner described a mechanism of injury that was a twisting mechanism with some degree of hyperextension and such a mechanism could/would be consistent with a tear. He also testified that Petitioner's pre-existing MRI scan and x-rays revealed no obvious pre-existing condition rather than a little bit of mild early arthritis involving the opposite side of the knee. He did not see any arthritis on the meniscal side of his knee. Dr. Paletta imposed no work restrictions at that time as it was his understanding that Petitioner was mainly doing low-level sedentary work. He anticipated Petitioner would require restrictions for three to four weeks post-operatively and that he would be at maximum medical improvement (MMI) between three to six weeks post-operatively. (PX 4 pp. 8 - 13)

Dr. Paletta testified that he has often treated workers' compensation patients and non-workers' compensation patients weeks or months after the initial accident. (PX 4 pg. 9) In reaching his causal opinion, Dr. Paletta testified that Petitioner's mechanism of injury was consistent with the radiological findings and the onset of his symptoms, and had persisted, since his work accident. (PX 4 pg. 10) Dr. Paletta found no evidence of a pre-existing condition. Id.

Dr. Paletta also testified that he was not surprised that Petitioner's symptoms changed when Petitioner changed positions from being a lab technician to a machine operator. The doctor explained that a meniscus tear is the type of injury that will cause more symptoms with standing, walking, and climbing, than with sedentary or seated activities. At the initial visit with Petitioner Dr. Paletta noted no evidence of arthritis on the medial side of the knee. Since Dr. Paletta understood that Petitioner was doing a low-

level type of sedentary work he felt that no restrictions were necessary to impose on Petitioner at that first visit in 2016.

Dr. Paletta testified that the next time he saw Petitioner was on September 25, 2017. Despite telling Petitioner to lose weight at the time of their first visit, Petitioner had not yet done so.

During that visit, Dr. Paletta reviewed an MRI performed on September 15, 2017. Dr. Paletta testified that there was an obvious change in objective findings per the MRI as Petitioner now had evidence of significant arthritis, including evidence of arthritis at the medial side of the knee, which findings were not present in 2016. An "abnormal appearing" meniscus was still present. He explained that the more recent MRI revealed arthritic changes in Petitioner's right knee some of which he felt was related to his January 26, 2016 work injury. (PX 4 pg. 35) Dr. Paletta explained that Petitioner's meniscal tear was a single plane tear with no associated degenerative changes which indicated Petitioner's arthritic changes seen in the second MRI were caused by his work injury. Id. Dr. Paletta noted that despite Petitioner's size and weight, Petitioner's first MRI showed no degeneration or arthritis, but his second MRI showed arthritic changes. Dr. Paletta testified that he found Petitioner to be truthful and found his subjective complaints were confirmed by his objective findings. Dr. Paletta found Petitioner's mechanism of injury to be credible and the kind of mechanism that would cause a torn meniscus. (PX 4 pg. 22)

Dr. Paletta testified that the progression of some of the medial compartment disease/arthritis would be related to the fact that Petitioner had torn the meniscus and lost some function. He did not feel the patellofemoral deterioration would be related to the meniscus injury. He explained, "It is more difficult to state that the patellofemoral deterioration would be related to that 'cause the meniscus doesn't have an effect on the patella. So, I think in [Petitioner's]case, there was evidence of relatively rapid progression of arthritis in part related to the meniscus tear – that would be the arthritis specific to the medial compartment – and in part related top other factors, probably including his weight as we've already discussed." (PX 4, pp. 16-17) As it was more difficult to assess whether Petitioner's pain was purely from the meniscus tear or from some of the arthritic changes, he recommended that the arthritis be treated initially and, therefore, he recommended an injection of the knee. He also reinforced the importance of weight loss to Petitioner. He further noted that if most of Petitioner's symptoms were related to arthritis, the arthroscopic surgery first intended for the medical meniscus repair would be much less successful. The weight loss would potentially help with surgery, if necessary. (PX 4, p. 17)

Dr. Paletta further testified that the injections he has recommended are done under ultrasound guidance which was different than what Dr. Lupardus did. He had no issue with what the doctor had done but, given Petitioner's size, it would be difficult to know, with certainty, that you were actually accessing the joint when performing the injection. Hence, he recommends the ultrasound guidance. At that same visit, Dr. Paletta recommended work restriction with regard to squatting, kneeling, and climbing because that increases the loads on the kneecap part of the joint where Petitioner had signs of

progressive degenerative changes. (PX 4, p. 19) Dr. Paletta further testified that the restrictions were imposed given Petitioner's job in construction or as a machine operator. He felt Petitioner could work as a lab tech as that job was mainly clerical or sedentary. He did not feel the restrictions needed to be permanent. (PX 4, p. 19)

Dr. Paletta felt Petitioner would be able to return to the work of his choice after the recommended treatment, including weight reduction. (PX 4, p. 20)

On cross-examination Dr. Paletta acknowledged that he had never seen the records of Multicare Specialists. (PX 4, p. 25) It was the doctor's understanding that Petitioner had pain immediately after the accident and then continued with ongoing complaints of pain over the course of the months until he examined him. He had no idea why Dr. Lupardus injected both of Petitioner's knees. (PX 4, p. 26)

Dr. Paletta testified that the primary reason he concluded there was a causal relationship between Petitioner's accident and his injury was threefold – the mechanism of injury Petitioner described, the correlation of the onset of pain to that injury or mechanism, and the appearance of the MRI scan which did not show what appeared to be a "long-standing, chronic, beat-up meniscus." The mechanism of injury would have been the primary one, however. (PX 4, p. 27) He acknowledged that Petitioner claimed an injury in January and he didn't see him until about sixteen weeks thereafter. When asked because there's no time stamp on an MRI and there's no real precision on just when a tear might occur, could it have taken place at any time during those sixteen weeks, and the doctor replied, "Yes, sir, that's a fair statement." (PX 4, p. 28)

Dr. Paletta was aware that Petitioner had changed to a different job working construction but he didn't believe it had worked out very well because Petitioner felt pain. He further agreed that "potentially" work on a construction job could have contributed to an increase in the degeneration that he noted in Petitioner's knee between the first visit of May in 2016 and the second visit of September 2017. (PX 4, p. 29)

Dr. Paletta was asked about his restrictions and testified that the restrictions were predominantly related to the patella but not completely. (PX 4, pp. 30, 37-38) Dr. Paletta agreed that not only could Petitioner perform the job of a lab technician with the restrictions he imposed, he could also perform the job as a machine operator as long as he did not have to climb up and down steps. Dr. Paletta further testified that if Petitioner did not lose weight he could expect more evidence of premature degenerative changes as were noted in the most recent diagnostic tests.

Dr. Paletta, on redirect, testified that he has had no reason to doubt Petitioner's truthfulness so far and he hadn't found any inconsistencies in the information available to him. (PX 4, pp. 36 - 37)

Dr. Paletta also testified that Petitioner has never reported any problems with his left knee. (PX 4, pp. 38-39)

Additional Medical Information

On April 24, 2018 Dr. Johnson issued an addendum report after reviewing the medical records of Dr. Paletta and the MRI of September 15, 2017. Dr. Johnson's opinion remained consistent that the delay of three months in reporting knee pain caused the doctor to conclude that one could not determine, within a reasonable degree of medical certainty, that the meniscus tear was related to the alleged injury of January 26, 2016. (RX 2)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on his 19(b) Petition on August 15, 2018. Petitioner and Donny Ray were the only witnesses. The disputed issues were accident, earnings, causal connection, medical bills, temporary total disability, and prospective medical care.

Petitioner, who was 43 years old at the time of the hearing, testified that on January 26, 2016 he was working as a lab technician. He had climbed up on a three-step ladder to wash out a mix tank and was spraying it down. He testified that he slipped, grabbed the ladder, and, as he was falling back, he hyper-extended his knee. He testified that he did not immediately tell anyone about what happened, but then told "Jean", the associate lead worker, that he thought he had hurt his knee. Petitioner testified that he went home and returned to work the next day with severe pain and swelling in his knee. He further testified that the next day, he told his supervisor (Mr. Wolff) what had happened and Mr. Wolff wrote it down in his notebook. Petitioner also testified that he told other supervisory personnel about the occurrence.

Petitioner testified that that he did not feel immediate pain. He said he felt a "stretchy feeling." He was not in sufficient discomfort to seek medical attention.

Petitioner testified that he sought no medical attention until late April of 2016. During that time his knee hurt and he would take pain pills as needed. He also testified that his job as a lab technician was not particularly active as he spent most of the time sitting. However, when his job changed at the end of March or beginning of April (2016) and he began working as a machine operator and was on the floor 8 – 12 hours a day and climbing up and down ladders, his knee "came to a head." He thought that occurred about the end of March or early April.

Petitioner explained that "Bruce", "Jean", and "Rudy" all knew that he was prescribed pain pills and he told them when he was taking them so that they would be aware in case there was an issue. Petitioner testified that if he was in pain he would take his pills and tell them but it didn't occur every day. Thereafter his job changed.

Petitioner denied any knee pain or problems with movement or stability before January 26, 2016. He had no intervening knee injuries.

Petitioner testified that one night while changing a film roll he had to climb up a plastic three step "thing" and get on a machine and his knee gave way and he almost fell. Scared, and concerned because his knee was also popping, he told his lead what was happening and that he was going to the doctor. He then went to Multicare Specialists.

Petitioner testified that he first complained about his knee pain on May 2, 2016. Petitioner testified that he saw Dr. Brooks for both ankle and knee pain and stated that the doctor told him he (the doctor) was going to treat the ankle that day, but that the knee sounded like a workers' compensation issue and that he needed to speak to the company about that situation. It was at that point that Petitioner retained counsel.

Petitioner testified that he was eventually referred to Dr. Paletta. An MRI was conducted on May 20, 2016. Petitioner saw Dr. Paletta on May 25, 2016. The doctor recommended Petitioner continue with his personal physician and the doctor advised him to lose weight. He felt that Petitioner had a meniscus tear and might need surgery. Dr. Paletta provided no work restrictions. At that time Petitioner was working as a machine operator for Respondent.

Petitioner also testified that in September of 2016 he left Respondent's employment because he had tried to bid off his job with Respondent and wanted a more active job per Dr. Paletta. When he discussed this with his sister, she recommended that he work as a construction laborer. Petitioner started working as a construction laborer in September 2016.

On November 11, 2016 Petitioner saw an independent medical examiner, Dr. Glen Johnson. Petitioner stated that Dr. Johnson told him his knee was surprisingly clean, meaning that it did not have a lot of arthritis or scar tissue. At the time Petitioner saw Dr. Johnson he was between labor jobs with different contractors.

Petitioner testified that he had a second MRI on September 15, 2017. Thereafter, he saw Dr. Paletta for a second time on September 25, 2017. Petitioner understood from that examination that there was more arthritis in his knee and that his knee was worse. Dr. Paletta had different recommendations for treatment and gave Petitioner work restrictions. Dr. Paletta was no longer recommending surgery but was recommending ultrasound guided injections. At the time Petitioner received restrictions from Dr. Paletta Petitioner was working out of the labor union hall. Upon providing the restrictions to the labor business agent Petitioner was told that there was no light duty available in the construction setting. Petitioner conceded that if he was offered a sedentary position such as a lab technician he could perform that job based upon the restrictions imposed by Dr. Paletta.

Petitioner testified to being sent home from construction work on occasion. He also testified that he is not currently working and he would like to undergo the recommended injections.

Petitioner testified that he worked in construction for a year between the time he first saw Dr. Paletta and the next time he saw Dr. Paletta.

On cross-examination Petitioner conceded that it was his understanding his knee condition was worse on the second visit with Dr. Paletta than it was at the first visit. The restrictions imposed by Dr. Paletta was that there was to be no kneeling, no steps, no squatting, and no significant bending of his knee. Petitioner conceded on cross-examination that during construction he would be lifting weights up to as much as 50 pounds, walking about the construction site, climbing ladders and scaffolds, helping other workers carry things, being on his feet for most of the day, and was not performing light duty. He described the lab technician job that he had with Respondent as being a light duty type of job. Petitioner conceded on cross-examination that when he received the restriction from Dr. Paletta he did not seek work from Respondent as a lab technician; a job for which he was qualified and which was consistent with his restrictions.

Petitioner agreed that Dr. Paletta told him to lose weight and that Petitioner lost some weight while doing construction work but had since put it back on.

Petitioner also testified that he regularly worked mandatory overtime. Petitioner testified he was required to cover a shift if another employee called off. Petitioner acknowledged he would volunteer for overtime occasionally but estimated voluntary overtime to have occurred two to three times during his entire tenure with Respondent. (See also PX 6)

Mr. Don Ray testified on behalf of Petitioner. Mr. Ray is a retired business manager for Local 1084. Mr. Ray testified light duty work is not available in construction. He also testified that, in his experience as business manager, Petitioner has never had disciplinary issues and is known as a truthful employee. Mr. Ray recalled Petitioner being sent home from a construction site approximately 5 times. He explained the decision to send a worker home was up to the owner or the contractor. Mr. Ray testified the employee could not leave a job site unilaterally. He recalled the reason Petitioner was sent home was due to problems with his knee that caused him to be unable to perform his required tasks.

Mr. Ray has known Petitioner since 2000 both professionally and socially. He recalled Petitioner was "one heck of a dancer…he had moves for a big man like you had never seen." Mr. Ray testified he has not seen Petitioner dance since the accident.

Petitioner's medical bills are contained in PX 5.

The Arbitrator concludes:

Issue (C) Did Petitioner sustain an accident arising out of and in the course of his employment on January 26, 2016?

Petitioner sustained an accident on January 26, 2016 that arose out of and in the course of his employment with Respondent.

Petitioner described an incident at work when he slipped and hyper-extended his right knee. Petitioner was engaged in a work activity and work risk at the time of the accident. No issue was really raised as to whether he was in the course of his employment.

Issue (E) Was timely notice of the accident given to the Respondent?

Petitioner provided timely notice of his accident. Petitioner identified numerous individuals in supervisory capacities to whom he reported both the accident and the resultant discomfort to his knee. Consequently, Petitioner provided proper notice to the Respondent of an accident arising out of and in the course of his employment.

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

Petitioner failed to prove that his current condition of ill-being in his right knee is causally related to his work accident. In so concluding the Arbitrator notes concerns with Petitioner's credibility and forthrightness which, in turn, undermine the persuasiveness of Dr. Paletta's opinions. Petitioner also failed to prove that any current condition of ill-being in his left knee is causally related to the work accident. In regard to the left knee, the Arbitrator notes that Petitioner did not testify to any ongoing left knee issues nor did Dr. Paletta note any in his more recent office visit.

Dr. Paletta's causation opinion regarding Petitioner's right knee was based upon four factors: (1) the mechanism of injury; (2) the onset of pain; (3) the objective findings on the MRI scan; and (4) his belief that Petitioner was being honest and truthful.

As for the mechanism of injury, Petitioner told Dr. Paletta that he injured his right knee on January 26, 2016 when he "twisted and hyper-extended" it. Dr. Paletta's causation opinion was based upon that understanding as to the mechanism of injury. However, up until that initial visit with Dr. Paletta on May 25, 2016, Petitioner had never described the mechanism of injury in that manner. Indeed, up until that time, Petitioner had never really described the accident with any great amount of detail whatsoever. The Medicare Specialist records (hereafter referred to as "MS records") are devoid of any such description. At most, is the reference in Dr. Eavenson's record of May 3, 2016 wherein Petitioner is noted to have stated that while at work he was getting off a ladder and "tweaked" his knee. There was no mention of a twist or a hyperextension. Additionally, the MS records contain no mention of any knee complaints between April 21, 2016 (when he first presented there) and the visit on May 2, 2016. Even on May 2, 2016 there is no history of an accident. Petitioner simply correlated his complaints with activities of

stairs, weightbearing and twisting activities. He did not indicate he had twisted and hyper-extended it nor did he indicate he had been working through pain which had increased with his job change. One must also keep in mind that Petitioner was not even working on May 2 or 3, 2016. He had been off work on FMLA for his bilateral ankle problems. While he returned to his machine operator position on May 5th on a full duty basis, he returned to MS on May 11, 2016 and reported no right knee pain. (PX 1, p. 47) On May 12, 2016 Petitioner's only right knee complaints were in relation to exercise, not work. Petitioner's description of the accident in the MS records as a "tweak" coupled with his ability to continue working and with no mention of a specific incident and attendant details until he presents to Dr. Paletta after retaining an attorney and filing his claim herein undermines Dr. Paletta's understanding as to the mechanism of injury. Nothing in the record corroborates Petitioner's statement to Dr. Paletta that he twisted his right knee at the time of the accident.

Additionally, it cannot be overlooked that Dr. Paletta never reviewed the Medicare Specialists records. He testified that based upon the information furnished to him, Petitioner appeared truthful. However, he acknowledged never seeing the MS records. Had he reviewed these records he would have seen the inconsistencies pointed out above. He also would have noted that, while he was unaware of any injuries or incidents subsequent to January 26, 2016, Petitioner, on May 16, 2016, reported that "something" had happened over the weekend. Additionally, Petitioner testified at his hearing that "one night" while changing a film roll he had to climb up a plastic three step "thing" (which sounds like a ladder of sorts) to get on a machine and his knee gave way and he almost fell. He also testified that it was this incident that led him to go to the doctor in early May. When he went to Dr. Eavenson on May 3rd, he told the doctor that he was "getting off a ladder when he tweaked his knee." Dr. Eavenson's notes don't state when that occurred but, arguably, Petitioner could have been describing the more recent event while working as a machine operator. Again, Dr. Paletta was unaware of all of this because he hadn't reviewed the records and these records, indicating a different slant on the history and some inconsistencies in Petitioner's level of pain and whether it was continuous since the alleged accident or more intermittent, in nature, undermine the weight to be afforded to his opinion.

The Arbitrator also had concerns with Petitioner's credibility and forthrightness as reflected in his arbitration testimony. She did not find him to be altogether upfront and candid about his overall health and physical abilities independent of his alleged knee injury. Petitioner testified that between the date of accident and his initial visit for treatment he relied upon pain medication. That is not corroborated by the medical records or reflected in any medical histories. Furthermore, while Petitioner testified to having no knee issues before the accident and being active, Medicare Specialists records suggest otherwise as Petitioner told the doctor he was so tired by the end of the day, he just wanted to sit on the couch because his ankles hurt. At another visit he told the doctor his inability to exercise was partially due to chronic low back pain. Petitioner had a history of chronic low back pain for which surgery had been recommended but he was unable to pursue it until he lost over one hundred pounds. Thus, Petitioner's overall health and physical abilities was a little less "picture perfect" pre-accident than he suggested. Also,

he testified that he presented to MS with both ankle and knee complaints and was told the doctor could address the ankle but not the work-related knee. That was not corroborated by any medical records or witnesses. Finally, the Arbitrator notes that Petitioner also told Dr. Lupardis in August of 2017 that his dizziness was being caused by medication. That was not true as the preceding visit for that dizziness indicated it was caused by dehydration, not medication. It should also be pointed out that before Petitioner ever mentioned a work accident his doctor was recommending an MRI of his knee; however, Petitioner declined it because he couldn't afford it. Thereafter, he filed his claim herein. All of these inconsistencies cause the Arbitrator to question the true cause of his right knee complaints.

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

Petitioner sufficiently explained the issue of overtime and whether overtime was mandatory in the positions he held and which were documented in the wage statement. The Arbitrator finds that Petitioner's average weekly wage was $1,023.10 for the year preceding the accident.

Issue (J). Medical Services

Consistent with her causation determination, Petitioner's request for an award of medical bills is denied. With regard to Petitioner's medical bills, as found in PX 6, the Arbitrator notes that the last page appears to deal with medications. Petitioner provides no testimony regarding using Acetaminophen nor did he even explain what other charges are included on the page, a page, in and of itself, which is difficult to read.

Issue (K). What temporary benefits are in dispute?

Consistent with her causation determination, Petitioner's request for an award of temporary total disability benefits is denied.

Issue (O). **Prospective medical care.**

Consistent with her causation determination, Petitioner's request for an award of prospective medical care is denied.

Petitioner's claim for compensation is denied and no benefits are awarded.

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