ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC010444
Case Name	Lynette Brown v. Ford Motor Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0281
Number of Pages of Decision	19
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Mark Lee
Respondent Attorney	Olimpia Pietraszewski

DATE FILED: 8/1/2022

/s/ Deborah Baker, Commissioner

Signature

22IWCC0281

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
X Modify Findings Section regarding §8(j) credit	☐ PTD/Fatal denied
☒ Modify Increase TTD award period	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LYNETTE BROWN,

Petitioner,

vs. NO: 17 WC 10444

FORD MOTOR COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, other-§8(j) credit, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission, herein, affirms and adopts the Arbitrator's award of permanent partial disability.

The Commission, herein, affirms and adopts the Arbitrator's award for credit due Respondent in the amount of $4,830.00. However, the Commission modifies the "Findings" section of the Arbitrator's decision and, in the last sentence regarding the amount of Respondent's credit under Section 8(j) of the Act, strikes "$0" and replaces it with "$4,830.00."

The Commission modifies the award of temporary total disability (TTD) benefits based on a careful review of the evidence. The Commission notes that the Arbitrator awarded 3-1/7 weeks of TTD benefits for the time period March 6, 2017, through March 28, 2017. The Arbitrator terminated benefits on that date stating Dr. Schlenker instructed Petitioner to return for re-evaluation and the Arbitrator found no evidence of Petitioner receiving treatment during that interim period from March 28, 2017, through her full duty release May 2, 2017. The Commission

finds that Petitioner was under active medical treatment and had been authorized off work by her treating doctors through May 2, 2017. Dr. Johnson had excused Petitioner from work March 6, 2017, through March 10, 2017, and instructed Petitioner to be seen by a specialist (Dr. Schlenker). (PX2). Petitioner was seen by Dr. Schlenker March 8, 2017, March 13, 2017, and March 18, 2017, at which times Petitioner was not released to full duty. (PX 3). On March 28, 2018, Dr. Schlenker continued to restrict Petitioner from work and advised Petitioner to return for follow-up. (PX 3). Petitioner returned for a follow-up visit with Dr. Schlenker on May 2, 2017, at which point she was released to full duty. (PX 3, 6) Thus, the evidence shows Petitioner was temporarily and totally disabled from March 6, 2017, through her full duty release, May 2, 2017. The Commission also notes and finds significant Petitioner was paid non-occupational disability benefits by UniCare for the time period March 15, 2017, through May 1, 2017, for which Respondent is receiving a credit in the amount of $4,830.00, as noted above.

All else otherwise is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 18, 2021, is, otherwise, hereby, affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $772.53 per week for a period of 8-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. ($6,400.96 total TTD)

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.28 per week for a period of 1.9 weeks, as provided in §8(e)(3) of the Act, for the reason that the injuries sustained caused the 5% loss of Petitioner's right middle finger. ($1,321.03 total PPD)

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner for the reasonable and necessary medical expenses as evidenced in PX 2 and 3, pursuant to §8(a) and §8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, specifically §8(j) credit of $4,830.00 for non-occupational lost time benefits paid by UniCare. Respondent is entitled to credit for any medical bills paid on account of said accidental injury, and Respondent shall hold Petitioner harmless for any claims from providers for which Respondent is receiving such credit.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,500.00. 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.

August 1, 2022

o-6/14/22
KAD/jsf

/s/*Deborah J. Baker*
Deborah J. Baker

/s/*Maria E. Portela*
Maria E. Portela

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC010444
Case Name	BROWN, LYNETTE v. FORD MOTOR COMPANY
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Mark Lee
Respondent Attorney	Chandler Caswell

DATE FILED: 11/18/2021

/s/Elaine Llerena, Arbitrator

Signature

INTEREST RATE WEEK OF NOVEMBER 16, 2021 0.06%

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

Lynette Brown
Employee/Petitioner

v.

Ford Motor Company
Employer/Respondent

Case # **17** WC **010444**

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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **September 20, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 20, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**60,257.60** the average weekly wage was $**1,158.80**.

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 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 **$4,830.00** for other benefits, for a total credit of **$4,830.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services as provided in Petitioner's Exhibits 2 and 3, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $772.53/week for 3 and 1/7 weeks, commencing March 6, 2017 through March 28, 2017, as provided in Section 8(b) of the Act.

The Arbitrator finds that Petitioner sustained a permanency loss of 5% loss of use of the right middle finger, which amounts to 1.9 weeks of permanency at the rate of $695.28/week, totaling $1,321.03.

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.

Elaine Llerena

Signature of Arbitrator

November 18, 2021

STATEMENT OF FACTS

Petitioner is 57 years old, recently divorced and employed at Ford Motor Company. (T. 7) Petitioner has been employed at Ford Motor Company since September 2010. (T. 7-8, 28) Petitioner is currently a weld inspector and her duties include inspecting welds to make sure they are appropriate for the various parts in the body shop. (T. 8)

On February 20, 2017, Petitioner was allowed to inspect doors on the main line by her process coach, Ken Perry. *Id*. This was a different job than her current job as a weld inspector. *Id.* Prior to inspecting doors, Petitioner's job involved putting bolts in the lower fenders of vehicles. (T. 9) Petitioner had been inspecting doors for about three weeks prior to February 20, 2017. (T. 10) Inspecting doors was physically less demanding than Petitioner's prior job of putting bolts in the lower fenders. *Id*. Petitioner was working the C-crew shift, which meant that she was working Friday and Saturday mornings and Sunday and Monday nights. (T. 11)

There are two types of doors, the sedan doors and the Explorer doors. *Id*. The Explorer doors are larger in size and not as easy to turn. (T. 11-12) Once the door is pulled off the slot and turned, it is difficult to turn and the space to position the door on is small. (T. 12)

On February 20, 2017, an incident occurred while Petitioner was inspecting doors. (T. 11) When Petitioner was trying to pull the door off the slot, the door began to fall, and she tried to break its fall. (T. 12) Petitioner put her hand out to stop the door, and she was able to keep it from falling. *Id.* At that point, Petitioner felt the impact of the door on her whole hand. *Id*.

Petitioner noticed what she thought was a minor cut, and that her right index finger was more painful than other parts of her hand after the impact. (T. 14, 15). Petitioner could not recall how long the laceration on her right middle finger measured. (T. 50-51) She could not tell that the injury was as severe as it was. (T. 14)

The glove that Petitioner was wearing at the time of the injury was too sheer. *Id*. Petitioner testified that she should have had on suede gloves, which she now knows as a weld inspector, but did not know at the time of the injury. *Id*. Petitioner testified that the glove was too thin, and it was her first experience with the metal, the metal was sharp, and she did not know it was so sharp. *Id*.

Petitioner did not report the injury on the date it occurred, and continued to work because at the time, she did not realize the injury was "so severe." (T. 13, 40, 41) Petitioner testified that if she had realized it was severe, she would have gone to medical. (T. 14) Petitioner did not get a pass to go to medical for the accident because she did not report it. (T. 40-41) Petitioner did not fill out or turn in any paperwork on the date of accident. (T. 41). There were no witnesses to the accident. (T. 40)

Petitioner worked the rest of her shift and went home. (T. 13,14,15) Petitioner was woken out of her sleep and she felt like her hand was on fire. (T. 15) Petitioner had never had an experience like that and decided to go to urgent care. (T. 16)

Petitioner presented to Dr. Johnson at Evergreen Care Center ("Evergreen") on February 20, 2017 with complaints of right third digit pain following an accident at work the night prior. (PX2. 9)[1] Petitioner reported a door fell on her finger while inspecting it. *Id*. Petitioner reported that her finger became really swollen, she drained pus, and the pain had not improved. *Id*. She was in pain and could not sleep. Petitioner reported that she did not report this incident. *Id*. Dr. Johnson noted Petitioner's third phalanx was macerated and draining purulent discharge. *Id*. Dr. Johnson's assessment was cellulitis and paronychia. *Id*. Petitioner was instructed to keep the finger uncovered when not working. *Id*.

Petitioner had difficulty remembering certain things. (T. 16, 18) Petitioner recalled there was not much they could do for her at Evergreen. (T. 16) She could not recall if she went back to work the following day after initially being seeing by Dr. Johnson. *Id.* Petitioner later testified that she continued to work after seeing a doctor on the date of accident because she thought her injury would get better. (T. 24-25)

Petitioner testified that she thought she tried to work following the accident, until it got to the point that she could not put on a glove or do anything. (T. 16) Petitioner recalled an instance where Tim Bell, her superintendent, came to get her because he wanted her to do a "campaign over in paint." (T. 17) Bell wanted her to use a hammer, and normally she would do what was needed, but she told Bell that she could not swing the hammer. *Id.*

Petitioner tried to report the injury. *Id.* Petitioner could not recall the day that she went upstairs to report the injury, but recalled talking to her superintendent, "Jeanine." *Id.* Jeanine told Petitioner to not be afraid of reporting the accident. *Id.* Petitioner explained that "they scare you to death" if the accident is not reported right away. *Id.* Petitioner was told by union representatives that she would be fired or suspended if she went to medical or to labor. (T. 17, 35-36) Petitioner, however, did not feel threatened by the union representatives. (T. 36) Petitioner testified that she did not report the accident at that time, and Jeanine told her that she would cover for Petitioner for a couple of days. (T. 18)

Petitioner could not recall when she reported the accident, but at some point she knew that she could not work. *Id*. At that time, Petitioner testified that she had to go to medical and she told them what happened. *Id*. Petitioner was told to go to medical right away the next time she was injured. *Id.*

Petitioner testified that she returned to Evergreen on March 2, 2017 because she was in pain and could not work. *Id.*

On March 2, 2017, Petitioner presented to Dr. Johnson with continued complaints of right third digit pain, swelling, and tightness. (PX2. 8) Dr. Johnson noted that Petitioner had pale fingertips and erythema. *Id*. Petitioner was diagnosed with finger pain, paronychia, and Reynaud's. *Id*. Petitioner was instructed to take Bactrim and Epsom salt soaks. *Id*. X-rays of Petitioner's third right digit were ordered. *Id*. Dr. Johnson noted that Petitioner would be referred to a hand specialist if symptoms persistent. *Id*.

[1] Respondent also submitted subpoenaed records from Evergreen Care Center, which were admitted as Respondent's Exhibit 3.

After this point in time, Petitioner went to medical and filled out an accident report. (T.18, 19) After the injury worsened, Petitioner told her superintendent and process coach that she would no longer work. (T. 24-25)

Petitioner was shown and identified Petitioner's Exhibit 1 as the February 20, 2017 Ford Motor Company injury/accident investigation document. (T. 19) Petitioner filled out the form on March 3, 2017. *Id.* Petitioner testified that this date would have to be consistent with her recollection because although she did not remember the dates, she remembered that it was after the accident. *Id*. Petitioner testified that the description of the accident contained within the form was also consistent with her recollection of what happened. (T. 20) Petitioner testified that, "basically" she was excused from work and did not have to return to work once she went to medical. (T. 21)

Petitioner did not remember if she returned to Evergreen after March 2, 2017. (T. 20)

Petitioner presented to Dr. Johnson on March 6, 2017 for a follow-up. (PX2. 7) Petitioner presented with continued pain and swelling. *Id*. Petitioner requested a doctor's note. *Id*. Petitioner's diagnoses on this date were hand pain and cellulitis with persistent drainage. *Id.* Petitioner was instructed to continue taking Bactrim and was referred to a hand specialist. *Id*. Dr. Johnson provided Petitioner with a note indicating that Petitioner had first been seen on February 20, 2017 for evaluation of a work injury to her right third digit and was re-evaluated on March 2, 2017 and March 6, 2017. (PX2. 10) Dr. Johnson provided Petitioner with a second note, also dated March 6, 2017, indicating her referral to a hand surgeon and diagnoses of cellulitis of the right third digit. (PX2. 11)

Dr. Johnson provided Petitioner with a third note, dated March 7, 2017, requesting that Petitioner be excused from work March 6, 2017 through March 10, 2017, until Petitioner was evaluated by a specialist. (PX2. 10)

Petitioner remembered Evergreen referred her to a specialist and she started to see a specialist. (T. 20-21) Petitioner then saw Dr. Schlenker at Plastic Surgery and Hand. (T. 21)

On March 8, 2017, Petitioner presented to James D. Schlenker, M.D. at Hand and Plastic Surgery for an evaluation. (PX3. 10)[2] Petitioner's chief complaint was an injury to her right middle finger. *Id*. Petitioner reported that her finger looked better, but the wound would not heal, and the tip of her finger was very sensitive and painful. (PX3. 9) Petitioner reported not being able to work and requested a work status note. *Id*. Dr. Schlenker noted that Petitioner presented with an ulceration to the tip of her right middle finger. (PX3. 10) Petitioner's reported history was that she sustained an injury at work on February 20, 2017, while inspecting doors. (PX3. 9, 10) She struck the tip of her right middle finger against a door that she was manipulating. (PX3. 10) Dr. Schlenker noted that there was no actual crush injury between the door and another object, and that Petitioner's injury was simply blunt trauma against the tip of her finger. *Id*. Dr. Schlenker further noted that Petitioner went home and to sleep following the injury. *Id*. Petitioner

[2] Respondent also submitted subpoenaed medical records from Hand and Plastic Surgery, which were admitted as Respondent's Exhibit 2.

woke up with throbbing in the tip of her middle finger and went to an urgent care, where she saw Dr. Johnson, and was referred to his office for further evaluation and treatment. (PX3. 9, 10) Dr. Schlenker reported that Petitioner works the third shift and sleeps during the day. (PX3. 10) On exam, Dr. Schlenker noted the skin on Petitioner's hand seemed to be tight on the palmar aspect of the finger, there was a mild degree of flexion contracture, and an ulcer in the tip of the right middle finger measuring 0.5 x 1cm. *Id*. Dr. Schlenker further noted that the distal portion of the middle finger is whitish in color indicating a poor capillary circulation, the thumb on the right hand was a bluish color over the distal phalanx on the palmar aspect, and there was a slow refill when both the right ulnar and right radial arteries were occluded. *Id*. Dr. Schlenker also noted that Petitioner's left hand had a bluish discoloration over the distal phalanges of all digits. *Id*. Dr. Schlenker's diagnoses were ulcer at the tip of right middle finger following blunt injury at work, Raynaud's phenomenon, and possible sclerodactyly with scleroderma. *Id*. Petitioner testified that because she had an open wound to her hand and continued working, it became so infected that Dr. Schlenker could not do anything except give her pain medication and refer her to a pain specialist. (T. 22-23) Petitioner was prescribed vasodilating agent Procardia and would later be prescribed Trental and an alpha blocking agent to improve circulation. (PX3. 10) Dr. Schlenker recommended removal of Petitioner's artificial nails, which Petitioner refused. (PX3. 8) Petitioner was referred to Dr. Jerry Coltro. *Id*. Dr. Schlenker did not believe Petitioner was able to perform her regular job duties at that time. (PX3. 11)

Petitioner was afraid to see a pain specialist because she did not want to get "hooked" on strong pain medication. (T. 23) She did not see a pain specialist. (T. 50) Petitioner testified that she just had to endure the pain, which was unfortunate because all the skin had come off and it had to heal on its own. *Id.*

On March 13, 2017, Petitioner presented for a follow-up with Dr. Schlenker. (PX3. 7) The notes for this office visit are handwritten. *Id*. Petitioner reported using Silvadene cream daily, a decrease in swelling, and that her finger looked and felt much better. *Id*. Petitioner brought a disability form with her to this visit. *Id*. Petitioner had not yet scheduled an appointment with Dr. Coltro. *Id*. Dr. Schlenker noted Petitioner still had the ulcer at the tip of her right middle finger, "but may be smaller." *Id*. Dr. Schlenker added Trental to Petitioner's medication regimen and Petitioner was instructed to return in two weeks. *Id.* Petitioner was kept off work. (PX3. 6)

Petitioner again saw Dr. Schlenker on March 28, 2017. *Id*. This office visit note is also handwritten. *Id*. Petitioner reported that she stopped taking the Procardia because it was making her sick, and the ulcer at her right middle finger was healing and was not as sensitive. *Id*. Petitioner had not scheduled an appointment with Dr. Parija (sp) and/or Dr. Coltro. *Id*. Dr. Schlenker noted Petitioner's middle finger appeared "more healed," but was still tender. *Id*. Dr. Schlenker instructed Petitioner continue taking Trental and return in two weeks for re-evaluation. *Id*. Dr. Schlenker continued to keep Petitioner off work. *Id*.

On May 2, 2017, Petitioner returned to Dr. Schlenker for a follow-up. *Id*. Petitioner's right middle finger was much improved. (PX3. 2) Petitioner wanted to return to work full duty. (PX3. 6) Dr. Schlenker reported Petitioner's finger was healed. (PX3. 5) He noted a bluish discolor remained on the tips of her left fingers. *Id*. Dr. Schlenker returned Petitioner to work

light duty effective May 3, 2017 and full duty effective May 5, 2017. (PX3. 6)

Petitioner chose to stop treatment for this injury. (T. 50)

This is Petitioner's first workers' compensation claim. (T. 24, 51) Petitioner "guessed" that she signed paperwork saying that she accepted the job and all of Ford Motor Company's policies when hired by Ford Motor Company. (T. 28) Petitioner was aware of Ford Motor Company's reporting policy. (T. 29, 39) Petitioner has previously reported an accident at Ford Motor Company. (T. 24, 28) In the past, Petitioner signed reporting guidelines after reporting other instances, as well as paperwork stating that she would report any work-related accident or injury. (T. 29, 39)

On cross examination, Petitioner was shown Respondent's Group Exhibits 5 and 6. Respondent's Group 5 consists of multiple Ford Motor Company's Occupational Health and Safety Information Management System Visit Summary Reports for February 8, 2011, April 19, 2011, September 6, 2014, November 24, 2014, three reports dated December 20, 2014, March 16, 2015, April 17, 2015, February 8, 2016, February 6, 2016, April 8, 2016, August 20, 2016. Respondent's Group 6 consists of pre-accident investigative records from Ford Motor Company.

Petitioner agreed that she signed a work incident/injury report on February 8, 2011, November 24, 2014, December 16, 2014, March 15, 2015, and February 6, 2016. (T. 30, 31, 32, 33) Regarding the March 15, 2015 report, Petitioner testified that she did not go upstairs to report an injury. (T. 32) Petitioner explained that she had gone upstairs for treatment for bug bites that were itching. *Id.* The incident/injury report is the only report Ford Motor Company has when an employee goes upstairs. (T. 33) As to the February 6, 2016 incident, Petitioner agreed that the form states that she left the facility to seek other medical treatment. *Id*. Petitioner confused the February 6, 2016 incident with the February 20, 2017 incident, and testified that she left work on February 6, 2016 because her hand was injured and she could not work. (T. 34) When Petitioner was informed that the February 6, 2016 incident/accident report was for an injury from a year prior, Petitioner testified that she did not know what the February 6, 2016 report was for. *Id*.

Regarding Petitioner's Exhibit 1, Petitioner filled out and signed the accident report. (T. 42) She does not stamp the accident reports. (T. 42). She fills out the accident report and medical stamps the accident report. *Id.* Petitioner filled out the February 20, 2017 accident report and gave it to the nurse. (T. 43, 44) Petitioner obtained the report form from Amanda, the nurse. (T. 54) Petitioner gave the form back to the nurse once she had filled it out. (T. 54, 60, 61) Petitioner did not fill out the medical person's name on the form. (T. at 57) The nurse's name on the form is not in Petitioner's handwriting. (T. 57-58) The nurse filled in her own name on the form. (T. 57, 58, 59) There is certain information on the form that is filled in by the medical personnel and that Petitioner left blank. (T. 58) Petitioner does not fill out the name of the person or medical staff reported to or the nurse's information on the form. (T. at 59) Once Petitioner hands the form to the nurse, she does not know what happens next. (T. at 61) Petitioner did not design or manufacture the accident/injury report presented as Petitioner's Exhibit 1. (T. 53-54)

Petitioner received off-work notes from Evergreen and was off work for a period after the accident. (T. 44, 46) Petitioner testified that she was off work because the upper part of her hand

was "wide open" and she could not work. (T. 44) Petitioner testified that Ford Motor Company placed her off work because of the injury. (T. 45, 46) Petitioner did not physically provide the off-work notes to the nurse at Ford Motor Company. (T. 55) The doctors' offices provided the off-work notes to the nurse at Ford Motor Company. *Id.* Petitioner was paid for her time off work by UniCare. (T. 47)

Petitioner reported prior claims of accident/injury because those incidents impacted her ability to work. (T. 52) Petitioner would go to medical if she could not physically perform her job. (T. 52) When she hurt her hand with the door, Petitioner did not know it was going to be so intense. (T. 52-53, 56) Petitioner thought that she could work through the injury and did not know her finger was going to become inflamed. (T. 53) Her finger did not become inflamed until she went to bed that night. *Id.* Petitioner acknowledged that she would have been in violation of Ford Motor Company's reporting policy because she did not report the incident on the same date. *Id*.

At the time of the February 20, 2017 injury, Petitioner was not treating with Evergreen or Dr. Schlenker for any non-work-related injuries. (T. 55)

At trial, Petitioner testified that her finger is now slightly deformed because of all the trauma and from the skin having to grow back. (T. 25) Her finger does not straighten out the same as her left hand. *Id*. She has to use all of her fingers for her current position. *Id.* Her finger's current condition impacts Petitioner's ability to perform her current position to some degree, but she works through it. (T. 25-26) Petitioner's ability is impacted because her hands are not as strong and there is some numbness to the area under the nail bed. (T. 26) Petitioner testified that she can perform her job. (T. 27) Petitioner testified that she now wears suede gloves and they offer more protection to her hands. *Id*.

Respondent called Richard Roggetz ("Roggetz") as its witness. (T. 62) Roggetz has worked at Ford Motor Company for six and a half years. (T. 63) He is the plant investigator. *Id*. He investigates injuries that Ford Motor Company has "on a deeper level." *Id*.

As a part of his job, Roggetz is given accident reports from Ford Motor Company. (T. 64) Roggetz identified a document shown to him as an "FTOV," which is a first-time office visit. (T. 65, 72) The FTOV is used in Roggetz's daily business to investigate injuries. *Id*. When employees go to medical to report an injury, they fill out the FTOV upon arrival. *Id*. Every employee that goes to medical fills out an FTOV. (T. 72) An employee must go to medical to obtain the paperwork. (T. 78)

When an employee is injured on the line, the employee is required to pull the cord that alerts the process coach or the team lead that something is wrong at the station. (T. 66) Then, the team lead and the process coach go to the station and talk to the employee and see what the employee needs. *Id*. If the employee is injured, the employee should let the process coach or the team lead know. *Id*. If it is something serious, then they call the plant medical and have the plant medical take the employee up to medical or call an outside ambulance. *Id*. If the employee can walk up to medical on their own, the process coach or team lead fills out a pass for the employee. *Id*. The employee takes that pass up to the medical department and puts it under the scanner. (T.

67) The scanner time stamps the pass with the time that the employee entered the medical facility. *Id*. The employee signs in on the medical form to let the doctor know that they arrived and then sits and fills out the FTOV. *Id*. The employee then sees the physician and if the employee needs to see their own doctor or does not feel comfortable with what the Ford Motor Company doctor says, the employee can take an "early out." (T. 67, 69) An "early out" is a form filled out by the employee. (T. 67) The employee takes the "early out" form to labor and informs labor that they are leaving. *Id*. As soon as an employee sees a doctor on their own, they are required to return to the medical department and turn in the paperwork. *Id*. If the employee has restrictions, then the employee is obviously off work. *Id*.

An employee can leave the line without being noticed or notifying anybody, but it normally did not happen. (T. 69-70) An employee can report an injury to multiple people. (T. 70-71)

The forms that an employee fills out are also time-stamped or medical staff writes a visit number on the form. (T. 68) When medical types in the report of what happened when they see the employee, the report comes up with a number on the top right side. *Id*. This number is written by the medical staff on the top of the form that was turned in by the employee, so that it coordinates with the report. (T. 68-69) Roggetz did not see a number written on the form that was shown to him.[3] *Id.*

After an incident report has been entered, it is not always given to Roggetz. (T. 71) Roggetz is one of many incident investigators at Ford Motor Company. *Id*. After an incident is reported, it goes to an incident investigator at the facility. *Id*. If an employee does not fill out an incident report, the injury will not be investigated. *Id*.

On cross-examination, Roggetz was shown Petitioner's Exhibit No. 1, which he identified as an FTOV. (T. 72) Petitioner's Exhibit 1 is the official form used by Ford Motor Company. *Id*. The medical department stamps the form at the top. (T. 73) The stamp on Petitioner's Exhibit No. 1 looks to be consistent with the stamp Ford Motor Company uses or used at that time. *Id*. Medical does not stamp the time that the employee goes into the medical department on the form. *Id*. Medical would just write the medical visit at the top of the form by hand, so the date stamp that they put on the top of the form would not be there. *Id*. Only the medical visit number would be written on the top right-hand side of the form. (T. 73-74)

The only time the form would have a number at the top would be after the employee sees a plant nurse. (T. 78) Afterwards, the plant nurse writes a number at the top of the form to correlate with Ford Motor Company's system so that the injury can be looked up. *Id*. The number at the top of the form is not stamped, it is written by hand. (T. 79)

Roggetz testified that an employee does not have access to the stamp. (T. 72) He then testified that anyone can stamp a form, because the stamp machine is sitting out in the medical office. (T. 74) The stamp used on Petitioner's Exhibit No. 1 is used to stamp the medical pass that the employee brings upstairs from their supervisor. *Id*.

[3] The document shown to Roggetz was not identified on the record.

On re-direct examination, Roggetz was again shown Petitioner's Exhibit No. 1. (T. 75) He testified that the employee fills out the form prior to seeing the nurse, then the nurse goes over the form with the employee, which is why they sign it on the back. (T. 76) The form must be given to the nurse to submit to Ford Motor Company. *Id*. Employees are supposed to turn in the form and fill it out in the medical department. (T. 77)

Roggetz testified that when an employee goes to medical, the employee can get the form and can fill it out or take it with them. (T. 75) Roggetz then testified that the only time that an employee would not be required to fill out the form is if they were taken away in an ambulance. (T. 77) In that instance, the employee would be required to fill out the form when they came back to the plant. *Id*.

Roggetz was then shown the March 15, 2015 report contained within Respondent's Exhibit 5. (T. 74) Roggetz testified that what is seen at the top of the March 15, 2015 report would be what is traditionally seen at the top of those forms. (T. 74).

Roggetz testified that the form filled out by Petitioner in Petitioner's Exhibit 1 is a record of the injury. (T. at 77)

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:

A claimant has the burden of proving by a preponderance of the evidence, all of the elements of her claim. *O'Dette v. Industrial Com'n*, 79 Ill.2d 249 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign the weight to the witnesses' testimony. *R & D Thiel v. Illinois Workers' Compensation Com'n*, 398 Ill. App. 3d 858, 868 (1st Dist. 2010); *see also Hosteny v. Illinois Workers' Compensation Com'n*, 397 Ill. App. 3d 665, 674 (1st Dist. 2009). Although an employee's testimony about an alleged accident might be sufficient, standing alone, to justify an award of benefits under the Act, it is not enough where consideration of all facts and circumstances demonstrate that the manifest weight of the evidence is against it. *Caterpillar Tractor Co. v. Industrial Comm'n*, 83 Ill. 2d 213, 218, 414 N.E.2d 740, 46 Ill. Dec. 687 (1980).

As an initial matter, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. Petitioner was calm, well-mannered, composed, spoke clearly, and made normal eye contact with the Arbitrator.

The Arbitrator notes that at times throughout Petitioner's testimony, Petitioner had difficulty recalling specific information. So, while Petitioner testified that she suffered an injury to her right index finger, the Arbitrator attributes this confusion to the length of time that has

passed between Petitioner's injury date to the date of arbitration. As such, the Arbitrator relies on the medical records, which provide a consistent history as to the mechanism of injury with Petitioner's testimony, but record treatment for an injury to Petitioner's right middle finger.

The Arbitrator finds that an accident occurred on February 20, 2017 that arose out of and in the course of Petitioner's employment with Respondent. In reaching such finding, the Arbitrator relies on Petitioner's testimony that (1) her duties on the date of the accident involved inspecting vehicle doors; (2) on February 20, 2017, she was inspecting vehicle doors; (3) a door that she was inspecting began to fall; (4) Petitioner used her right hand to break the door's fall; and (5) Petitioner felt the impact of the door on her right hand. The Arbitrator also relies on the records in evidence, which document and reflect a consistent accident history.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to the Act, notice of a work-related accident must be reported to the employer within 45 days of the accident. 820 ILCS 305/6(c). The purpose of the notice requirement is to give employers the opportunity to investigate the accident and gather evidence related to same. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 96, 411 N.E.2d 249, 252 (1980). A claimant's failure to report an accident on the day it occurred is not a reasonable basis for disputing a claim. See *Oliver v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 143836WC, ¶39-¶47 (2015).

The Arbitrator notes that Petitioner recalled reporting the accident to Ford Motor Company's medical department after her March 2, 2017 appointment with Dr. Johnson. (T. 18, 19) Petitioner also informed her superintendent and process coach that she would no longer work following the March 2, 2017 follow-up visit with Dr. Johnson. (T. 24-25)

Petitioner was shown and identified Petitioner's Exhibit 1 as the February 20, 2017 Ford Motor Company injury/accident investigation document. (T. 19) She testified that she filled out the form on March 3, 2017. *Id.* The Arbitrator notes that there is a time stamp at the top of the document reflecting a date of March 6, 2017. (PX1) The Arbitrator notes that both dates are consistent with Petitioner's testimony of having reported the accident after the March 2, 2017 re-evaluation with Dr. Johnson.

The Arbitrator notes that Petitioner consistently and credibly testified that (1) she obtained the form from Ford's medical department; (2) she filled out, signed, and returned the form to the nurse in the medical department; (3) she did not fill out the medical person's name on the form, (4) the nurse's name on Petitioner's Exhibit 1 is not in Petitioner's handwriting, (5) that the nurse filled in her own name on the form; and (6) she did not design or manufacture Petitioner's Exhibit 1. (T. 42, 43, 44, 53-54, 54,57-58, 59 60, 61) The Arbitrator notes that an "AVillareal RN" filled in his/her name in the space allocated for "Nurse" on the form. The Arbitrator further notes that no evidence was presented to rebut this testimony, and Roggetz's testimony corroborated most of Petitioner's testimony.

Roggetz identified Petitioner's Exhibit 1 as the official form used by Ford Motor Company. (T. 72) He further testified that (1) the medical department stamps the accident form

at the top; and (2) the stamp on Petitioner's Exhibit No. 1 is consistent with the stamp Ford Motor Company uses or used at that time of the February 20, 2017 accident.

The Arbitrator notes that Roggetz's testimony was inconsistent at times. He initially testified that an employee does not have access to the time stamp in the medical department, but then testified that anyone can stamp a form, because the stamp machine is sitting out in the medical office. (T. 72, 74) He also testified that when an employee goes to medical, the employee can get the form and can fill it out or take it with them. (T. 75) Roggetz then testified that the only time that an employee would not be required to fill out the form is if they were taken away in an ambulance. (T. 77) Roggetz did not provide any testimony to rebut that Petitioner's Exhibit 1 was not handed in to Ford's medical department.

Roggetz, however, ultimately testified that the form filled out by Petitioner in Petitioner's Exhibit 1 is a record of the February 20, 2017 injury. (T. at 77)

Based on the above, the Arbitrator finds that Petitioner provided notice to Respondent of the February 20, 2017 accident within the 45-day notice requitement.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS*:*

Based on (1) Petitioner's testimony as to how the work accident occurred; (2) Petitioner's credible denial of any pre-accident right middle finger problems or treatment; (2) the fact that none of the records in evidence reflect any pre-accident right middle finger treatment or problems; (3) Dr. Johnson's treatment records; and (4) Dr. Schlenker's treatment records, the Arbitrator finds that Petitioner established a causal connection between the work accident of February 20, 2017 and her current right middle finger condition of ill-being.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS*:*

Based on the above, the Arbitrator finds that the treatment provided for Petitioner's right middle finger cellulitis and Reynaud's syndrome was reasonable and necessary. The Arbitrator further finds that Respondent shall pay the medical bills for treatment of Petitioner's right middle finger cellulitis and Reynaud's syndrome per the medical fee schedule.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any clams by any providers of the services for which Respondent is receiving this credit.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS*:*

Having found that Petitioner's current condition of ill-being of the right middle finger is causally related to her work accident, the Arbitrator finds that Petitioner is entitled to TTD benefits. At issue is the claimed TTD period of March 6, 2017 through May 5, 2017. (See Ax 1, No. 8).

Dr. Johnson provided Petitioner with a note, dated March 7, 2017, requesting that Petitioner be excused from work March 6, 2017 through March 10, 2017, until Petitioner was evaluated by a specialist. (PX2. 10)

Petitioner was seen and kept off work by Dr. Schlenker on March 8, 2017, March 13, 2017, and March 18, 2017. (PX3. 11, 6) On March 28, 2017, Petitioner was instructed to return to Dr. Schlenker for re-evaluation. (PX3. 6) Petitioner did not return to Dr. Schlenker until May 2, 2017 and there is no evidence that Petitioner sought treatment for her right middle finger between March 28, 2017 and May 2, 2017. (PX3. 2). Although Dr. Schlenker released Petitioner to work light duty effective May 3, 2017 and full duty effective May 5, 2017, there are no records that support Petitioner having been off work entirely after March 28, 2017 through May 2, 2017.

Based on the above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from March 6, 2017 through March 28, 2017.

WITH RESPECT TO ISSUE (N), WHETHER RESPONDENT IS DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was paid for her time off work by UniCare. (T. 47) As evidence of payments made to Petitioner while she was off work, Respondent submitted Respondent's Exhibit 7, which consists of a printout of an email from Effie Holmes, Ford Motor Company's workers' compensation claims administrator, to Vicki Kornegay. (RX7) The email printout states that Petitioner was paid $4,830.00 for the period of March 15, 2017 through May 1, 2017 for the diagnoses of Raynaud's Phenomenon and decubitis ulcer. Petitioner's counsel raised an objection as to the "argumentative questions regarding the circumstances of said credit," but had no objection in regards to Respondent "want[ing] to take a credit for the $4,830 for disability which [Petitioner] admitted she received." (T. 83)

Based on the parties' stipulation, the Respondent is entitled to a credit of $4,830.00 for nonoccupational indemnity disability benefits paid by UniCare to Petitioner, to the extent it is allowed under Section 8(j) of the Act.

WITH RESPECT TO THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that pursuant to Section 8.1(b) of the Act, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered includes: (i) the reported level of impairment pursuant to AMA; (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.

With regard to criterion (i), the Arbitrator notes that no AMA Impairment Rating was rendered, and therefore the Arbitrator gives no weight to this factor.

With regard to criterion (ii), the Arbitrator notes that Petitioner was employed at Ford Motor Company and her duties included inspecting doors at the time of the accident. The Arbitrator further notes that Petitioner was ultimately released to return to work without restrictions and did in fact return to work at Ford Motor Company. The Arbitrator gives this factor greater weight.

With regard to criterion (iii), the Arbitrator notes that Petitioner was 54 years old at the time of the accident and reported relatively minor issues as a result of her right middle finger injury. The Arbitrator notes that Petitioner returned to work following the February 20, 2017 accident and is presently employed by Ford Motor Company as a weld inspector. The Arbitrator gives some weight to this factor.

With regard to criterion (iv), the Arbitrator again notes that Petitioner returned to work at Ford Motor Company and was employed by Ford Motor Company as a weld inspector at the time of trial. The Arbitrator notes that Petitioner has not demonstrated that her future earning capacity has been affected by the accident, and therefore the Arbitrator gives lesser weight to this factor.

With regard to criterion (v), the Arbitrator notes that while Petitioner testified that her right middle finger is deformed and does not straighten out, there is no evidence in the medical records that corroborates her testimony. While Dr. Schlenker noted that a bluish discolor remained on the tips of Petitioner's left fingers, Dr. Schlenker reported no abnormalities associated with Petitioner's right middle finger. The Arbitrator further notes that Dr. Schlenker's record of May 2, 2017 reports that Petitioner's right middle finger was healed. (PX3. 5) Therefore, the Arbitrator gives this factor its appropriate weight.

Upon consideration of the above, the Arbitrator finds that Petitioner has sustained 5% loss of use of her right middle finger.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC021370
Case Name	Kelli Spears v. Caterpillar Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0282
Number of Pages of Decision	14
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	KEITH SPARKS
Respondent Attorney	Elizabeth LeBaron

DATE FILED: 8/4/2022

/s/ Deborah Simpson, Commissioner

Signature

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

Kelli Spears,
Petitioner,

vs. NO: 17 WC 21370

Caterpillar Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2021, 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 $9,300.00. 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.

August 4, 2022
o7/27/22
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC021370
Case Name	SPEARS, KELLI v. CATERPILLAR INC
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Keith Sparks
Respondent Attorney	Elizabeth LeBaron

DATE FILED: 12/28/2021

/s/Edward Lee, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 28, 2021 0.21%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kelli Spears,
Employee/Petitioner
v.
Caterpillar Inc,
Employer/Respondent

Case # **17** WC **21370**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **9-28-2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS:

On **5-4-2017**, 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 $**35,152.00**; the average weekly wage was $**676.00**.

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.

Respondent shall be given a credit of $**0** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**4,677.11** for other benefits, for a total credit of $**4,677.11**.

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

ORDER:

Respondent shall pay temporary total disability benefits of **$ 450.67** week for a period of **8 5/7 weeks** from **1-23-2018 through 3-25-2018** as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable, necessary and related medical bills as provided in Section 8(a) of the Act. The parties have stipulated that if Respondent is liable and responsible for Petitioner's reasonable and necessary medical treatment, Petitioner will be awarded $694.53 for unpaid medical and Respondent will receive an 8(j) credit for the balanced billed by Dr. Kefalas' facility and will hold Petitioner harmless pursuant to Section 8(j).

Respondent shall pay permanent partial disability benefits of **$405.60** week for a period of 22.8 **weeks** as provided in Section 8(e) of the Act, as Petitioner established that she was entitled to an award of **12%** loss of use to the right hand.

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

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

Edward Lee

Signature of Arbitrator

December 28, 2021

MEMORANDUM OF THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner, Kelli Spears, is employed with Respondent, Caterpillar Inc., as a 3A assembly and test specialist at the time of the hearing. (T.7). Petitioner started working for Respondent in 2007. (T.7).

Petitioner initially started working with Respondent in the paint line. (T.7). She described that she would tape off segments of the vehicles she was working on. (T.8). After the machines or components were painted, she would demask them and clean them. (T.8).

Petitioner moved to subassembly of the motor grader in December 2007. (T.8). Petitioner explained that subassembly refers to the act of assembling smaller parts or components. (T.9). She further elaborated that if an individual is only working on parts and not the frame of the truck physically, then you categorized as subassembly. (T.9). During this time, Petitioner worked on attaching valves to the valve bank of the motor grader. (T.9). The valves were attached with bolts, elbows, and brackets using various tools like torque wrenches or impact guns. (T.10).

From fall of 2008 through April 2009 Petitioner worked in predelivery inspection. (T.10). Petitioner was laid off from April 2009 through June 2010. (T.10).

Petitioner returned to Respondent in June of 2010 in assembly of the wheel tractor scraper area. (T.11). Petitioner described that she connected all the hoses from the tractor to the cab. (T. 11). She also assembled the wheels which consisted of torquing 30 to 40 bolts around the wheel using a large impulse gun to 450 newton meters. (T.11). She states that she is required to do two wheels on her side but, oftentimes, would do all four wheels. (T.11-12).

In the fall of 2012, Petitioner relocated to the off-highway truck or OHT line through June of 2013. (T.12). Petitioner put on flanges, elbows, and platforms onto the frame of the truck. (T.12). She had to put on two platforms per truck and each platform required eight bolts. (T.12-13). To attach the platform, she would use a large gun called a reaction gun and finish the operation with a six-foot torque wrench. (T.13). Petitioner stated she did three to four trucks per day at that time. (T.14).

From June 2013 through June 2015, Petitioner worked in subassembly of the fuel and hydraulic tanks for the 40-ton, 60-ton, and 100-ton trucks. (T.14). Petitioner testified that she would subassemble, which meant she had to build up the part, various filters and pumps which she then would attach onto the fuel tank itself. (T.15). She would also connect or attach hoses, electrical harnesses, brackets, and elbows to the fuel tanks. (T.15). To connect the parts, Petitioner would hand tighten a spinning nut, then she would take her backup wrench to torque down the nut into a locked position. (T.16). Petitioner clarified that using a backup wrench means she is using two

wrenches simultaneously in opposite directions or forces, essentially pushing and pulling at the same time. (T.16).

From June 2015 through February 2017, Petitioner was laid off from Respondent. (T.17). Petitioner found work as a part-time cashier in May 2016 through January 2017 outside of Respondent. (T.42-44, Rx.4).

Petitioner returned to work with Respondent in February 2017 in subassembly of fenders and platforms. (T.17). Petitioner would assemble two fenders per day and assemble a hydraulic tank for the 100-ton truck. (T.17-18, 41).

Each fender would require two big filters to be attached, using a crane to put them into place. (T.20). Attaching both filters would require 30-40 bolts. (T.21). On the other side of fender, Petitioner would then attach another filter with four bolts and a large hose which requires a clamp to be tightened. (T.21). After the filters, Petitioner would attach a railing using a crane to put it into place. (T.22). Putting together the railing would require 12 bolts. (T.22). The railing was approximately three feet tall. (T.22). Following the railing, Petitioner assembles a mirror onto the railing using two metal flanges which require four bolts each, therefore, eight bolts total. (T.23). A rubber flap is then attached to the fender using 10-12 bolts. (T.23). The rubber flap requires two people to facilitate assembly because it is a heavy piece, approximately 25 pounds. (T.23). One person holds the flap in place while Petitioner puts one bolt through the front side, then she reaches underneath and behind the fender to attach a washer and nut on the other end of the bolt. (T.23-24). She repeats this for the other 10-12 bolts. Petitioner would repeat this process for the other fender operation. (T.24).

Petitioner testified that each fender had a lot of similarities. (T.24). However, the right-side fender, had a bigger air filter and took an additional four large bolts which had to be bolted underneath the filter. (T.24). This larger air filter required additional parts compared to the left fender, totaling an additional 16 bolts. (T.25).

Petitioner also subassembled a hydraulic tank for the 100-ton line. (T.26). The hydraulic tank is 20 inches by 30 inches. (T.26). She would hoist it with a crane onto a fixture where she would mount it with four bolts. (T.26). Petitioner must remove all the steel plugs covering the openings of the hydraulic tank and replace them with elbow pieces and tighten them. (T.26-27). She attaches hoses to those elbow pieces and then torques the hoses down. (T.27).

Petitioner testified that in her subassembly operations she would use 37 or more tools. (T.35-36). These tools ranged from 4.5 newton meters (NM) to 420 newton meters (NM), which correlates to how much force is needed to operate those tools. (T.36-37). She estimated that a 4.5 NM wrench might be eight to twelve inches and weighed a few ounces. (T.37). A 420 NM wrench is as tall as her and too heavy to pick up with one hand. (T.38). A 4.5 NM torque gun is smaller gun weighing about 10-12 ounces. (T.38). While a 420 NM torque gun is a very large

gun which requires two-handed operation, the socket on the 420 NM torque gun is approximately four inches in diameter. (T.38).

In her normal workday, subassembly for the left and right fender, Petitioner would start by hand approximately 300 bolts. (T.40). Petitioner testified that starting the bolts by hand was the required and standard operating procedure. (T.40). After starting the bolts by hand, Petitioner would torque each bolt down, primarily with the 55 NM torque gun. (T.40).

On May 4, 2017, Petitioner reported to medical and drafted an incident report, as well as a statement regarding her injury. (Rx.3, p.1; Rx.4). Petitioner reported she has returned from layoff, a period of 20 months, and started working on February 6, 2017. (Rx.3, p.1; Rx.4). Upon Petitioner's return to work, she started experiencing shoulder pain until about the middle of April when Petitioner also started to experience numbness in her right hand. (Rx.3, p.1; Rx.4). On the incident report, Petitioner marked "yes" indicating that she believed her work contributed to her injury. (Rx.3, p.1).

Petitioner testified that she initially treated with Respondent's medical department. (T.27). Petitioner had an EMG study done of her right hand at Respondent's request. (T.27; Rx.3, p.7).

Petitioner started treating with Dr. Kefalas at Central Illinois Bone and Joint Center on September 1, 2017. (T.28; Px.1, p. 7). On January 23, 2018, Dr. Kefalas performed a right carpal tunnel release on Petitioner. (T.28; Px.1, p. 18). Following surgery, Petitioner continued to treat with Dr. Kefalas and was instructed to return to work on March 26, 2018. (T.28; Px.1, p. 10-12). Petitioner then was released from medical care in April 2018. (T.28; Px.1, p. 13). In Dr. Kefalas' last medical note, Petitioner indicates continued right hand pain in the palm and into the wrist. (Px.1, p.13).

Petitioner has been able to return to full duty work. (T.32). Petitioner states that following the surgery, her condition and hand has improved. (T.31). She states she is not back at 100 percent and would estimate that she is at 85 percent in terms of strength or endurance of her hand. (T.32). Petitioner testified that she still experiences tightness and an occasional ache. (T.29). Petitioner states activities with direct pressure are bothersome like push-ups, yoga, and using a lawnmower. (T.29-30). Additionally, that carrying heavier objects with her hand like larger groceries or heavier torque guns cause some pain. (T.31).

Testimony of Respondent's witness – Sheila Strobel

Ms. Strobel testified that she has worked for Respondent since 2004. (T.58). Ms. Strobel started as an inventory analyst until she became section manager in the sub area in 2012. (T.58). She states that a section manger is a supervisor-like position over the hourly employees. (T.58). Ms. Strobel became manufacturing engineer in 2015. (T.58).

A manufacturing engineer designs the work orders which each assembler utilizes. (T.59). The work orders instruct the assemblers on what parts they will need, how to put them together, and the torque tools they will need. (T.59).

At the time of February 2017, Ms. Strobel was a manufacturing engineer of the large truck/small truck subs. (T.60). In this area, assemblers put together torque converters, A-frames, fenders, platforms, fuel tanks, hydraulic tanks, and other components. (T.60).

Ms. Strobel testified that the fender in the sub assembly area is similar to a car fender which goes over the tire of the truck. (T.61). In addition, the fender will have a platform and catwalk attached to it which provides access to the truck. (T.61). The platform goes above the engine and torque converter of the truck and is used for access purposes by the operators. (T.61-62).

In May of 2017, Ms. Strobel was asked to create a job analysis report at the request of Respondent. (T.61). Ms. Strobel testified that the focus of her job analysis centered on Respondent indicating Petitioner had reported right shoulder injury. (T.66, 76, 89). As a result, she was asked by Respondent to extract data from the database about Petitioner's tools she utilized, frequency of the tool usage, build rate of certain components, and torque amounts of the tools. (T.62, 67). Ms. Strobel states that she did not determine the weight and force of the tools, that portion was authored by someone in safety, and she was not present when safety measured the force. (T.62-63). The information on the job analysis is generic data for Petitioner's entire build, but in using the data, Ms. Strobel testified they were more focused on the shoulder area. (T.76). Ms. Strobel agreed that the job analysis did not provide any information on the posture or positioning of Petitioner's work, nor the recommendations or alterations she would normally provide as a mechanical engineer to Petitioner's position. (T.79).

Ms. Strobel testified that Petitioner's most frequent tool was the 55 NM torque gun. (T.69). She described that it resembles a household drill but a little larger. (T.69). Ms. Strobel stated that she could not recall if any of Petitioner's operations required unusual posture. (T.70). She stated that Petitioner was required to assemble 300 bolts to complete one entire fender. (T.71). If there were multiple assemblers, that figure would be divided up among the assemblers. (T.71). Ms. Strobel initially testified that the build rate for fenders was one per day, indicating only one side. (T.68). However, during cross-examination, she stated she was not positive if Petitioner's operations only assembled one fender per day. (T.84). She acknowledged that a build rate of "one unit" may require two fenders. (T.84-85).

Ms. Strobel testified that she provided Respondent with Petitioner's bolt frequency information, specifying Petitioner did 300 or more bolts. (T.71). She acknowledged that the 300-bolt figure was not included in the job analysis report or other information (T.88).

Ms. Strobel participated in the shop walk conducted by Respondent. (T.65, Rx.6). She states that the shop walk took about 30 minutes to complete. (T.66). Petitioner had testified that the shop walk took about 10 minutes. (T.54). Ms. Strobel testified the job analysis she created, and

the physician shop walk report, essentially matches in information. (T.82). She could not identify any difference between the two documents. (T.82-83). Ms. Strobel indicated she did not have any part in drafting the physician shop walk. (T.83).

Ms. Strobel agreed that during the period of February 2017 to May 2017, the sub assembly area also subassembled the hydraulic tanks. (T.85). She acknowledged that Respondent did not request her to include that information into her job analysis report. (T.86).

Dr. Craig Phillips Deposition Testimony

On July 16, 2017, Respondent's Section 12 examiner, Dr. Craig Phillips, testified in an evidence deposition regarding his November 10, 2017 examination of Petitioner. (Rx.2). Dr. Phillips noted that Petitioner reported working for Respondent as an assembler for 11 years. (Rx.2, p.14). He stated that Petitioner in February 2017 worked with torque wrenches and would do about 300 bolts per day. (Rx.2, p.14). Dr. Phillips noted that she would also connect tubes and fittings using two wrenches. (Rx.2, p.15). Dr. Phillips reported he was provided documentation from Respondent of a physician shop walk which outlined her wrench usage. (Rx.2, p.20).

Dr. Phillips testified that he does not believe Petitioner's right hand carpal tunnel syndrome were causally related to her work duties with Respondent. (Rx.2, p.23). He stated the Petitioner's work duties varied and she did not have constant repetitive activities. (Rx.2, p.24). Dr. Phillips stated that Petitioner's wrist position was not hyperextended for most of her work duties. (Rx.2, p.24).

Dr. Phillips acknowledged that Petitioner described starting 300 bolts by hand then using a 55 NM torque gun to tighten each bolt. (Rx.2, p.34). He stated that operating a torque gun over 300 times to fasten bolts were not repetitive or constant in his opinion. (Rx.2, p.35). Dr. Phillips testified it was his belief Petitioner only built one fender per day, not two, and one platform. (Rx.2, p.33, 42).

Dr. John Kefalas Deposition Testimony

On October 9, 2020, Petitioner's treating surgeon, Dr. John Kefalas, testified in an evidence deposition. (Px.2). Dr. Kefalas testified she treated Petitioner starting in September 2017 noting that she had symptoms consistent with carpal tunnel syndrome in the right hand and wrist. (Px.2, p.10-12). He testified he performed surgery on Petitioner on January 23, 2018. (Px.2, p.12).

Dr. Kefalas testified that he performed a medical causation analysis and determined that Petitioner's right hand carpal tunnel injury was causally related to her work activity at Respondent. (Px.2, p.15-24). His medical causation analysis utilized a six-step approach. (Px.2, p.15).

The first step was to identify the correct diagnosis as carpal tunnel. (Px.2, p.16). The second step was to identify the epidemiologic evidence for carpal tunnel related to Petitioner and determine if that evidence supports the opinion that her injury is associated with her work. (Px.2, p.16-19). Dr. Kefalas determined that Petitioner's work duties fit a job task with sufficient force and repetition, or force and posture in highly repetitive work. (Px.2, p.20). The third step

was to determine if Petitioner was indeed exposed to work activities which have an association with causing the injury as identified in step two. (Px.2, p.21). Dr. Kefalas found that Petitioner's work, as described, were reasonable numbers to support that conclusion. (Px.2, p.21). The fourth step took into other relevant factors for this condition. Dr. Kefalas indicated that the lack of other medical conditions and the relevant timeline of Petitioner's symptoms and complaints were significant in supporting his opinion. (Px.2, p.22-23). The fifth step was to determine the existence of non-physiologic signs or factors which would contradict his analysis. (Px.2, p.23). He did not find anything in Petitioner's case to support negating his analysis. (Px.2, p.23-24). The last step was to formulate the conclusion finding a causal relationship. (Px.2, p.24).

Dr. Kefalas explained that that while performing this six-step approach, if any single step is determined to be inadequate, he would not find a causal relationship for Petitioner's injury. (Px.2, p.22). In formulating his opinion, and as part of his analysis, Dr. Kefalas, explained that no single factor is determinative to finding causation. (Px.2, p.25). He stated that carpal tunnel is a multifactorial, indicating multiple contributing factors are associated with its development. (Px.2, p.24, 49-50). Dr. Kefalas testified that in the epidemiologic literature there are no studies that support a particular dose/response relationship with regard to the development of carpal tunnel. (Px.2, p.49). He elaborated that since there is no set dose/response relationship, each particular job is unique and has to be evaluated individually. (Px.2, p.56).

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of the Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

An injury is compensable under the Illinois Workers' Compensation Act only if it "arise out of" and "in the course of" employment. An injury "arising out of" one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. *Greene v. Industrial Comm'n*, 87 Ill.2d 1, 428 N.E.2d 476 (1981). For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. *Chmelik v. Vana*, 31 Ill.2d 272, 201 N.E.2d 434 (1964).

The arbitrator concludes that Petitioner's accident and injuries arose out of and in the course of Petitioner's employment with Respondent. Further, the arbitrator also finds that Petitioner's carpal tunnel injury is causally related to Petitioner's work duties with Respondent. The arbitrator finds that Petitioner testified in a credible, believable, and consistent fashion supported by the medical records and her treating surgeon's testimony.

In support of this conclusion the Arbitrator notes the following:

The arbitrator finds that Petitioner's work duties in the subassembly area putting together fenders and platforms contributed to the development of carpal tunnel and, therefore, this risk is incidental to her employment. Petitioner credibly testified regarding her job duties in assembling multiple fenders, platforms, and hydraulic tanks. Respondent's witness, Ms. Strobel, corroborates Petitioner's description of her work duties.

The arbitrator found significant that Petitioner testified in significant and elaborate detail about her work duties in subassembly. From her testimony, Petitioner clearly illustrated a job duty which is repetitive, requiring over 300 bolts and the use of multiple torque tools and guns. Specifically, Respondent's own job analysis identified over 37 torque tools which Petitioner is required to use in performing her job duties. Further, Petitioner's job duties went largely unrebutted, and even was corroborated to a large extent by Respondent's witness, Ms. Strobel.

Petitioner's counsel questioned Ms. Strobel if she generally knew the operations of the subassembly of a fender. (T.86). Petitioner's counsel outlined the steps Petitioner had previously testified to regarding subassembly of the fender. (T.86). Ms. Strobel agreed with described procedure without offering any counter information to the job duties. (T.86-88). Further, Ms. Strobel did acknowledge that the build rate of "one unit" could reasonably mean assembly of the left and right fender. (T.84-85).

Furthermore, the arbitrator finds Respondent's analysis and review of Petitioner's job duties is insufficient and inconsistent, therefore, the arbitrator, nor any other individual reviewing the information, can possibly rely on the accuracy of the information presented. Ms. Strobel credibly testified that she was asked to pull Petitioner's information at the request of Respondent in relation to a shoulder injury analysis. She testified she provided the information of Petitioner's operation of a fender requiring 300 bolts, but it was not included in the job analysis. She stated she was never asked to include information about subassembly of the hydraulic tank which she agreed Petitioner performed in her area at the time in question.

Specifically, the physician shop walk analysis is questionable, unreliable, and the arbitrator finds it cannot be utilized to support any conclusion about Petitioner's job duties. Ms. Strobel testified that she did not take part in authoring the physician shop walk document. Notably, it is signed by Dr. Fabrique only. The entire shop walk document copies verbatim Ms. Strobel's job analysis information without additional information or commentary. In fact, Ms. Strobel testified that her job analysis report and the physician shop walk appear identical, and even she cannot identify a difference between the two documents. (T.82-83). The arbitrator cannot extrapolate any information from this physician shop walk and cannot determine what Dr. Fabrique actually witnessed or discussed in regard to her "assembly job" as indicated.

Concluding that the Petitioner's testimony regarding her job duties is significantly more accurate to her actual work, the arbitrator finds the opinions of Dr. Kefalas more persuasive than Dr. Phillips in regard to causation. Dr. Kefalas' medical causation analysis was very methodical and

comprehensive. Dr. Kefalas testified that carpal tunnel development is a multifactorial issue with multiple contributing factors. He stated that because there is no specific dose/response relationship, each particular job must be evaluated individually. (Px.2, p.56). He evaluated all the available information and found Petitioner's work duties were a causative factor for her developing carpal tunnel surgery. The arbitrator finds that since Dr. Kefalas' understanding of Petitioner's job duties is consistent with the arbitrator's findings, Dr. Kefalas' causation opinion is found to be more reliable. Dr. Phillips testified that he evaluated Petitioner's job duties with some significant reliance on the job analysis report and Dr. Fabrique's shop walk record. As previously determined, the arbitrator finds issues with both of these documents which negates much of Dr. Phillips' causation opinions.

Therefore, the arbitrator finds that Petitioner's carpal tunnel condition is causally related to her occupational activities with Respondent.

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 that all the medical treatment Petitioner has received has been reasonable and necessary. The arbitrator awards medical bills up through Petitioner's maximum medical improvement and medical discharge. The parties have stipulated that if Respondent is liable and responsible for Petitioner's reasonable and necessary medical treatment, Petitioner will be awarded $694.53 for unpaid medical and Respondent will receive an 8(j) credit for the balanced billed by Dr. Kefalas' facility and will hold Petitioner harmless pursuant to Section 8(j).

Issue (K): Was Petitioner entitled to Temporary Total Disability Benefits?

The arbitrator awards temporary total disability benefits representing Petitioner's lost time of 1/23/2018 through 3/25/2018 totaling a period of 8 5/7 weeks.

The arbitrator notes that Petitioner was off work following her surgery and released to full duty on March 26, 2018. Thereafter, Petitioner returned to full duty work.

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

The arbitrator finds that Petitioner is entitled to 12% loss of the right hand for her surgically operated carpal tunnel injury.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established pursuant to Section 8.1b of the Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq.

In determining the level of permanent partial disability, the arbitrator's determination is based on the following factors:

i) The arbitrator notes that neither party submitted an AMA impairment rating for Petitioner's injuries. The arbitrator places no weight into this factor.

ii) Petitioner is an assembler for Respondent working on various equipment and machinery. Petitioner's testimony illustrates she has done significant assembly work with Respondent which can include strenuous and repetitive activity. Petitioner credibly testified to occasional discomfort or pain with certain hand activities which she clearly requires at work. Petitioner is back to full duty work since 2018. The arbitrator places some weight in this factor.

iii) Petitioner was 49 years old at the time of the accident. The arbitrator notes the Petitioner still has a number of years with regard to her working life remaining until the age of retirement. The arbitrator puts some weight in this factor.

iv) Following Petitioner's work injury, Petitioner has returned back to her employment with Respondent. Petitioner has been able to return to work full duty and without any job change. Petitioner has not experienced a loss in future earning capacity. The arbitrator puts lesser weight on this factor when making the permanency determination.

vi) The medical records corroborate Petitioner's disability as Petitioner had surgical intervention involving her carpal tunnel injury. Further, following Petitioner's surgery, she did not immediately improve. Petitioner continues to experience pain and discomfort on occasion and with specific hand activities.

The arbitrator finds that the medical records corroborate Petitioner's disability and is given the greater weight. The arbitrator finds that Petitioner is entitled to 12% loss of the right hand for her surgically operated carpal tunnel injury.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021480
Case Name	Margie A Devenny v. State of Illinois - Jack Mabley Developmental Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0283
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Joseph Blewitt

DATE FILED: 8/4/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARGIE A. DEVENNY,

Petitioner,

vs. NO: 18 WC 21480

STATE OF ILLINOIS,
JACK MABLEY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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. This case was consolidated for hearing with case number 18 WC 21479.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 3, 2022 is hereby affirmed and adopted.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

August 4, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 7/27/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021480
Case Name	DEVENNY, MARGIE A v. STATE OF ILLINOIS, JACK MABLEY DEVELOPMENTAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Joseph Blewitt

DATE FILED: 2/3/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 1, 2022 0.50%

/s/ Roma Dalal, Arbitrator

Signature

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

February 3, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margie A. Devenny
Employee/Petitioner

v.

State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

Case # **18 WC 21480**

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 **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **12/17/2021**. 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 **6/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$43,280.11**; the average weekly wage was $**865.60**.

On the date of accident, Petitioner was **55** 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, $**487.22** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**487.22**.

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

ORDER

The Arbitrator awards permanency benefits in the amount of 8% of a person as a whole or 40 weeks of PPD at a rate of $519.36/week for 40 weeks amounting to $20,774.40 for Petitioner's low back injury, as provided in Section 8(d)(2) of the Act.

The parties stipulated all medical bills have been paid.

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

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

_

FEBRUARY 3, 2022

Signature of Arbitrator

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margie A. Devenny
Employee/Petitioner

v.

State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

Case # **18** WC **021480**

Consolidated cases: **18 WC 021479**

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 **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **12/17/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$43,280.11**; the average weekly wage was $**865.60**.

On the date of accident, Petitioner was **55** 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, $**487.22** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**487.22**.

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

ORDER

See Arbitration Decision order for case number 18WC021479, incorporated herein by reference.

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

2/3/2022
Date

STATE OF ILLINOIS)
) SS
COUNTY OF LASALLE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Margie A. Devenny Case # **18 WC 021479**
Employee/Petitioner

v. Consolidated cases: **18 WC 021480**
State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

FINDINGS OF FACTS

This matter proceeded to hearing on December 17, 2021 on Cases 18 021479 and 18 WC 021480.

For the date of accident June 14, 2017 (Case No. 18 WC 021479), the parties stipulated that all medical bills have been paid as well as TPD benefits. The only issue in dispute is nature and extent. (Arb. Ex.1). For the date of accident July 16, 2017 (Case No. 18WC021480), issues in dispute include accident, notice, causal connection, unpaid medical bills, TPD benefits, and nature and extent. (Arb. Ex. 2).

Ms. Margie Devenny (hereinafter referred to as the "Petitioner") was employed by the State of Illinois, Jack Mabley Developmental Center (hereinafter referred to as the "Respondent") as a Mental Health Technician II. This job consisted of assisting individuals with all life skills, to include grooming, getting out of bed, toileting, assisting with walking, assisting with activities, and going out in the community. Petitioner testified that these residents are mentally handicapped and can become violent and combative at times.

Petitioner testified prior to the accident she had no problems with her back. On June 14, 2017 Petitioner was pulled over from another home to do a lunch break with a resident that was combative. Petitioner was assisting the resident who was considered a loper (someone who was trying to get out of the building). Petitioner had attempted to block the resident who grabbed and yanked on her. Petitioner testified she worked with him for 30 minutes. She subsequently went back to her regular home and noted she could hardly walk. As such, she reported the work accident to Michelle Kendrick. This is corroborated by incident report filled out. (PX 21).

Petitioner testified consistently with her medical records. On June 21, 2017 Petitioner first presented to Physicians Immediate Care. Petitioner presented with a chief complaint of low back since June 15, 2017. Petitioner noted she was helping with a combative resident when she started having pain in her low back that was shooting into her hip and leg. Petitioner described that she was wrestling with a client and twisted her back. She now felt back pain with radiation down her left leg past her knee. Petitioner was diagnosed with low back pain and left side sciatica. She was recommended physical therapy and was provided restrictions of no bending, no twisting, and no lifting greater than 10 lbs. (PX 1, p. 4-5).

Petitioner returned on June 27, 2017 to Physicians Immediate Care. Petitioner was provided MOBIC and her restrictions remained the same. (PX 1, p. 18). On July 6, 2017 Petitioner followed up for her low back noting it was much better but still had occasional pain radiating down her left leg to her knee. Petitioner was to continue taking medication and return to work without restrictions. (PX 1, p. 27-28).

On June 27, 2017 Petitioner began physical therapy at Katherine Shaw Bethea Hospital. Petitioner was to undergo the same for four weeks. (PX 2, p. 112-114). Petitioner followed up at Physicians Immediate Care on July 12, 2017. Petitioner reported an increase in pain after working a 16-hour day. Petitioner was to begin physical therapy next week. Petitioner was advised to return to work with an eight-hour shift restriction. (PX 1, p. 35-57).

On July 16, 2017 Petitioner testified that she was working in the evening and was assigned to work with the same combative resident. Petitioner testified she had to complete the toileting and showering of the individual. The individual did not provide any assistance. As such Petitioner noted it was too much weight/physical involvement. Petitioner stated she also had to dress him. Petitioner subsequently felt low back and right sided pain. Petitioner testified she notified her supervisor, Michelle Kendrick, of the incident and increased symptoms while working with the same individual. Her supervisor did not feel any written incident report was required and that her ongoing complaints were a continuation of the injuries she sustained in the original June 14, 2017 accident, although exacerbated by the continued work activity.

Petitioner returned to Physicians Immediate Care on July 20, 2017. Petitioner noted worsening pain, now going down the right leg and left leg. Petitioner was provided medication and advised to undergo an MRI of the lumbar spine. Petitioner was to continue with physical therapy as well. Petitioner was provided with restrictions again of no prolonged bending and no lifting over 10 pounds. (PX 1, p. 48-49). On July 28, 2017 Petitioner returned. Petitioner was awaiting authorization of her MRI. She was to continue with therapy. (PX 1, p. 62-63).

In an August 4, 2017 physical therapy progress report Petitioner had partially met her goals. Petitioner was to continue therapy. (PX 2, p. 144). Petitioner returned to Physicians Immediate Care on August 17, 2017. Petitioner was provided MOBIC. Petitioner was provided increased restrictions of no prolonged bending and no lifting over 20 lbs. (PX 1, p. 76-77).

On August 17, 2017 Petitioner underwent an MRI for the lumbar spine at Katherine Shaw Bethea Hospital which revealed a left foraminal disk herniation at L4-5, resulting compression of the left L4 nerve root. (PX 1, p. 85, PX 3, p. 156).

On August 25, 2017 Petitioner returned to Physicians Immediate Care. Petitioner was referred to Rockford Spine for her herniated disc. Petitioner was placed back on 10-pound lifting restrictions. (PX 1, p. 90-91).

On October 26, 2017, Petitioner presented to Rockford Spine Center and was seen by Angela D. Johnson, APN. Petitioner was a 55-year-old female who came into the clinic for a complaint of back pain and left lower extremity pain. Petitioner noted she was assisting an aggressive resident and got kicked in the knee and had a bit of knee pain and then developed pain that radiated into her left buttocks and lateral thigh to her lateral calf. Petitioner was examined and diagnosed with Left L4 radiculopathy secondary to an L4-5 far lateral disc protrusion. The doctor noted her symptoms of radiculopathy were improving, and the lumbar strain was contributing to the majority of her complaints which is her back pain. (PX 4, p. 173-174). At this point petitioner was to continue with physical therapy, utilize over the counter analgesics, try lumbar traction, and consider a lumbar epidural steroid injection. Petitioner was provided with work restrictions of avoiding excessive bending, twisting, pushing, and pulling activities and try to avoid far forward flexion activities. She

was to alternative between sitting and standing through the day as needed. She should limit her lifting to no more than 25-pound from floor to waist level. She was to return in six weeks. (PX 4, p. 174).

On December 18, 2017 Petitioner followed up at Rockford Spine Center with Angela D. Johnson, APN, for left L4 radiculopathy secondary to disk protrusion. (PX 4, p. 169). Petitioner noted her symptom were continuing to improve. They discussed a trial of lumbar epidural injections. Petitioner was provided work restrictions to avoid lifting primarily from floor to waist level more than 50 pounds. Petitioner was encouraged to utilize proper body mechanics. She was to return in six weeks. (PX 4, p. 169).

On January 4, 2018 Petitioner presented to Dr. Patrick O'Leary for a Section 12 Examination. (PX 22, p. 302). Dr. O'Leary went over Petitioner's work accident history and medical care. He also performed an examine. Based on the same he diagnosed Petitioner with an L4-5 herniation with a likely L4 radiculopathy. He noted there was a causal relationship between Petitioner's objective findings and reported accident. Treatment to date had been reasonable and necessary. At this point, he opined petitioner should consider an epidural steroid injection or two at L4-5 on the left side. If this did not help, she may ultimately need a microdiscectomy. Prognosis was good. At this point she was able to return to work with no lifting more than 10 pounds, no bending or squatting or twisting excessively from the waist. (PX 22, p. 302-305).

Petitioner followed up with Ms. Johnson, APN, on January 29, 2018. Petitioner noted her symptoms had plateaued. She was having a difficult time with standing, walking, bending forward. Petitioner believed physical therapy had helped. Petitioner now wanted to consider a lumbar epidural steroid injection. Petitioner was referred to Dr. Ibarra and was to return in two to three weeks after the injection. (PX 4, p. 170).

On March 5, 2018 Petitioner presented to Dr. Juan Ibarra. Petitioner was a 56-year-old female with a work-related accident. The doctor reviewed the MRI of the lumbar spine and agreed that it revealed a left foraminal discogenic herniation of the L4-L5 disk impinging on the left L4 nerve root at that area. There were some facet arthropathy changes of the left L4-L5 and L5-S1 facet joint. Petitioner was diagnosed with intractable spinal pain with left lumbar radiculitis secondary to left lateral discogenic protrusion of L4-L5 disk and left lumbar spondylosis without myelopathy. He noted she would benefit from an epidural steroid injection towards the left side of the midline to the L4-L5 level. He advised her there was some involvement of possible impingement of the medial branches within the left L4-L5 and L5-S1 facet joint that was contributing to a second type of spinal pain discomfort. They would address that later, if needed. (PX 5, p. 207-208).

On March 15, 2018 petitioner underwent a lumbar epidural injection. (PX 5, p. 217).

Petitioner returned to Dr. Ibarra on April 12, 2018. Petitioner noted she was 75% improved since the injection. Petitioner had little pain remaining. At this point she does not need another epidural injection. The doctor noted he would be available in case she had recurrence of any sciatica pain. Petitioner was scheduled next week to start her place of employment with no restrictions. (PX 5, p. 232).

On May 14, 2018 Petitioner was seen in a follow up with Ms. Johnson, APN. Petitioner noted since her injection she felt 75-80% better and was ready to return to work. She requested her restrictions be lifted. Petitioner was diagnosed with chronic axial back pain and L4-5 disc protrusion with left L4 radiculopathy which had improved. At this point, Petitioner did not have any significant neurological deficit. She was agreeable to allowing Petitioner return to work without restrictions. For discomfort Petitioner could use over the counter analgesics, NAIDS, acetaminophen, topical patches and creams, activity modification, a lumbar corset, traction, a TENS unit, ice, heat, massage myofascial therapy, and chiropractic care. She could also continue to follow with Dr. Ibarra if she needed to. Petitioner would return on an as needed basis. (PX 4, p. 171).

On May 18, 2018 Petitioner was seen at Whiteside County Community Health Clinic. Petitioner was a 56-year-old female who presented for left knee pain and asthma. It was noted that she had chronic knee pain when she was injured at work last year. Her knee pain had now worsened due to working several 16-hour days. Petitioner was to undergo an X-ray of the left knee. (PX 6, p. 238-242).

Petitioner was seen on June 24, 2019 at Whiteside County Health Department for her asthma. Petitioner stated she needed a refill on medication and no other concerns. Although she was diagnosed with chronic knee pain, no treatment was discussed. This is unrelated to the work injury. (PX 6, p. 243-245).

On July 21, 2021 Petitioner presented to SCMH Physicians Clinic. Petitioner was a 59-year-old female who presented for a refill of her Mobic. Petitioner reported having a history of low back pain and advised she took Mobic for her pain. She reported her back as chronic and was constant and ache in nature. Today, she is rating her pain at a 6/10. Her back is exacerbated by colder weather and with prolonged periods of sitting, standing, and walking. Petitioner was diagnosed with lumbar pain with radiculopathy. She was provided Mobic and advised to try to lose weight. She was to return on a PRN basis. (PX 7, p. 249-252).

Petitioner was able to continue working at the Center after the accident. Petitioner testified that she eventually took a leave of absence to care for her mother beginning July 17, 2018 and retired from her position on October 1, 2018. The Arbitrator notes she indicated that she was not as strong and capable and could not give the residents what they needed. She further indicated her back injury was the main factor in her decision to retire. She testified she maintained her title of Mental Health Tech II and made "about the same" amount of money after she returned to full duty.

At this point she testified that her pain is under control but has to watch herself. She has to be careful with lifting/running but can walk. She cannot clean floors or toilets without pain. Petitioner testified driving is also hard. She is aware of her body mechanics. If she overdoes an activity, she will feel it and will need Mobic. Petitioner continues to do her home exercises, yoga and walking for her back. She will treat as needed.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

With regard to Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent and with regard to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

For accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his or her employment. Navistar Intern. Transp. Corp. v. Industrial Com'n, 315 Ill.App.3d 1197 (2000).

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. 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. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "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. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Additionally, a decision by the Commission cannot be based upon speculation or conjecture. Deere and Company v Industrial Commission, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. Three "D" Discount Store v Industrial Commission, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. Shell Oil Co. v. Industrial Comm'n, 2 Ill.2d 590, 592 119 N.E. 2d 224, 226 (1954). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

The parties have stipulated to accident and causal relationship of Petitioner's injuries from the work accident of 6/14/2017. Based on the totality of evidence presented, the Arbitrator finds Petitioner sustained injuries to her low back as a result of the work accident on 6/14/2017. Pursuant to the parties' stipulations at the beginning of trial, the Arbitrator notes the July 16, 2017 injury was a temporary exacerbation of the established 6/14/17 injury. This is corroborated by Petitioner's testimony indicating why a second accident form was never filled out. As such, although there were two dates of accident, the Arbitrator finds the accident of July 16, 2017 was

an exacerbation of the first injury and relates causation of the ongoing medical care to the original June 14, 2017 injury.

After a careful review of the record, the Arbitrator finds Petitioner sustained a back injury on June 14, 2017 after she was blocking a resident from leaving and subsequently aggravated that same condition on July 16, 2017 when taking care and lifting that same resident. Based on the same, the Arbitrator finds that the incident arose out of and in the course of Petitioner's employment and sustained a compensable accident.

In regard to causation, the parties stipulated to causation in regard to the first accident. As the Arbitrator finds the second accident was a temporary exacerbation of the first injury the Arbitrator deems Petitioner's low back condition to be causally related to her June 14, 2017 work injury.

The Arbitrator notes Petitioner initially treated for her low back only as of June 21, 2017. Petitioner had consistent complaints and was eventually released from care as of May 14, 2018. Her medical providers noted she would need to follow up on an as needed basis. The Arbitrator deems Petitioner at MMI for this condition as this date. The Arbitrator does note, however, that Petitioner had to follow up on one occasion, July 21, 2021, to obtain a prescription of Mobic.

Although the parties stipulated to causation for the June 14, 2017 injury the parties did not stipulate to causation for the July 16, 2017 injury. Regarding Petitioner's left knee, the Arbitrator notes that Petitioner did not initially indicate a left injury to Physicians Immediate Care. (PX 1). Petitioner later noted on October 26, 2017 she got kicked in the knee and "had a little bit of knee pain." (PX 4). The Arbitrator notes most the physical therapy records through August 4, 2017 treated for a diagnosis of low back pain and radiculopathy. In addition, after October 26, 2017 the medical notes are silent regarding any left leg injury until May 18, 2018, almost 7 months later, after she was released from care for her back. As such the Arbitrator notes Petitioner may have sustained a minor left knee condition that resolved with no active diagnoses or medical care until May 18, 2018 when she was released from care. (PX 1-PX6).

Following consideration of the testimony and evidence presented, it is found by this Arbitrator that the Petitioner may have sustained a minor left knee contusion with no active medical care.

With regard to issue "E", whether timely notice was given to Respondent, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). In Case 18WC021479, notice is not disputed. In case 18 WC 021480, notice is disputed. The Arbitrator finds however, petitioner testified she immediately told her supervisor, Michelle Kendrick of the accident. Petitioner further noted that her supervisor did not feel any written incident report was required and that her ongoing complaints were a continuation of the injuries she sustained in the original June 14, 2017 accident, although exacerbated by the continued work activity.

The Arbitrator once again agrees the July 16, 2017 was an exacerbation of the original injury of June 14, 2017. As such, the Arbitrator finds petitioner provided timely notice of the accident to Respondent.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. Once again case 18WC021479 there were no medical bills placed into evidence. Respondent claimed that all medical bills were paid.

Section 8(a) of the Act states a Respondent is responsible …"for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

In case 18WC021480 Petitioner provided the following medical bills into evidence:

- Exhibit 8 medical bills from Physician Immediate Care with a $0.00 balance.
- Exhibit 9 medical bills from KSB Hospital (PT 6/27/17) with a $0.00 balance
- Exhibit 10 medical bills from KSB Hospital PT (7/19/17-7/28/17) with a $0.00 balance.
- Exhibit 11 medical bills from KSB Hospital PT (8/1/17, 8/4/17) with a $0.00 balance.
- Exhibit 12 medical bills from KSB Hospital (8/17/17 MRI) with a $0.00 balance.
- Exhibit 13 medical bills from Rockford Radiology (8/17/17) with a $596.00 balance.
- Exhibit 14 medical bills from Rockford Spine Center (10/26/17-5/14/18) with a $0.00 balance.
- Exhibit 15 medical bills from CGH Medical Center (3/5/18) with a $927.00 balance.
- Exhibit 16 medical bills from CGH Medical Center (3/15/18) a $2,082.00 balance.
- Exhibit 17 medical bills from CGH Medical Center (4/12/18) with a $524.00 balance.
- Exhibit 18 medical bills from Whiteside County Health Dept. (5/18/18 and 6/24/19) with a $270.00 balance.
- Exhibit 19 medical bills from SCMH Physicians Clinic with a $120.00 balance.

In reviewing the medical services provided to Petitioner, the Arbitrator notes Respondent indicated that all medical bills were paid. It is unclear as Petitioner submitted several medical bills into evidence. As such, the Arbitrator orders Respondent to pay Petitioner the reasonable and necessary medical expenses pertaining to petitioner's low back injury incurred in connection with the care and treatment of her causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With regard to issue "K", what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein.

Once again in case 18WC021479 there are no TPD benefits in dispute. The parties agree that TPD benefits were paid correctly. As the Arbitrator finds the July 16, 2017 was an exacerbation of the original injury of June 14, 2017 all TPD benefits have been paid. Respondent shall receive credit for amounts paid.

With regard to issue "L", what is the nature and extent of the injury, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
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.

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

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner testified she was employed as a Mental Health Technician II at the time of the work injury. Given Petitioner has to work with residents and help them with acts of daily living the Arbitrator notes this is a physically demanding position. Given the nature of the work, the Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes Petitioner was 55 years old on the date of this accident. The Arbitrator notes that due to Petitioner's advanced age the remaining amount of work life is minimal. As such, the Arbitrator assigns moderate weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator concludes Petitioner is capable of working with no restrictions and as such, is capable of making the same amount in wages as Petitioner was previous to her injury. As Petitioner's injury did not affect her earning capacity, the Arbitrator assigns significant weight to this factor.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicate Petitioner sustained a back injury necessitating physical therapy, prescription medication and one lumbar epidural injection. The Arbitrator acknowledges Petitioner's continued complaints of back pain. While the Arbitrator notes Petitioner voluntarily retired with a full duty return to work, Petitioner testified the main reason for retirement was due to her ongoing back complaints.

Petitioner testified her pain was under control, but she had to be careful with lifting/running. She also noted that cleaning and driving were difficult. Lastly, Petitioner testified she would take Mobic as needed. Based on the same, the Arbitrator assigns significant weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 8% loss of use of person as a whole pursuant to §8(d)2 of the Act for the injuries sustained to her low back. Respondent shall pay Petitioner permanent partial disability benefits of $519.36/week for 40 weeks or $20,774.40.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021479
Case Name	Margie A Devenny v. State of Illinois - Jack Mabley Developmental Center
Consolidated Cases	18WC021480
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0284
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Joseph Blewitt

DATE FILED: 8/4/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARGIE A. DEVENNY,

Petitioner,

vs. NO: 18 WC 21479

STATE OF ILLINOIS,
JACK MABLEY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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. This case was consolidated for hearing with case number 18 WC 21480.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 3, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $519.36 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 8% loss of use of the person as a whole.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

August 4, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 7/27/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021479
Case Name	DEVENNY, MARGIE A v. STATE OF ILLINOIS, JACK MABLEY DEVELOPMENTAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Joseph Blewitt

DATE FILED: 2/3/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 1, 2022 0.50%

/s/ Roma Dalal, Arbitrator
Signature

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

February 3, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margie A. Devenny
Employee/Petitioner

v.

State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

Case # **18** WC **021479**

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 **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **12/17/2021**. 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 **6/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$43,280.11**; the average weekly wage was $**865.60**.

On the date of accident, Petitioner was **55** 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, $**487.22** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**487.22**.

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

ORDER

The Arbitrator awards permanency benefits in the amount of 8% of a person as a whole or 40 weeks of PPD at a rate of $519.36/week for 40 weeks amounting to $20,774.40 for Petitioner's low back injury, as provided in Section 8(d)(2) of the Act.

The parties stipulated all medical bills have been paid.

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

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

–

Signature of Arbitrator

FEBRUARY 3, 2022

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margie A. Devenny
Employee/Petitioner

v.

State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

Case # **18** WC **021480**

Consolidated cases: **18 WC 021479**

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 **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **12/17/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/14/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$43,280.11**; the average weekly wage was $**865.60**.

On the date of accident, Petitioner was **55** 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, $**487.22** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**487.22**.

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

ORDER

See Arbitration Decision order for case number 18WC021479, incorporated herein by reference.

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

2/3/2022
Date

STATE OF ILLINOIS)
) SS
COUNTY OF LASALLE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Margie A. Devenny Case # **18 WC 021479**
Employee/Petitioner

v. Consolidated cases: **18 WC 021480**
State of Illinois, Jack Mabley Developmental Center
Employer/Respondent

FINDINGS OF FACTS

This matter proceeded to hearing on December 17, 2021 on Cases 18 021479 and 18 WC 021480.

For the date of accident June 14, 2017 (Case No. 18 WC 021479), the parties stipulated that all medical bills have been paid as well as TPD benefits. The only issue in dispute is nature and extent. (Arb. Ex.1). For the date of accident July 16, 2017 (Case No. 18WC021480), issues in dispute include accident, notice, causal connection, unpaid medical bills, TPD benefits, and nature and extent. (Arb. Ex. 2).

Ms. Margie Devenny (hereinafter referred to as the "Petitioner") was employed by the State of Illinois, Jack Mabley Developmental Center (hereinafter referred to as the "Respondent") as a Mental Health Technician II. This job consisted of assisting individuals with all life skills, to include grooming, getting out of bed, toileting, assisting with walking, assisting with activities, and going out in the community. Petitioner testified that these residents are mentally handicapped and can become violent and combative at times.

Petitioner testified prior to the accident she had no problems with her back. On June 14, 2017 Petitioner was pulled over from another home to do a lunch break with a resident that was combative. Petitioner was assisting the resident who was considered a loper (someone who was trying to get out of the building). Petitioner had attempted to block the resident who grabbed and yanked on her. Petitioner testified she worked with him for 30 minutes. She subsequently went back to her regular home and noted she could hardly walk. As such, she reported the work accident to Michelle Kendrick. This is corroborated by incident report filled out. (PX 21).

Petitioner testified consistently with her medical records. On June 21, 2017 Petitioner first presented to Physicians Immediate Care. Petitioner presented with a chief complaint of low back since June 15, 2017. Petitioner noted she was helping with a combative resident when she started having pain in her low back that was shooting into her hip and leg. Petitioner described that she was wrestling with a client and twisted her back. She now felt back pain with radiation down her left leg past her knee. Petitioner was diagnosed with low back pain and left side sciatica. She was recommended physical therapy and was provided restrictions of no bending, no twisting, and no lifting greater than 10 lbs. (PX 1, p. 4-5).

Petitioner returned on June 27, 2017 to Physicians Immediate Care. Petitioner was provided MOBIC and her restrictions remained the same. (PX 1, p. 18). On July 6, 2017 Petitioner followed up for her low back noting it was much better but still had occasional pain radiating down her left leg to her knee. Petitioner was to continue taking medication and return to work without restrictions. (PX 1, p. 27-28).

On June 27, 2017 Petitioner began physical therapy at Katherine Shaw Bethea Hospital. Petitioner was to undergo the same for four weeks. (PX 2, p. 112-114). Petitioner followed up at Physicians Immediate Care on July 12, 2017. Petitioner reported an increase in pain after working a 16-hour day. Petitioner was to begin physical therapy next week. Petitioner was advised to return to work with an eight-hour shift restriction. (PX 1, p. 35-57).

On July 16, 2017 Petitioner testified that she was working in the evening and was assigned to work with the same combative resident. Petitioner testified she had to complete the toileting and showering of the individual. The individual did not provide any assistance. As such Petitioner noted it was too much weight/physical involvement. Petitioner stated she also had to dress him. Petitioner subsequently felt low back and right sided pain. Petitioner testified she notified her supervisor, Michelle Kendrick, of the incident and increased symptoms while working with the same individual. Her supervisor did not feel any written incident report was required and that her ongoing complaints were a continuation of the injuries she sustained in the original June 14, 2017 accident, although exacerbated by the continued work activity.

Petitioner returned to Physicians Immediate Care on July 20, 2017. Petitioner noted worsening pain, now going down the right leg and left leg. Petitioner was provided medication and advised to undergo an MRI of the lumbar spine. Petitioner was to continue with physical therapy as well. Petitioner was provided with restrictions again of no prolonged bending and no lifting over 10 pounds. (PX 1, p. 48-49). On July 28, 2017 Petitioner returned. Petitioner was awaiting authorization of her MRI. She was to continue with therapy. (PX 1, p. 62-63).

In an August 4, 2017 physical therapy progress report Petitioner had partially met her goals. Petitioner was to continue therapy. (PX 2, p. 144). Petitioner returned to Physicians Immediate Care on August 17, 2017. Petitioner was provided MOBIC. Petitioner was provided increased restrictions of no prolonged bending and no lifting over 20 lbs. (PX 1, p. 76-77).

On August 17, 2017 Petitioner underwent an MRI for the lumbar spine at Katherine Shaw Bethea Hospital which revealed a left foraminal disk herniation at L4-5, resulting compression of the left L4 nerve root. (PX 1, p. 85, PX 3, p. 156).

On August 25, 2017 Petitioner returned to Physicians Immediate Care. Petitioner was referred to Rockford Spine for her herniated disc. Petitioner was placed back on 10-pound lifting restrictions. (PX 1, p. 90-91).

On October 26, 2017, Petitioner presented to Rockford Spine Center and was seen by Angela D. Johnson, APN. Petitioner was a 55-year-old female who came into the clinic for a complaint of back pain and left lower extremity pain. Petitioner noted she was assisting an aggressive resident and got kicked in the knee and had a bit of knee pain and then developed pain that radiated into her left buttocks and lateral thigh to her lateral calf. Petitioner was examined and diagnosed with Left L4 radiculopathy secondary to an L4-5 far lateral disc protrusion. The doctor noted her symptoms of radiculopathy were improving, and the lumbar strain was contributing to the majority of her complaints which is her back pain. (PX 4, p. 173-174). At this point petitioner was to continue with physical therapy, utilize over the counter analgesics, try lumbar traction, and consider a lumbar epidural steroid injection. Petitioner was provided with work restrictions of avoiding excessive bending, twisting, pushing, and pulling activities and try to avoid far forward flexion activities. She

was to alternative between sitting and standing through the day as needed. She should limit her lifting to no more than 25-pound from floor to waist level. She was to return in six weeks. (PX 4, p. 174).

On December 18, 2017 Petitioner followed up at Rockford Spine Center with Angela D. Johnson, APN, for left L4 radiculopathy secondary to disk protrusion. (PX 4, p. 169). Petitioner noted her symptom were continuing to improve. They discussed a trial of lumbar epidural injections. Petitioner was provided work restrictions to avoid lifting primarily from floor to waist level more than 50 pounds. Petitioner was encouraged to utilize proper body mechanics. She was to return in six weeks. (PX 4, p. 169).

On January 4, 2018 Petitioner presented to Dr. Patrick O'Leary for a Section 12 Examination. (PX 22, p. 302). Dr. O'Leary went over Petitioner's work accident history and medical care. He also performed an examine. Based on the same he diagnosed Petitioner with an L4-5 herniation with a likely L4 radiculopathy. He noted there was a causal relationship between Petitioner's objective findings and reported accident. Treatment to date had been reasonable and necessary. At this point, he opined petitioner should consider an epidural steroid injection or two at L4-5 on the left side. If this did not help, she may ultimately need a microdiscectomy. Prognosis was good. At this point she was able to return to work with no lifting more than 10 pounds, no bending or squatting or twisting excessively from the waist. (PX 22, p. 302-305).

Petitioner followed up with Ms. Johnson, APN, on January 29, 2018. Petitioner noted her symptoms had plateaued. She was having a difficult time with standing, walking, bending forward. Petitioner believed physical therapy had helped. Petitioner now wanted to consider a lumbar epidural steroid injection. Petitioner was referred to Dr. Ibarra and was to return in two to three weeks after the injection. (PX 4, p. 170).

On March 5, 2018 Petitioner presented to Dr. Juan Ibarra. Petitioner was a 56-year-old female with a work-related accident. The doctor reviewed the MRI of the lumbar spine and agreed that it revealed a left foraminal discogenic herniation of the L4-L5 disk impinging on the left L4 nerve root at that area. There were some facet arthropathy changes of the left L4-L5 and L5-S1 facet joint. Petitioner was diagnosed with intractable spinal pain with left lumbar radiculitis secondary to left lateral discogenic protrusion of L4-L5 disk and left lumbar spondylosis without myelopathy. He noted she would benefit from an epidural steroid injection towards the left side of the midline to the L4-L5 level. He advised her there was some involvement of possible impingement of the medial branches within the left L4-L5 and L5-S1 facet joint that was contributing to a second type of spinal pain discomfort. They would address that later, if needed. (PX 5, p. 207-208).

On March 15, 2018 petitioner underwent a lumbar epidural injection. (PX 5, p. 217).

Petitioner returned to Dr. Ibarra on April 12, 2018. Petitioner noted she was 75% improved since the injection. Petitioner had little pain remaining. At this point she does not need another epidural injection. The doctor noted he would be available in case she had recurrence of any sciatica pain. Petitioner was scheduled next week to start her place of employment with no restrictions. (PX 5, p. 232).

On May 14, 2018 Petitioner was seen in a follow up with Ms. Johnson, APN. Petitioner noted since her injection she felt 75-80% better and was ready to return to work. She requested her restrictions be lifted. Petitioner was diagnosed with chronic axial back pain and L4-5 disc protrusion with left L4 radiculopathy which had improved. At this point, Petitioner did not have any significant neurological deficit. She was agreeable to allowing Petitioner return to work without restrictions. For discomfort Petitioner could use over the counter analgesics, NAIDS, acetaminophen, topical patches and creams, activity modification, a lumbar corset, traction, a TENS unit, ice, heat, massage myofascial therapy, and chiropractic care. She could also continue to follow with Dr. Ibarra if she needed to. Petitioner would return on an as needed basis. (PX 4, p. 171).

On May 18, 2018 Petitioner was seen at Whiteside County Community Health Clinic. Petitioner was a 56-year-old female who presented for left knee pain and asthma. It was noted that she had chronic knee pain when she was injured at work last year. Her knee pain had now worsened due to working several 16-hour days. Petitioner was to undergo an X-ray of the left knee. (PX 6, p. 238-242).

Petitioner was seen on June 24, 2019 at Whiteside County Health Department for her asthma. Petitioner stated she needed a refill on medication and no other concerns. Although she was diagnosed with chronic knee pain, no treatment was discussed. This is unrelated to the work injury. (PX 6, p. 243-245).

On July 21, 2021 Petitioner presented to SCMH Physicians Clinic. Petitioner was a 59-year-old female who presented for a refill of her Mobic. Petitioner reported having a history of low back pain and advised she took Mobic for her pain. She reported her back as chronic and was constant and ache in nature. Today, she is rating her pain at a 6/10. Her back is exacerbated by colder weather and with prolonged periods of sitting, standing, and walking. Petitioner was diagnosed with lumbar pain with radiculopathy. She was provided Mobic and advised to try to lose weight. She was to return on a PRN basis. (PX 7, p. 249-252).

Petitioner was able to continue working at the Center after the accident. Petitioner testified that she eventually took a leave of absence to care for her mother beginning July 17, 2018 and retired from her position on October 1, 2018. The Arbitrator notes she indicated that she was not as strong and capable and could not give the residents what they needed. She further indicated her back injury was the main factor in her decision to retire. She testified she maintained her title of Mental Health Tech II and made "about the same" amount of money after she returned to full duty.

At this point she testified that her pain is under control but has to watch herself. She has to be careful with lifting/running but can walk. She cannot clean floors or toilets without pain. Petitioner testified driving is also hard. She is aware of her body mechanics. If she overdoes an activity, she will feel it and will need Mobic. Petitioner continues to do her home exercises, yoga and walking for her back. She will treat as needed.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

With regard to Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent and with regard to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

For accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his or her employment. Navistar Intern. Transp. Corp. v. Industrial Com'n, 315 Ill.App.3d 1197 (2000).

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. 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. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "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. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Additionally, a decision by the Commission cannot be based upon speculation or conjecture. Deere and Company v Industrial Commission, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. Three "D" Discount Store v Industrial Commission, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. Shell Oil Co. v. Industrial Comm'n, 2 Ill.2d 590, 592 119 N.E. 2d 224, 226 (1954). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

The parties have stipulated to accident and causal relationship of Petitioner's injuries from the work accident of 6/14/2017. Based on the totality of evidence presented, the Arbitrator finds Petitioner sustained injuries to her low back as a result of the work accident on 6/14/2017. Pursuant to the parties' stipulations at the beginning of trial, the Arbitrator notes the July 16, 2017 injury was a temporary exacerbation of the established 6/14/17 injury. This is corroborated by Petitioner's testimony indicating why a second accident form was never filled out. As such, although there were two dates of accident, the Arbitrator finds the accident of July 16, 2017 was

an exacerbation of the first injury and relates causation of the ongoing medical care to the original June 14, 2017 injury.

After a careful review of the record, the Arbitrator finds Petitioner sustained a back injury on June 14, 2017 after she was blocking a resident from leaving and subsequently aggravated that same condition on July 16, 2017 when taking care and lifting that same resident. Based on the same, the Arbitrator finds that the incident arose out of and in the course of Petitioner's employment and sustained a compensable accident.

In regard to causation, the parties stipulated to causation in regard to the first accident. As the Arbitrator finds the second accident was a temporary exacerbation of the first injury the Arbitrator deems Petitioner's low back condition to be causally related to her June 14, 2017 work injury.

The Arbitrator notes Petitioner initially treated for her low back only as of June 21, 2017. Petitioner had consistent complaints and was eventually released from care as of May 14, 2018. Her medical providers noted she would need to follow up on an as needed basis. The Arbitrator deems Petitioner at MMI for this condition as this date. The Arbitrator does note, however, that Petitioner had to follow up on one occasion, July 21, 2021, to obtain a prescription of Mobic.

Although the parties stipulated to causation for the June 14, 2017 injury the parties did not stipulate to causation for the July 16, 2017 injury. Regarding Petitioner's left knee, the Arbitrator notes that Petitioner did not initially indicate a left injury to Physicians Immediate Care. (PX 1). Petitioner later noted on October 26, 2017 she got kicked in the knee and "had a little bit of knee pain." (PX 4). The Arbitrator notes most the physical therapy records through August 4, 2017 treated for a diagnosis of low back pain and radiculopathy. In addition, after October 26, 2017 the medical notes are silent regarding any left leg injury until May 18, 2018, almost 7 months later, after she was released from care for her back. As such the Arbitrator notes Petitioner may have sustained a minor left knee condition that resolved with no active diagnoses or medical care until May 18, 2018 when she was released from care. (PX 1-PX6).

Following consideration of the testimony and evidence presented, it is found by this Arbitrator that the Petitioner may have sustained a minor left knee contusion with no active medical care.

With regard to issue "E", whether timely notice was given to Respondent, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). In Case 18WC021479, notice is not disputed. In case 18 WC 021480, notice is disputed. The Arbitrator finds however, petitioner testified she immediately told her supervisor, Michelle Kendrick of the accident. Petitioner further noted that her supervisor did not feel any written incident report was required and that her ongoing complaints were a continuation of the injuries she sustained in the original June 14, 2017 accident, although exacerbated by the continued work activity.

The Arbitrator once again agrees the July 16, 2017 was an exacerbation of the original injury of June 14, 2017. As such, the Arbitrator finds petitioner provided timely notice of the accident to Respondent.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. Once again case 18WC021479 there were no medical bills placed into evidence. Respondent claimed that all medical bills were paid.

Section 8(a) of the Act states a Respondent is responsible …"for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

In case 18WC021480 Petitioner provided the following medical bills into evidence:

- Exhibit 8 medical bills from Physician Immediate Care with a $0.00 balance.
- Exhibit 9 medical bills from KSB Hospital (PT 6/27/17) with a $0.00 balance
- Exhibit 10 medical bills from KSB Hospital PT (7/19/17-7/28/17) with a $0.00 balance.
- Exhibit 11 medical bills from KSB Hospital PT (8/1/17, 8/4/17) with a $0.00 balance.
- Exhibit 12 medical bills from KSB Hospital (8/17/17 MRI) with a $0.00 balance.
- Exhibit 13 medical bills from Rockford Radiology (8/17/17) with a $596.00 balance.
- Exhibit 14 medical bills from Rockford Spine Center (10/26/17-5/14/18) with a $0.00 balance.
- Exhibit 15 medical bills from CGH Medical Center (3/5/18) with a $927.00 balance.
- Exhibit 16 medical bills from CGH Medical Center (3/15/18) a $2,082.00 balance.
- Exhibit 17 medical bills from CGH Medical Center (4/12/18) with a $524.00 balance.
- Exhibit 18 medical bills from Whiteside County Health Dept. (5/18/18 and 6/24/19) with a $270.00 balance.
- Exhibit 19 medical bills from SCMH Physicians Clinic with a $120.00 balance.

In reviewing the medical services provided to Petitioner, the Arbitrator notes Respondent indicated that all medical bills were paid. It is unclear as Petitioner submitted several medical bills into evidence. As such, the Arbitrator orders Respondent to pay Petitioner the reasonable and necessary medical expenses pertaining to petitioner's low back injury incurred in connection with the care and treatment of her causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With regard to issue "K", what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein.

Once again in case 18WC021479 there are no TPD benefits in dispute. The parties agree that TPD benefits were paid correctly. As the Arbitrator finds the July 16, 2017 was an exacerbation of the original injury of June 14, 2017 all TPD benefits have been paid. Respondent shall receive credit for amounts paid.

With regard to issue "L", what is the nature and extent of the injury, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
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.

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

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner testified she was employed as a Mental Health Technician II at the time of the work injury. Given Petitioner has to work with residents and help them with acts of daily living the Arbitrator notes this is a physically demanding position. Given the nature of the work, the Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes Petitioner was 55 years old on the date of this accident. The Arbitrator notes that due to Petitioner's advanced age the remaining amount of work life is minimal. As such, the Arbitrator assigns moderate weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator concludes Petitioner is capable of working with no restrictions and as such, is capable of making the same amount in wages as Petitioner was previous to her injury. As Petitioner's injury did not affect her earning capacity, the Arbitrator assigns significant weight to this factor.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicate Petitioner sustained a back injury necessitating physical therapy, prescription medication and one lumbar epidural injection. The Arbitrator acknowledges Petitioner's continued complaints of back pain. While the Arbitrator notes Petitioner voluntarily retired with a full duty return to work, Petitioner testified the main reason for retirement was due to her ongoing back complaints.

Petitioner testified her pain was under control, but she had to be careful with lifting/running. She also noted that cleaning and driving were difficult. Lastly, Petitioner testified she would take Mobic as needed. Based on the same, the Arbitrator assigns significant weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 8% loss of use of person as a whole pursuant to §8(d)2 of the Act for the injuries sustained to her low back. Respondent shall pay Petitioner permanent partial disability benefits of $519.36/week for 40 weeks or $20,774.40.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005685
Case Name	Della Sutton v. Fairhaven Christian Retirement Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0285
Number of Pages of Decision	7
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	Bret Taylor

DATE FILED: 8/5/2022

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Della Sutton,

Petitioner,

vs. No. 20 WC 5685

Fairhaven Christian Retirement Center,

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, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner, a 47-year-old certified nursing assistant, testified that while at work on January 11, 2020, she obtained permission from a nurse to go to her car to get money to pay a friend who was coming by. Petitioner also testified that she intended to get money from her car to purchase snacks from the vending machine in the break room. Petitioner had parked her car in the lot behind her building, where her employer had instructed employees to park. After going outside, and while walking back from her car to the building, Petitioner fell on ice near the stairs or ramp.

Petitioner first sought treatment on January 11, 2020 at Physician's Immediate Care, where she complained of pain in her left elbow and left low back, but denied radicular symptoms. She reported she was not sure what she landed on because the accident happened so quickly. She also provided a history of low back pain and arthritis, which had recently been slightly painful. Petitioner was diagnosed with a left elbow contusion and low back pain, and given work restrictions.

At Petitioner's January 20, 2020 office visit, she described her symptoms then as being mild. The office note on that date reported her elbow and low back pain to be stable/improved. On January 30, 2020, Petitioner's physical therapist noted that following her therapeutic exercises, she had only minimal pain.

On February 6, 2020, Petitioner sought treatment from Dr. Ramirez-Flamenco. Then, Petitioner complained of low back pain which radiated to her right leg. Dr. Ramirez-Flamenco diagnosed Petitioner with lumbago, right-sided sciatica, and other chronic pain. She recommended Petitioner continue her mediations and physical therapy. On May 13, 2020, Petitioner expressed concern to Dr. Ramirez-Flamenco about her polyarthritis, which had been producing intermittent symptoms and pain up to 7/10 – not only in her low back, but also in her knees, shoulders and elbows. Dr. Ramirez-Flamenco recommended Petitioner undergo additional workup to rule out rheumatic disease.

On August 19, 2020, Petitioner underwent a lumbar spine MRI, which the radiologist compared to a previous MRI taken before her accident on December 12, 2018. The impression on the August 2020 MRI report was of mild degenerative changes of the L5-S1 disc and the L4-5 and L5-S1 facets. Petitioner's December 2018 MRI was not offered into evidence.

On September 9, 2020, Dr. Ramirez-Flamenco released Petitioner from care after referring her to a pain management physician. Petitioner has not seen Dr. Dr. Ramirez-Flamenco since. Although Petitioner claimed to have seen a pain management physician after that, she offered no records or bills into evidence from that physician.

Respondent was able to accommodate Petitioner's restrictions through June 2020, when Petitioner was terminated for violating company rules. Petitioner acknowledged that until that time, she had been able to perform most of her usual duties, including washing wheelchairs, and showering, dressing, stabilizing, and walking with patients. Petitioner testified she lost some time from work due to her pain and appointments. She also testified that her symptoms have remained the same since her accident, with her pain being constant at 8/10, and radiating from her low back down her right leg. Although no physician has authorized Petitioner off work, she testified her pain prevents her from working.

Petitioner acknowledged at arbitration that prior to her accident, she had experienced back pain for which she received medical treatment. She testified she did not recall undergoing the December 2018 lumbar MRI which was reported in her records.

The Arbitrator, in denying all benefits, found Petitioner failed to prove her injuries arose out of and in the course of her employment. The Arbitrator did not believe Petitioner's fall occurred during a scheduled break, but instead, during a personal deviation from her employment which had no incidental benefit to her employer. The Arbitrator also found Petitioner's testimony as a whole lacked credibility, especially regarding her purported current physical capabilities. The

Arbitrator noted she had been able to resume and perform nearly all of her job responsibilities shortly after her accident, and that her objective findings were *de minimis*.

With regard to the issue of Accident, the Commission views the evidence differently than the Arbitrator. In cases involving falls in parking lots, the proper inquiry is whether the employer maintains and provides the lot for their employees' use. If it does, the lot constitutes part of the employer's premises, and the presence of a hazardous condition thereon which causes a claimant's injury supports the finding of a compensable claim. *Archer Daniels Midland Co. v. Industrial Comm'n,* 91 Ill. 2d 210 (1982). In *Smith v. Ill. Workers' Comp. Comm'n,* 2019 IL App (3d) 180251WC-U, the appellate court determined that, "a risk-analysis is unnecessary if the injury occurred on premises due to an unsafe or hazardous condition. Our supreme court [citing *Archer Daniels*] has held that accidental injuries sustained on the employer's premises within a reasonable time before or after work arise 'in the course of' employment."

Slip and falls occurring on employer-provided parking lots are generally compensable when hazardous conditions are present. Snow and ice is considered to be a hazardous condition. *Mores-Harvey v. Indus. Comm'n,* 345 Ill. App. 3d 1034 (3rd Dist., 2004). In *Mores-Harvey,* the claimant slipped on a natural accumulation of snow and ice after exiting her car which was parked in her employer's parking lot. The appellate court found that claimant's fall resulted from an employment-related risk and not a neutral force, and reversed the Commission's denial of benefits.

The Illinois Supreme Court has held that in lunch hour cases, the most critical factor in determining whether the accident arose out of and in the course of employment is the location of the occurrence. Where the employee sustains an injury during the lunch break and is still on the employer's premises, the act of procuring lunch has been held to be reasonably incidental to the employment, even where the injury was not actually caused by a hazard of the employment. *Eagle Discount Supermarket v Industrial Comm.,* 82 Ill. 2d 331 (1980).

Employees injured while on breaks are treated no differently by Illinois courts than those injured during their lunch breaks. In *Harvey v. Ill. Workers' Comp. Comm'n,* 2016 IL App (1st) 150179WC-U, the claimant left the building in she worked to run a personal errand on an authorized break. Upon returning, she slipped on the freshly waxed floor in the lobby of her employer's building. The Commission found the claimant failed to prove an accident arising out of and in the course of her employment. The appellate court reversed, finding it immaterial that the lobby was open to the general public, because claimant's injury was caused by a hazardous condition on the employer's premises. The court stated, "the hazardous condition of the employer's premises renders the risk of injury a risk incidental to employment; accordingly, the claimant may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public."

The facts in the instant case are similar to those in *Harvey.* After Petitioner testified, Respondent offered no opposing evidence to show that her fall did not occur while she was on an authorized break, or that it did not occur in the lot where her employer directed her to park, or that

the ice on which she slipped was not a hazardous condition. The Commission therefore finds Petitioner's risk of injury was incidental to her employment, and that her accident on January 11, 2020 arose out of and in the course of it.

On her day of accident, Petitioner's chief complaints were only to her left elbow and *left* low back, and she denied radiating symptoms. Although Petitioner acknowledged that she had recently been experiencing right-sided low back pain due to pre-existing arthritis, she did not claim at that time that her fall had increased that pain.

On January 27, 2020, Petitioner told her physical therapist that she was unsure how she landed, but fell on her *left* side. She reported the intermittent pain and numbness she had been experiencing down her right leg had been present prior to her fall. Petitioner voiced no complaints of right hip pain until March 5, 2020. Then, according to her therapist's records, she claimed to have fallen on her *right* side and attributed right hip pain to that fall.

Petitioner testified that since June 2020, her pain has prevented from working. However, no physician authorized her off work, and her ability to perform most of her usual job duties for 5 months after her accident, belies that claim.

Petitioner's August 8, 2020 MRI report noted that the findings at L4-S1 were "degenerative" and "mild." The last records in evidence were from Dr. Ramirez-Flamenco, who released Petitioner from her care on September 9, 2020. Though Petitioner claimed she received causally related treatment after that date, no records in evidence corroborate that.

The Commission finds that as a result of Petitioner's January 11, 2020 accident, she sustained a strain/contusion to her left elbow, low back pain, and lumbago. Her right-sided low back symptoms and arthritis were present before her accident and were, at most, temporarily aggravated by her fall. Petitioner's treatment for those injuries between January 11, 2020 and September 9, 2020 is causally related to her accident.[1] The Commission does not find Petitioner's current right leg radiating pain or right hip pain to be causally related to her accident. Although Dr. Ramirez-Flamenco diagnosed Petitioner with right-sided sciatica one month after her accident, neither she, nor any other doctor, opined that condition was caused or aggravated by Petitioner's fall. No records show Petitioner had a causally related condition of ill-being after September 9, 2020.

At arbitration, Petitioner sought an unspecified dollar amount for temporary partial disability during the two week period between February 2, 2020 and February 15, 2020. Petitioner testified she had to work reduced hours because of her pain, her need to attend appointments, and her employer's inability to accommodate her restrictions. Petitioner offered into evidence her pay stub for that two-week period. It shows she earned $203.38 for 16.18 "regular hours" worked, and

[1] Records in evidence show that at least 6 or 7 of Petitioner's visits to the Crusader Clinic following her work accident were for conditions unrelated to her accident, including: an upper respiratory tract infection, pneumonia, hypertension, migraine headache, heel pain, sore throat and body aches. The Commission does not award those medical expenses.

$301.68, for 24 "Sick/Personal hours." The combined number of hours – 40.18, over a two week period – suggests her job was only part-time. No evidence was offered which would establish the usual number of hours Petitioner was assigned to work. That number would be needed to calculate and support her claim of working fewer hours during that period. Without such evidence, temporary partial disability cannot be ascertained.

In determining the level of Petitioner's permanent disability, the Commission has considered, and assigns the following weights, to the five factors enumerated in §8.1b(b) of the Act:

(i) **Disability impairment rating:** *no weight,* because no AMA Impairment Rating was offered into evidence;

(ii) **Employee's occupation:** *moderate weight,* because Petitioner demonstrated that she was capable of performing most of her usual duties soon after her accident;

(iii) **Employee's age of 47:** *moderate weight,* because Petitioner can expect to work for 15 to 20 more years following her accident;

(iv) **Future earning capacity:** *no weight,* because no evidence was offered to show how, or to what extent, Petitioner's earning capacity going forward may have been affected, and,

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner's initial complaints of pain related to her accident were to her left elbow and left lower back, with no related complaints of pain radiating to her right leg, or right hip pain, until weeks after her accident. Records show Petitioner had experienced intermittent, right-sided symptoms before her accident. Petitioner's low back pain from her January 11, 2020 accident improved in the weeks following it. Her August 19, 2020 lumbar MRI documented no acute findings; only mild degenerative changes. No medical records in evidence subsequent to Petitioner's release by Dr. Ramirez-Flamenco on September 9, 2020, substantiated any ongoing, causally related condition after that date.

The Commission finds Petitioner entitled to 2% loss of use of person as a whole for her injuries sustained on January 11, 2020. No permanency is awarded for Petitioner's left elbow injury, as it was minor, required little treatment, and by Petitioner's own admission, her symptoms resolved.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2021, is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the unpaid medical bills incurred in treating her left elbow and low back between January 11, 2020 and September 9, 2020, as provided by §8(a) and §8.2 of the Act. Respondent

shall also reimburse Petitioner for the causally related medical bills which were paid between those dates by Petitioner's group health insurance carrier and Medicaid, and $38.00 for Petitioner's out-of-pocket expenses.

IT IS FURTHER ORDERED BY THE COMMISSION that temporary disability benefits are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $330.00 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that Petitioner's injuries caused the 2% disability to the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $6,600.00. 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.

August 5, 2022

MP/mcp
o-07/21/22
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033093
Case Name	Chris Carlson v. Weber Electric
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0286
Number of Pages of Decision	15
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Hanlon
Respondent Attorney	Timothy Steil

DATE FILED: 8/9/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Chris Carlson,

Petitioner,

vs. NO: 19 WC 33093

Weber Electric,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 22, 2022, 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 $4,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 9, 2022
MP:yl
o 8/4/22
68

/s/ *Marc Parker*
Marc Parker

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033093
Case Name	CARLSON, CHRIS v. WEBER ELECTRIC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Ivo Austin
Respondent Attorney	Timothy Steil

DATE FILED: 2/22/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2022 0.77%

/s/Bradley Gillespie, Arbitrator

Signature

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)

CHRIS CARLSON
Employee/Petitioner

v.

WEBER ELECTRIC
Employer/Respondent

Case # **19** WC **033093**

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **September 29, 2021**. 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, **June 22, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**70,763.53**; the average weekly wage was $**1,360.84**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act for payments made under Respondent's group health insurance policy. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against her by reason of having received such payments, pursuant to Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay the following reasonable and necessary past medical services, pursuant to the medical fee schedule: All medical bills from Orthopedic and Shoulder Center contained in Petitioner's Exhibit 2, of which the total charged amount by the provider totals $4,635.82.

Respondent shall pay, pursuant to the fee schedule, the following prospective medical treatment recommended by Dr. Lawrence Li: right shoulder arthroscopic surgery, including any reasonable and necessary follow-up treatment, including, but not limited to, medications and physical therapy.

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.

Bradley D. Gillespie **FEBRUARY 22, 2022**

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF MCLEAN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHRIS CARLSON
Employee/Petitioner

v. **Case No: 19 WC 033093**

WEBER ELECTRIC
Employer/Respondent

MEMORANDUM OF 19(b) DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of the accident on June 22, 2019, Petitioner was 47 years old, married, with one dependent child. (Tr. p. 12) Petitioner was 5'11" tall and weighed 185 at the time of trial. (Tr. p. 12) Petitioner was employed by Respondent as an electrician. (Tr. pp. 12-13). He had worked for Respondent as an electrician since 2004, except for a year-and-a-half layoff, during which time Petitioner worked as an electrician elsewhere. (Tr. p. 13). Petitioner was a member of IBEW Local 197 union. (Tr. p. 14). Petitioner worked Monday through Friday from 7:00 a.m. to 3:30 p.m. *Id*. Since 2012, Petitioner had been assigned by Respondent to do commercial electrician work at the Illinois Farm Bureau offices. (Tr. p. 15).

Petitioner's work for Respondent required him to perform many job duties with his hands and arms positioned above his head. (Tr. p. 15). Petitioner estimated that at least 30 percent of his job duties for Respondent involved his hands being positioned above his head. *Id*. Those job duties included installing light fixtures, running conduit, making junction boxes, fabricating support systems for conduit racks, and installing fire alarms. (Tr. p. 16). While Petitioner was performing job duties with his arms above his head, he would use tools, such as strippers, Kleins, a tape measurer, channel locks, hammer drills, and hammers. (Tr. p. 17).

Many of the overhead job duties that Petitioner performed were repetitive in nature. (Tr. pp. 20-23). Petitioner testified that installing 2-by-4 lights, changing the ballasts on pole lights, making junction boxes, and running conduit were repetitive in nature. *Id*. Petitioner testified that sometimes he would make junction boxes for an entire shift, which would tire his fingers to the extent that he could no longer move them. (Tr. p. 22). Petitioner testified that he would sometimes be running conduit overhead for an entire week. (Tr. p. 23). He performed all of these duties for the entire time he was assigned at the Farm Bureau, beginning in 2012. *Id*.

Petitioner testified that he had experienced right shoulder pain while working prior to June 22, 2019. (Tr. pp. 23-24). However, he had never sought medical treatment for that pain. (Tr. p. 24). Petitioner worked a full week at his normal hours preceding the alleged date of accident. (Tr. p. 25). Petitioner testified that when he left work on Friday, June 21, 2019, he was not experiencing pain in his right shoulder. *Id.* Petitioner stated that he did recall doing anything the evening of June 21, 2019 which caused pain in his right shoulder. (Tr. p. 25).

Petitioner regularly lifted weights, but did not lift weights the evenings of June 20, 2019, or June 21, 2019. (Tr. p. 46).

When Petitioner woke up the morning of Saturday, June 22, 2019, he had right shoulder pain could not move his right arm. (Tr. p. 24). He reported to work the following week and attempted to perform his normal job duties. (Tr. p. 25). Petitioner testified that due to his right shoulder injury, he had to use his left hand to put his right arm above his head. (Tr. p. 25). During the week of June 24, 2019, Petitioner was working with his foreman, Nathan Feit. (Tr. p. 26). Petitioner informed Mr. Feit that his right shoulder was injured. *Id*. Petitioner testified that within one month of July 1, 2019, he informed Mr. Feit that his right shoulder injury was work-related. (Tr. 44).

Petitioner first sought medical treatment for his right shoulder injury on July 1, 2019, from Dr. Lawrence Li, of the Orthopedic and Shoulder Center in Normal, IL. (Tr. p. 27). Petitioner told Dr. Li's office to bill Petitioner's group health insurance. (Tr. p. 27). Petitioner did not immediately file a claim for workers' compensation benefits, in part because he did not want to damage his reputation and standing at work. (Tr. p. 31). After the July 1, 2019, appointment with Dr. Li, Petitioner understood that his right shoulder injury was work-related. (Tr. p. 28).

Petitioner testified that the conservative treatment recommended by Dr. Li provided some relief of his right shoulder symptoms but did not completely alleviate them. (Tr. pp. 28-29). Petitioner testified that he continues to suffer pain in his right shoulder. (Tr. p. 29). Petitioner eventually filed *pro se* an application for adjustment of claim with the Illinois Workers' Compensation Commission. (Tr. p. 30).

Petitioner stated that he had been lifting weights regularly for approximately two and a half years prior to June 22, 2019. (Tr. p. 31). He testified that he tried to lift weights five days a week, for 50 minutes per day, focusing on a different body part each day. (Tr. p. 31). Petitioner testified that he would occasionally would have soreness in his muscles after working out. (Tr. p. 32). Petitioner indicated that the muscle soreness was "completely different" than the pain he experienced upon awakening on the morning of June 22, 2019. (Tr. p. 33).

Since June 22, 2019, Petitioner has continued to work full-duty for Respondent. (Tr. p. 33). However, there are certain aspects of the job which are more difficult to perform. (Tr. p. 34). He cannot lift as much weight overhead as he could before the injury. *Id*. Having his right arm positioned at certain angles causes him increased pain. *Id*. Petitioner testified that since June 22, 2019, he is unable to play golf or lifts weights. *Id*.

Petitioner provided a recorded statement to Respondent's workers' compensation insurance carrier on October 15, 2019 (RX #3). During that statement, Petitioner reported that his shoulder felt 100 percent better after receiving conservative treatment from Dr. Li. (RX #3; Tr. p. 35). Petitioner testified that what he meant by "100 percent" was that the cortisone injection and physical therapy helped his shoulder a lot. (Tr. p. 35). But, Petitioner did not mean that the conservative treatment cured or alleviated all his symptoms, because he continued to have pain in his right shoulder. (Tr. p. 36).

On July 1, 2019, Dr. Li noted that Petitioner had been an electrician for over 15 years and did a lot of overhead work. (PX #1 p. 6). Petitioner reported that he had issues with his right shoulder in the past but was able to tolerate his symptoms. (PX #1 p. 6). Petitioner presented to Dr. Li with moderate, sharp, frequent pain of 6/10 in his right shoulder, along with weakness in his right shoulder. (PX #1 pp. 6-7). Dr. Li found positive Neer and Hawkins impingement tests. (PX #1 p. 9). Dr. Li diagnosed Petitioner with right shoulder rotator cuff

tendinopathy/partial thickness tear. (PX #1 p. 10). Dr. Li ordered x-rays and an MRI of the right shoulder. (PX #1 p. 10).

An MRI of Petitioner's right shoulder was completed on July 8, 2019. (PX #1 p. 11). On July 9, 2019, Dr. Li noted the following results of the MRI: (1) mild-to-moderate supraspinatus tendinosis with a small focal moderate to high-grade interstitial partial-thickness tear involving the insertional fibers; (2) mild tendinosis and tenosynovitis of the long head of the biceps tendon; (3) the possibility of a superior labral tear; and (4) moderate acromioclavicular degenerative joint disease. (PX #1 p. 13). Dr. Li recommended a corticosteroid injection and physical therapy. (PX #1 p. 15).

Dr. Li provided Petitioner a corticosteroid injection on July 15, 2019. (PX #1 p. 18). Petitioner began physical therapy on that same date. (PX #1 p. 20). His pain was noted to be intermittent, mild to moderate, aching pain between 2/10 and 3/10. *Id*. Petitioner's flexion and abduction in his right shoulder were limited. (PX #1 p. 21). A physical therapy plan of 2 to 3 sessions per week for 8 to 12 weeks was established. (PX #1 p. 22). On August 5, 2019, the physical therapist noted that Petitioner was having less pain with movements that used to hurt. (PX #1 p. 28). On August 8, 2019, the physical therapist noted that Petitioner continued to exhibit deficits in strength, joint mobility, pain, and activity tolerance, which limited his functional mobility. (PX #1 p. 33). He was making progress but was still unable to perform overhead motions well. *Id*.

Dr. Li noted significant improvement at Petitioner's August 22, 2019 follow up visit. (PX #1 p. 35). Dr. Li recommended that Petitioner continue his home exercise program. (PX #1 p. 37). On September 23, 2019, Petitioner returned for follow up with Dr. Li. (PX #1 p. 39). Dr. Li noted that Petitioner's right shoulder pain was minimal when at rest and with below chest activities. *Id.* However, Petitioner continued to be bothered significantly when reaching and raising his right arm. *Id*. Petitioner reported that he was unable to do the strenuous parts of his job duties for Respondent. (PX #1 at 39). Dr. Li recommended that Petitioner continue with his home exercise program for an additional month before possibly considering surgery. (PX #1 p. 41).

On October 21, 2019, Petitioner returned to Dr. Li. (PX #1 p. 45). Petitioner's home exercise program had not fully alleviated his right shoulder symptoms. *Id*. Dr. Li recommended arthroscopic shoulder surgery because Petitioner had failed conservative treatment. *Id*. At a follow up appointment on November 18, 2019, Petitioner reported continued pain in his right shoulder with no improvement. (PX #1 at 46). Petitioner continued to have pain at work, especially with any over chest work or reaching. (PX 1 p. 46). Petitioner followed up again on August 18, 2020. (PX #1 p. 49). Petitioner continued to experience pain in his right shoulder with over chest work. *Id*. At the time of trial, Petitioner had not undergone the surgery recommended by Dr. Li. (Tr. p. 31).

Respondent sent Petitioner to an Independent Medical Examination (IME) pursuant to section 12 of the Illinois Workers' Compensation Act (805 ILCS 820 ILCS 305/12). (RX #1). The IME was performed by Dr. Lyndon Gross on July 30, 2020. (RX #1).

On February 4, 2021, Dr. Li testified at an evidence deposition. (PX #3). Dr. Li testified that he performs an average of 200 shoulder surgeries per year. (PX #3 p. 6). He has been an orthopedic surgeon licensed in the State of Illinois since 1996. (PX #3 p. 4). Dr. Li testified that he understood that Petitioner had been an electrician for 15 years and that Petitioner's job duties as an electrician involved a lot of work overhead. (PX #3 pp. 8-9).

Dr. Li testified that based on the objective findings of the July 8, 2019 MRI, Petitioner's injury was not due to a traumatic event. (PX #3 p. 10). Dr. Li noted that the MRI did not show any bleeding into the joint, which would normally be found in a traumatic shoulder injury. *Id*. Dr. Li also noted that the MRI showed

several microscopic tears of the tendon, rather than a complete rupture which would be indicative of a traumatic injury. (PX #3 p. 16).

Dr. Li testified that he found significant that while undergoing treatment, Petitioner continued to suffer pain only when doing over-chest and overhead work activities. (PX #3 at 13). Dr. Li opined, to a reasonable degree of medical certainty, that Petitioner's right shoulder condition was caused or accelerated by the significant amount of over-chest and overhead repetitive activities Petitioner did working for Respondent for several years. (PX #3 pp. 14-15). Dr. Li testified that approximately one-third of Petitioner's job duties involved overhead work. (PX #3 p. 30). Dr. Li explained that a person of Petitioner's age would have some underlying tendinopathy and degeneration in his right shoulder, but that 15 years of doing overhead work—approximately one-third of Petitioner's life—accelerated that condition. (PX #3 p. 16). Dr. Li opined that Petitioner's right shoulder condition was a condition that he had observed in other patients whose employment involved significant overhead work. (PX #3 p. 17). Dr. Li testified that spending 20 to 33 percent of time at work doing over-chest and overhead activities of 15 years was significant enough to contribute to Petitioner's right shoulder injury. (PX #3 p. 50).

Dr. Li testified that the condition in Petitioner's right shoulder was not the kind of condition that would be caused by weightlifting. (PX #3 p. 18). Dr. Li stated that weightlifting injuries were more commonly traumatic injuries, rather than repetitive use injuries. *Id*. Dr. Li testified that Petitioner's weightlifting activities did not change his opinion that Petitioner's right shoulder injury was work-related. (PX #3 p. 19). Dr. Li testified that the amount of time Petitioner spend lifting weights above chest level and overhead was minimal, compared to the time Petitioner spent working over the past 15 years with his arms above chest level and overhead. (PX #3 pp. 19-20, 41).

Dr. Li testified that Petitioner's history of going to bed on June 21, 2019, with his shoulder feeling fine and awakening on June 22, 2019, with significant symptoms supported his opinion that Petitioner's condition was the result of repetitive overhead work. (PX #3 p. 20). Dr. Li also stated that the fact that Petitioner had experienced prior shoulder pain while working for Respondent supported his opinion, although it was not severe enough at that time to require medical treatment. (PX #3 p. 23).

Dr. Li testified that all the medical treatment he provided to Petitioner and recommended for Petitioner was reasonable and necessary to treat Petitioner's condition of ill-being. (PX #3 p. 24). Dr. Li also testified that the right shoulder arthroscopy that he recommended for Petitioner was reasonable and necessary to treat Petitioner's condition of ill-being. *Id*.

Respondent's independent medical examiner, Dr. Lyndon Gross, testified at an evidence deposition on May 13, 2021 (RX #2). Independent Medical Examinations account for approximately 20% of his practice. (RX #2 p. 6). Of the IME's Dr. Gross performs, 80 to 85 percent are done on behalf of employers. *Id*. Dr. Gross charges $1,500.00 to perform an IME. *Id*. He charged $2,000.00 for his deposition. (RX #2 p. 21).

Dr. Gross testified that when he examined Petitioner on July 30, 2020, Petitioner complained of 4 out of 10 pain in his right shoulder. (RX #2 p. 14). Dr. Gross diagnosed Petitioner with right shoulder rotator cuff tendinopathy and biceps tendinopathy. (RX #2 p. 14). Dr. Gross agreed with Dr. Li that Petitioner's right shoulder condition was not caused by a traumatic injury. (RX #2 pp. 16-17). Dr. Gross testified that it is "very uncommon for somebody to have significant shoulder pain without an acute injury to their shoulder." (RX #2 pp. 17-18). Dr. Gross testified that Petitioner's right-shoulder condition was caused by age-appropriate degeneration. (RX #2 p. 16). Dr. Gross did not explicitly testify that Petitioner's job duties were not a contributing cause of Petitioner's right shoulder injury. (*See generally*, RX #2).

Dr. Gross opined that the medical treatment Petitioner had received was reasonable. (RX #2 p. 19). Dr. Gross testified further that the surgery ordered by Dr. Li was not unreasonable but was not causally related to Petitioner's employment. *Id*.

Dr. Gross did not know what percentage of Petitioner's job duties involved overhead work. (RX #2 p. 22). Dr. Gross testified that he had treated patients in the past who developed right shoulder problems due to repetitive overhead work. (RX #2 p. 26). Dr. Gross testified that the part of Petitioner's shoulder that was injured is the part responsible "to help raise your arm up." (RX #2 p. 32). Dr. Gross opined that Petitioner's right shoulder injury was the result of age-appropriate degeneration. (RX #2 p. 16). Dr. Gross thought it would be "impossible to tell" whether any particular activity—including Petitioner's overhead work duties—accelerated or impacted the degeneration in his shoulder. (RX #2 p. 30). Dr. Gross did not opine that Petitioner's weightlifting had any impact on Petitioner's right shoulder condition. (*See generally*, RX #2).

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates 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, Arbitrator finds as follows on the issues presented at trial:

In support of the Arbitrator's decision relating to issue C, whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Arbitrator finds that an accident occurred on July 22, 2019, that arose out of and in the course of Petitioner's employment by Respondent.

An employee's injury is compensable under the Illinois Workers' Compensation Act (Act) only if it arises out of and in the course of his employment. 820 ILCS 305/2 (West 2020). "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 his employment." *Dunteman v. Illinois Workers' Compensation Comm'n*, 2016 IL App (4th) 150543WC, ¶ 40

"For an injury to 'arise out of' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). "The 'arising out of' component addresses the causal connection between a work-related injury and the claimant's current condition of ill-being." *Id.*

"It has long been recognized that, 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." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003).

Employers "take their employees as they find them." *Id*. at 205. "[E]ven though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* "Accidental injury

need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.*

An employee who has suffered a repetitive-trauma injury must meet the same standard of proof as an employee who suffers a sudden injury. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 313 (4th Dist. 2009). "Petitioner need only prove that some act or phase of employment was a causative factor of the resulting injury." *Three D Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 49 (4th Dist. 1989).

The Supreme Court eloquently explained the policy behind the compensability of repetitive-use injuries in *Durand v. Industrial Comm'n*, 224 Ill. 23 53, 71 (2006):

> "Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. *** To deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." (quoting *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529 (1987)).

The Arbitrator finds that Petitioner's right shoulder injury arose out of and in the course of Petitioner's employment with Respondent. Petitioner testified that he had worked as an electrician for 15 years. Since 2012, Petitioner had worked for Respondent as a commercial electrician assigned at the Illinois Farm Bureau campus. His job duties with Respondent required Petitioner to work with his hands above his head for at least 30 percent of his day. Some of that overhead work required the use of tools, including power tools, such as a hammer drill. Petitioner testified that many of those overhead job duties were repetitive in nature. Dr. Li testified to a consistent history of Petitioner's job duties. Respondent provided no evidence to rebut the testimony concerning his job duties. The Arbitrator finds Petitioner's unrebutted testimony about his job duties to be credible.

The Arbitrator finds that the overhead, repetitive job duties performed by Petitioner over many years while working for Respondent were a causative factor in the degenerative right shoulder injury suffered by Petitioner. Dr. Li testified that Petitioner's job duties as an electrician accelerated Petitioner's right shoulder condition. Dr. Li testified further that he had treated other patients whose overhead job duties contributed to similar injuries (PX #3 p. 17). While undergoing treatment with Dr. Li, Petitioner had minimal pain while doing below chest activities, but suffered significant pain when reaching and raising his right arm. (PX #1 p. 39). That history supports Dr. Li's conclusion that the overhead work for Respondent was a causative factor that contributed to Petitioner's injury. The Arbitrator concludes that Petitioner's years of overhead, repetitive work for Respondent was a causative factor that contributed to Petitioner's right shoulder injury.

The Arbitrator also finds significant that during his treatment with Dr. Li, Petitioner continued to suffer pain when reaching and raising his right arm above chest level. (PX #1 pp. 46, 49). The face that overchest activity, in particular, continued to cause Petitioner pain, supports Dr. Li's conclusions that Petitioner's overchest and overhead work activities were a causative factor in his right shoulder injury.

The Arbitrator finds Dr. Li's testimony more credible than that of Dr. Gross. Dr. Li had a better understanding of Petitioner's job duties. Dr. Li testified that approximately one-third of Petitioner's job duties involved overhead work. (PX #3 p. 30). This was consistent with Petitioner's testimony that at least 30 percent of his job duties with Respondent involved working with his arms overhead. (Tr. p. 15). Dr. Gross testified that he did not know how much of Petitioner's job involved overhead work. (RX #2 p. 22). Dr. Li has a stronger

foundation to his opinion that Petitioner's repetitive overhead job duties over 15 years contributed or accelerated the degenerative condition in Petitioner's right shoulder.

Dr. Gross was not aware of the amount of time Petitioner spent doing overhead work. (RX #2 p. 30). Therefore, Dr. Li was in a better position than Dr. Gross to give an opinion on causation. As such, Dr. Li's opinions are given greater weight than those of Dr. Gross.

Petitioner's hobby of weightlifting does not affect the Arbitrator's conclusion that Petitioner's injury arose out of and in the course of his employment with Respondent. Dr. Li testified that Petitioner's injury was not the kind of condition that would normally treat caused by weightlifting. (PX #3 p. 18). In Dr. Li's experience, weightlifting injuries were more commonly traumatic injuries than repetitive use injuries. *Id*. Dr. Li testified that the amount of time Petitioner spend lifting weights above chest level and overhead was minimal, compared to the time Petitioner spent working over the past 15 years with his arms above chest level and overhead. (PX #3 pp. 19-20, 41). Dr. Gross offered no opinion on a relationship between Petitioner's condition of ill-being and his weightlifting.

Furthermore, even if the Arbitrator were to find that Petitioner's weightlifting activities contributed to Petitioner's right shoulder injury, that does not negate the conclusion that Petitioner's injury arose out of and in the course of his employment for Respondent. "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." (Emphasis in original.) *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). The Arbitrator concludes that Petitioner's job duties were a causative factor in his repetitive right shoulder injury that manifested on June 22, 2019.

Wherefore, the Arbitrator finds that the workplace accident of June 22, 2019, arose out of and in the course of Petitioner's employment with Respondent.

In support of the Arbitrator's decision relating to issue E, whether the Petitioner gave sufficient notice of accident to the Respondent within the time limits of the Act, the Arbitrator finds the following:

As to issue E, the Arbitrator finds that Petitioner gave sufficient notice of the accident to Respondent within the time limits of the Act.

"Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2010). "No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *Id.*

"The purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident." *Gano Elec. Contracting v. Indus. Comm'n*, 260 Ill. App. 3d 92, 95 (4th Dist. 1994) "Compliance with the requirement is accomplished by placing the employer in possession of the known facts related to the accident within the statutory period, namely 45 days." *Id.* at 96. "A claim is barred only if no notice whatsoever has been given." *Id.* "Because the legislature has mandated a liberal construction on the issue of notice [citation], if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced." *Id.*

In this case, the date of accident was June 22, 2019. In a repetitive-trauma case, the "manifestation date" serves as the date of accident. *Durand v. Industrial Comm'n,* 224 Ill. 2d 53, 65 (2006). The manifestation date is

the date "on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person." *Id.* The employee's medical treatment, the severity of the injury, and how the injury affected the employee's job performance are relevant to determining when a reasonable person would have plainly recognized the injury and its relation to work. *Id.* at 72.

Petitioner testified that he awoke on the morning of June 22, 2019, he had pain and was unable to move his right arm. (Tr. p. 24). He reported to work on Monday June 24, 2019, and attempted to perform his normal job duties, but had to use his left hand to put his right arm above his head. (Tr. p. 25). During that time, he was working with his foreman, Nathan Feit. (Tr. p. 26). Petitioner told his forearm that his right shoulder was injured. *Id.* In addition, we can reasonably infer that Petitioner's foreman would have noticed Petitioner struggling with his job duties the week of June 24, 2019.

Petitioner later explicitly informed his foreman that his job duties were work-related. (Tr. p. 44). Petitioner did not realize that his right shoulder injury was work-related until after his first visit with Dr. Li on July 1, 2019. (Tr. p. 28). Petitioner testified that within one month of that first visit with Dr. Li, he informed his foreman that his right shoulder injury was work-related. (Tr. p. 44). That communication also fell within the 45-day window after the date of accident, June 22, 2019.

Petitioner's testimony on the issue of notice was unrebutted by Respondent. If Respondent wanted to contest Petitioner's testimony on that issue, Respondent could have called foreman, Nathan Feit, to testify. Respondent chose not to do so. Nor has Respondent presented evidence that Respondent was unduly prejudiced by any alleged defect in notice. Particularly under the liberal construction required of the notice requirement, Respondent has not provided any evidence to rebut Petitioner's testimony on the issue of notice.

The unrebutted evidence establishes that Petitioner provided sufficient notice of accident as required by the Act.

In support of the Arbitrator's decision relating to issue F, whether Petitioner's current condition of ill-being was causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the workplace injury of June 22, 2019.

The Arbitrator has already concluded in the analysis on issue C that Petitioner's right shoulder injury arose out of and in the course of Petitioner's employment with Respondent. Since the time that injury manifested itself on June 22, 2019, there is no evidence to suggest that Petitioner suffered any subsequent injuries to explain his current conditions of ill-being in his right shoulder. The Arbitrator relies on the analysis presented on issue C to support the conclusion that Petitioner's current condition of ill-being is causally related to the injury of June 22, 2019.

In support of the Arbitrator's decision relating to issue J, whether the medical services provided to Petitioner were reasonable and necessary and whether the Respondent has paid for all reasonably and necessary medical services, the Arbitrator finds the following:

The Respondent's IME doctor, Dr. Gross, agreed that the treatment up until his deposition of May 13, 2021, was reasonable to treat Petitioner's condition of ill-being. (RX #2 p. 19). Petitioner's treating physician, Dr. Li, testified that all the treatment he provided and recommended for Petitioner was reasonable and

necessary. (PX #3 p. 24). The unrebutted evidence establishes that the medical care received by Petitioner through May 13, 2021, was reasonable and necessary to treat the condition of ill-being suffered on July 22, 2019.

The Arbitrator therefore orders Respondent to pay all medical bills contained in Petitioner's Exhibit 2 according to the fee schedule.

In support of the Arbitrator's decision relating to issue K, whether Petitioner is entitled to prospective medical care, the Arbitrator finds the following:

Because the Arbitrator finds that Petitioner's condition of ill-being is causally related to the accident of July 22, 2019, the Arbitrator awards the following reasonable and necessary prospective medical care: the right shoulder arthroscopic surgery recommended by Dr. Li. Dr. Li testified that surgery is necessary due to the failure of conservative care to relieve Petitioner's shoulder pain. (PX #3 p. 24). Respondent's IME doctor, Dr. Gross, opined that the surgery ordered by Dr. Li was not unreasonable to treat Petitioner's condition of ill-being in his right shoulder. (RX #2 p. 19). Conservative treatment has failed, and Petitioner continues to have pain and functional limitation in his right shoulder.

Therefore, the Arbitrator orders that Respondent pay for the right shoulder arthroscopic surgery, along with any necessary follow up treatment.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC038363
Case Name	Terri L Scroggins v. State of Illinois – Department of Human Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0287
Number of Pages of Decision	25
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mallory Zimet
Respondent Attorney	Kayla Koyne

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

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

TERRI L. SCROGGINS,

Petitioner,

vs. NO: 16 WC 38363

STATE OF ILLINOIS,
DEPARTMENT OF HUMAN SERVICES

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD), and permanent partial disability (PPD), 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 27, 2021 is hereby affirmed and adopted.

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

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

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

August 9, 2022

CAH/tdm
O: 8/4/22
052

/s/*Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC038363
Case Name	SCROGGINS, TERRI L v. STATE OF IL DEPARTMENT OF HUMAN SERVICES
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Kathy Olivero
Respondent Attorney	Kayla Koyne

DATE FILED: 12/27/2021

/s/ Dennis OBrien, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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

December 27, 2021

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TERRI L. SCROGGINS
Employee/Petitioner

v.

STATE OF ILLINOIS DEPARTMENT OF HUMAN SERVICES
Employer/Respondent

Case # **16** WC **038363**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 26, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 7, 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.

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

In the year preceding the injury, Petitioner earned $**46,912.10**; the average weekly wage was $**903.31**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **no** 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 any and all amounts paid through its group medical plan under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove that she suffered an accident on October 7, 2016 10, 2017 which arose out of and in the course of her employment by Respondent.

Having found that Petitioner's injuries are not compensable under the Act, all other issues are declared moot.

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

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

Signature of Arbitrator **December 27, 2021**

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that as of the date of arbitration she was employed by Respondent, having been so employed since August of 2015. She said she works for the Home Services Program in the Department of Human Services, having started as a rehabilitation counselor trainee for six to eight months, doing home visits for assessments and then initiating services for the clients who met eligibility requirements, such as a personal care provider, emergency home response systems and home delivered meals. After her trainee period she was promoted to rehabilitation counselor performing similar duties. She said she traveled in three counties to do her home visits, driving her own vehicle, and she used her right foot to operate the gas pedal and brakes. She said her job required she walk quite a bit and climb stairs into individual's homes. She said she would also interact with vendors, getting at least three bids via email and telephone for such things as home modifications.

Petitioner said she worked out of an office in Decatur, Illinois. That building housed offices for the Illinois Department of Employment Security and Work Force Investments (WIOAA), also. About half of the employees in the building were with her agency, about half with WIOAA and Employment Security only had two employees there. She said she had a cube rather than an office as such. The building had a common break room for all employees, with a refrigerator for her agency and a refrigerator for WIOAA, as well as a microwave, coffee pot, couch, table and chairs, and television. She said she would typically put her lunch in the refrigerator. She said that area was also used for events in the building such as birthdays, retirements and work anniversaries.

Petitioner said the break room was also used for food drives. She knew of two, but only one had been done the year before. She said flyers were out to different events on the tables. For the food drives there would be flyers on the table, a flyer on the door, flyers in everyone's mailbox and by the sign-in sheet. The food drive was the WSOY annual food drive, WSOY being a local radio station. She said there had been a food drive every year that she had worked for Respondent. She said he did not participate the first year but made a monetary donation the second year to a co-worker, Brandon Mosby, a case coordinator for Respondent. When asked if she was encouraged to partake in the food drive Petitioner did not answer with a yes or no, she said it was "well supported," as three out of ten people she did assessments for benefited from food banks or food pantries, and the clients of other agencies in her building also used community provided services. Petitioner said the activity had been ongoing in the week or two before October 7, 2016, flyers had been up.

Petitioner said she had previously injured her right foot in 2007, breaking off the tip of her right fibula, the bump on the lateral malleolus on the outside of her ankle. She said she fell into a tree root and had also stretched out the medial and lateral ligaments in her foot and they were secured by Dr. Idusuyi with some spider wire. She said she did not really have issues with that right ankle after she had been treated, though she had a

couple of instances where she had some foot pain and briefly had it checked out, but it was not an ongoing issue.

Petitioner identified Respondent's Exhibit 7 as a May 2015 x-ray from Dr. Gregory's office, which he shared with Dr. Leonard. She said she was seen at that time for right lateral foot pain. She said that was not from the 2007 injury, it was a unique pain, and did not last long. She said that exhibit also reflected a second visit she made to St. Mary's emergency room. She said in 2015 she did not have any issues with rotating her right foot medially.

Petitioner said that in October of 2009 she had injured her left foot, tearing the left Achilles. She said it was surgically repaired in February of 2010. She said she had almost been struck by a car in a parking lot, and a sudden movement caused a second tear. She had a second procedure to repair the Achilles, but it did not hold, so she had a third Achilles repair in April of 2011 where a tendon from her big toe was transferred up over the Achilles by Dr. Kluesner. She said that following that treatment she did not use a cane or wear a brace, it did not affect her walking in any manner, and that she had been told it was stronger than other people's as it had been doubled up.

Petitioner said Dr. Collins at the Christie Clinic in Champaign was her primary care physician, She said she saw him for medication checkups, and he never examined her right food during those checkups. She said that prior to October 7, 2016 she had not been experiencing any issues with balance. She said she had been seen in February of 2012 for what was thought to be a mini stroke. At the time she was a practical nursing instructor through Parkland College, was in a medical unit at Provena and felt a little funny, her signature was not right, when exiting a room she went into the doorframe, and while walking down the hallway she was kind of leaning to the right side with heaviness in her right leg. She notified her supervisor, sent her students home, and went to the emergency room. MRIs were done, but nothing neurological showed up. She had not had these symptoms before and they lasted for three to four days and have not been an issue since then. She then noted that a few weeks later she passed out at her apartment, struck her head and was admitted to the hospital, again in 2012. She did not have those kinds of problems after that.

Petitioner testified that before October 3, 2016 she did not have any issues with lifting her right foot or with her right foot staying planted or getting stuck in carpet. She said October 7, 2016 was a Friday, and she started work at 7:30. She went to the break room to put her lunch and beverages in the refrigerator. A coworker liked to bring in a fruit tray on Fridays, so Petitioner said she probably took a couple of pieces of melon and pineapple with her to her desk. She said she did not have any problem with her foot getting stuck in the carpet as she walked to the break room that morning, nor did she have any issue with her right foot getting planted or picking up or moving her right foot. She said the break room had break room had linoleum in it and the rest of the building had 2 X 2 carpet tiles.

Petitioner identified Respondent Exhibit 11 as eight pages of photographs of the surface outside the break room as it existed on October 7, 2016, showing low nap carpet. She said she had never had any issues walking on that carpet prior to that date. Petitioner said that on that date she was wearing tennis shoes, one of the two normal types of footwear she wore while working, the other being casual loafers. Petitioner said her supervisor on that date was Adam Flack, who was present at the arbitration hearing, but Mr. Flack was not present at the facility on October 7, 2016 as he was in the Mattoon office.

Petitioner said that at about 11 o'clock on October 7, 2016 people were coming to pick up the food from the food drive, and some suggested they get a group photo. She said employees from WIOAA were still carrying stuff in right at 11 o'clock. Petitioner said she walked from her cubical to just outside the break room but the entrance was blocked by the two guys who were bringing in a hand truck with multiple cartons of canned goods on it. At the time she, her teammate, Brandon Mosley, and Dana Warner of WIOAA were in the area outside the break room. She said everyone was in a cheerful mood. She said as the two men with the hand truck went around the corner, one of the boxes on the hand truck fell off, onto the floor. The side of the box was probably only about one inch high, and the cans in the box that fell scattered and rolled all over the place. Several were near her. She said Dana and Brandon picked up a couple of the cans, and she proceeded to do likewise. She said she did not know how many she picked up, but the ones she picked up she put in the carton, which was by the hand truck, as did Dana and Brandon. Petitioner said that after the dozen or so cans were back in the carton, she stooped down to pick up the carton to place it back on the hand truck. She said as she picked up the carton it gave way, part of it collapsed, and the cans started to fall out of the carton. She said she did not know if she was all the way to a standing position when this happened, she may have only been part way up, still rising up. She said her first instinct was to try to keep as many cans in the carton as possible, so she tried shifting her position, but was not able to do so fast enough to prevent herself from falling. She said her whole upper body went to the right, but her right leg stayed planted. She said when this happened Brandon was in the break room and Dana was within an arms-length of her.

Petitioner said she filled out an accident report, Respondent Exhibit 2. In that report she said she said she shifted her position, and she testified that the reason she did so was a desire not to pick up the cans again, she was trying to keep as many cans in the carton as she could. While she said in that report that her foot stuck to the carpet, she testified there was no glue or tape on the carpet, that the reason her foot was stuck was just the way her body was balanced and everything happening so quickly. In that report she said her body rotated 180 degrees to the right, and she said that was caused by momentum. She said she fell to the ground, though she had some assistance to the floor from Dana. She said she could feel things in her right upper leg tearing and hear some crunching, so she knew she was seriously injured. She did not want them to call an ambulance, so they put her in a chair with rollers, she went to her desk, and put some papers away, and then was driven to St. Mary's Hospital.

She said she told the staff at St. Mary's Hospital what she had testified to in the hearing and said their records stating she walking on carpeted floor, her shoe got caught, she stumbled and twisted her right leg and fell to the floor was not accurate. She said she told them of the box of canned goods, etc. The emergency room referred her to Dr. Sullivan, an orthopedist. She said she was given a prescription by the ER staff for a walker. Later that same day she returned to the hospital as she could not move her right foot laterally and could not pull her foot up.

Petitioner said she received testing and treatment from Dr. Sullivan, and he performed surgery on her in December of 2016. She said there was no improvement following the surgery, the fracture was not healing and her foot drop was not improved. She said she left the hospital with a brace, and Dr. Sullivan later prescribed a couple of other braces.

Petitioner later was treated by Dr. Kluesner, a podiatrist, who treated her Achilles tendon and eventually performed surgery in June of 2017, performing a nerve release, but nothing to the bone as he was a podiatrist. She said initially there was no improvement, even after months of physical therapy, and it was not until March of the following year before she could start moving her right foot a little, get a little dorsiflexion. Petitioner said that before regaining some dorsiflexion she had stumbled and fallen and fractured her big toe. She said Dr. Kluesner had been having her use the same ankle foot orthotic (AFO) brace she was using as of the date of arbitration, which keeps her foot in an upright position so it does not drag, but she had taken it off to get in the shower and that was when she fell, when she did not have the brace on. She said she has been in a brace of one nature or another since the time of this accident.

Petitioner said Respondent sent her for an examination by Dr. Farley in St. Louis in June of 2019. She said Dr. Farley told her she might need additional surgeries in the future, including a knee stabilization surgery. She continued to see Dr. Kluesner to discuss further treatment, and she was scheduled for a tendon transfer surgery by Dr. Kluesner in late 2019, but she canceled it as she was starting to get some movement back, and was hopeful she would get more, and would prefer to have that occur naturally rather than reroute a tendon from the back of her leg to the front of her leg. She said this would be totally different from the prior Achilles tendon surgery she had.

Petitioner said she went to see Dr. Bonutti to discuss treatment to the right leg, and he referred her to Dr. MacKinnon at Washington University. She said that because of COVID she saw Dr. MacKinnon via televisits. Dr. MacKinnon told her a third revision of the nerve injury could be done, but she had to get to a certain body mass index before she could have that surgery, losing approximately 100 pounds. She said she lost 40 pounds but gained 15 of it back, but was, as of the date of arbitration, working with a weight loss program, but had not yet met her goal. She said she last saw Dr. McKinnon in January of 2021, and Dr. McKinnon at that time was looking at two possible surgeries, one to release the common peroneal nerve right under the knee, the other to release the superficial peroneal nerve.

Petitioner said the braces she had been using since this injury occurred are not very durable, the first one broke very quickly, and her current brace had been cracked for a long time, it was being held together with casting tape and electrical tape, but she was having trouble getting it replaced. The foot doctor did not want to prescribe for the knee and the knee doctor never wanted to prescribe something for the foot, while the best fitting brace is a one piece brace instead of a two brace combination as she currently has, and the insurance did not want to pay for it. She said she had Cigna as her group health insurance through the State of Illinois, and then she had Aetna as her carrier.

Petitioner said that since her return to work she had medical appointments which were noted in Petitioner's Exhibit 13, her attendance records for the period since her return to work through January of 2021, as she has had to take off work to attend those medical appointments. She said to minimize time away from work she scheduled therapy after work and appointments after 2 o'clock in the afternoon so she could work most of the day. She said to see Dr. Kluesner she had to drive to the Champaign area, and to see Dr. Bonutti she would have to travel to Effingham, Illinois. She said extended physical therapy sessions, such as an evaluation followed by therapy, would require her to miss work.

Petitioner testified that she was 49 years old on the date of the accident and did not know how long she intended to work, saying she would work as long as she could. She said she is currently a Rehabilitation Counselor Senior, but the only real difference in her duties was training new staff and being a resource for counselors who were not as experienced as her.

She said that after returning to work she was not making home visits as she could not drive, but she was assisting the department in catching up with a great deal of filing that was way behind, sorting, stacking, and filing. She primarily worked at a desk from February until April 15, 2017, when she was released by Dr. Sullivan. She said she resumed making home visits as a rehabilitation counselor. She said her work was harder, that in December after her first surgery she was told she needed to use a cane, and before that using stairs and walking on uneven ground was difficult, as was walking long distances. She said she does not currently use the cane all of the time in the house or places where things are flat, but if she is someplace unfamiliar or does not know how far she has to walk, or what kind of terrain it is, the cane is always in the car. She said she did not wear the AFO brace all of the time as it is uncomfortable and it hurts. She said it is cracked and flexes outward. She said she did not always wear it when she was outside of her home, but she did wear it most, but not all, places that she went.

Petitioner said that she does not put files in the bottom drawer of lateral filing cabinets as it was hard for her to stoop down and get them. She also avoids messing with the shredder when it was full as it was an enclosed, tight space.

Petitioner said that as of the date of arbitration she was earning the same or more as she had on the date of the accident due to her becoming a rehabilitation counselor senior and annual raises, though she said her step was out of line so it affected the payment of back pay and interest. She said she is a licensed professional nurse and had applied for a health facilities surveillance nurse position prior to the accident and was scheduled for an interview for that the week after the accident, and had to cancel the interview. She said she did not know if she could do that at this point.

Petitioner said that as of the date of arbitration her foot felt like it was under pressure and had a pins and needles feeling in the entire foot, like it was asleep. She said the intensity of that varied. She said every once in a while she would feel a jolt that would do down from the knee through the toes. She said a light touch might create a disproportionate amount of pain. She said movement in the foot had improved somewhat, she could pull her foot to a neutral position, but it wanted to go to an extended position when not in the brace, and her toes would curl unless she consciously straightened them. Her knee complaints varied with the weather, she said, with pressure on the nerve causing more pain at some time than others. She said there was chronic pain in the knee. The right big toe ached. She said she continued to use both the AFO brace for the foot and the knee brace., but nothing for the big toe. She has hydrocodone, but she does not take it very often, she does not like taking it. She said she loved to fish but did not have the ability to stay in a boat very long as she used to, and her balance is off due to the drop foot. She said fishing with her nieces and nephews from the rocks was hard due to difficulties getting up and down. She said that while she used to teach martial arts she no longer saw that as an option. She said she paid someone to maintain her yard. She said she had gotten used to sleeping in pain, but adjusting her position in bed was difficult.

Petitioner said she spoke with Cadi Putnam of Creative Case Management several times by phone on the first weekend following the accident. She said in her conversations with Adam Flack she never told him she was walking at the time the accident occurred, or that she was loading the boxes of food into the pick up vehicle, as they sent in individuals to load the truck. She believed she told Mr. Flack about a box of vegetables breaking apart.

Petitioner said that prior to the date of this accident there had been occasions while working when she had to turn to her right or left to go to an area of the building. She said she had never had difficulties turning her right foot before October 7, 2016.

On cross examination Petitioner said she did not currently have any specific work restrictions, her doctors had told her to do what she could do. She said she was working full duty. She said she was not currently treating for this injury, she was not following up with anybody or actively pursuing any treatment at the time of arbitration, and she was not at the point where Dr. Mackinnon would do a procedure.

Petitioner said she had been able to perform her job satisfactorily since going back to work, had received performance evaluations since returning to work, and that all of her evaluations have been positive. She said she had received no complaints from her supervisors over her job performance since returning to work. Her job activities had changed, but that was due to COVID, they were not doing home visits, those were being performed telephonically, and she had worked remotely since March 19, 2020, only being in the office a handful of days since then. She said before this accident she would fish at a friend's cabin on Lake Pana nearly every weekend from Friday night through Sunday.

Petitioner said that on the date of the accident she came out of her cubical as someone said they should get a photograph of everyone who had helped with the food drive. She said they had about 900 pounds of food, and as a small office they were proud of that. She said she was heading to the break room for that photo.

Adam Thomas Flack

Mr. Flack was called as a witness by Respondent. He said he was employed by Respondent as a Public Service Administrator covering the Decatur and Mattoon offices. He said he was so employed on October 7, 2016. He said he began working for Respondent on September 7, 2011. He said he was Petitioner's supervisor, and had been since she was hired in the spring of 2015.

Mr. Flack identified Respondent Exhibit 1 as an OSHA form which he filled out following Petitioner's injury, signing it on October 13, 2016. He said he took a picture of the carpet in that area of the office several weeks to months later, after he was requested to do so. He said the photographs in Respondent Exhibit 11 were of the area of carpet right outside the break room in the Decatur office. He said the carpet in that area had not changed since the time of this incident.

Mr. Flack said that there was a food drive that their co-located partner, WIOAA, held every year. He said his office had no responsibility for it but they like to have a friendly office competition, with no prizes, just bragging rights for who collected the most. He said generally somebody from the WIOAA staff would be responsible for getting the food out of the building and to the food pantry. He said the food drive no longer was done, the year of the incident was the last time.

Mr. Flack said participation in the food drive was voluntary, Respondent did not organize it, WIOAA did that. Employees were not supposed to do it during work hours, those who participated did it either during breaks or lunches. People were not ordered by DHS to help with the food drive, and while he could not remember who did not participate by name, almost everybody did participate. He said he did not keep track of who did or did not participate as it was voluntary. He said he did tell people that if they were going to participate it needed to be during the lunch hour or during breaks, they were not to use work hours for that.

Mr. Flack said that people who did participate did not get any extra benefits, such as time off. He said employees could leave the office during their breaks or lunch. He said Dana Miller, who witnessed the fall, was not a state employee, she was on the WIOAA staff. He said it was not part of Petitioner's job duties to do community outreach or organize events such as the food drive.

Mr. Flack said he was still Petitioner's supervisor as of the date of arbitration. He said she was a wonderful employee and had done a fantastic job since returning to work following her surgery. He said he always mentioned in her annual performance evaluation that she was extremely thorough and well organized, was personable with her caseload and gave everyone every ounce of time they needed to justify the services they used. He said Petitioner would say he just said that as she was a warm body in the office, but he said he would really hate to lose her as she was fantastic. He said there was a short period of time after she came back that she had a limited work schedule as she was not to do any major walking, etc., and that was for a period of several months. He said she still worked hard to do as much as she possibly could during that time.

On cross examination Mr. Flack said Petitioner was a very detailed in respect to her reports or other documents she prepared at work. He said she was honest and straightforward. He said did not know she was picking up cans that had been dropped by someone involved in the food drive as he was not present when it occurred, he was in the Mattoon office that day. He said he got several calls that day, one from Dana Miller, and he was sure he received another call or email about it. He said he did not talk to Petitioner that day as other employees stepped in, took care of what needed to be done, and took her to the hospital. He did not recall if he spoke with Petitioner over the weekend as he usually turned his state phone off during the weekend. He said that due to the length of time since this occurred he could not remember if he was in the Decatur office the following Monday, but that he was usually there three days a week and in Mattoon two days per week. He said he could determine that if he checked his calendar. He said he generally was in Decatur on Monday, Wednesday and Thursdays, so he would have been there barring emergencies, or additional meetings or trainings.

Mr. Flack said he did not fill out the OSHA report at that time as he had asked his boss, Randy Staton, if he was supposed to fill anything out and where he would find it. He said it took a couple of days to get the report form, Respondent Exhibit 1, downloaded from a website. He did not think he had taken any notes prior to filling out the report. He said what whatever was on the form, including the description of the injuries, was what Petitioner told him, he did not receive any additional medical records accounting for what happened. He said he would have filled out the report on the date he signed it, October 13, 2016. He was shown Respondent Exhibit 2 and asked if he knew Petitioner had completed that form, which was dated October 11, 2016. He said he did not think he had seen it, but it was a long time ago. He said he did not think he had ever seen it prior to the date of arbitration. He said that it was his understanding that Petitioner was holding a box at the time the incident occurred. He said the vehicle that food was being loaded into was outside the building and was

supplied by the person who generally manages the food drive. He said Petitioner was not outside at the time of the incident, she was outside the break room, on the carpet, just outside the doorway.

Mr. Flack said he had spoken with Dana Miller several months after the incident, asking if she had any pictures as it was his understanding from someone else in the office, he could not remember who, that she had taken pictures. She reported she did not have pictures but did tell him that Petitioner was assisting to help carry boxes of food out to the vehicle, tripped on the carpet and fell on her knees.

Mr. Flack said that on the days when he was in the Decatur office he would interact with Petitioner almost every time. He said he did not see her having difficulties walking on the carpet in the building prior to the incident, but after she had gotten her brace and had been to the doctor several times he noted a little bit of a limp. He said she tried to stay in one place for the most part when she came back to work. He said she tried very hard to do that, and if she was not able to do so on a particular day, she would stay home.

Mr. Flack said he was not familiar with Susan Hammond or Cadi Putnam.

Mr. Flack said he never instructed any of Respondent's employees that they should not partake in the food drive, saying it was completely voluntary for them, whoever wanted to participate could do it for the community. He said he never instructed anyone to participate or not to participate, it was completely up to them, as long as they were not using work time to do it. He said some of the clients the Department of Human Services provided services to potentially could be part of the community the food drive served. He said he had seen flyers for the food drive in different locations in the building in October of 2016. He said the food drive had occurred for several years in a row, but 2016 was the last one. He said he knew there was a kind of competition between agencies with respect to the amount of food collected, but he did not remember who kept the unofficial tally. He said he did not know there was a photograph taken with respect to the food drive, but said that would be nice, as he understood the drive had been rather successful. He said in the week before the incident, while in the Decatur office, he was aware food was being collected, he had donated food himself, putting it in the break room.

Mr. Flack said that following this incident Petitioner was not issued a reprimand or warning of any sort for what occurred on October 7, 2016, nor did any other employee.

Mr. Flack said that he had been unaware that Petitioner had been dealing with a breaking or broken box, or anything about the box. He said the only person who contacted him asking for more information about this accident was the Assistant Attorney General who was present. He said the carpet outside the break room was quite similar to the carpet in the hearing room, very thin, even the replacement squares used in other areas of the office were very thin.

Mr. Flack said the shoes Petitioner wore to work were similar to those she was wearing at the hearing, tennis shoes.

MEDICAL EVIDENCE

Pre-Accident Medical:

Dr. Kluesner saw Petitioner on July 19, 2016, less than three months prior to this accident, with Petitioner complaining of pain in the right Achilles tendon that had been bothering her on and off for three

months. Physical examination revealed pain and tenderness along the insertional area of the Achilles tendon on the right foot, palpable thickening of the Achilles tendon at its insertion and a bony protruberance in that area. X-rays at Christie Clinic on that date indicated an old non-united avulsion fractures off the tips of the medial and lateral malleoli of the right ankle, an old non-united avulsion fracture dorsally at the talonavicular joint, large Achilles and plantar calcaneal spurs, as well a soft tissue swelling of the ankle. Dr. Kluesner told Petitioner to begin using a heel lift for that foot. The diagnosis was right Achilles tendinitis, retrocalcaneal exostosis and Haglund's deformity. (RX 8 p.11,12; PX 6 p.2)

Petitioner was seen by Dr. Kluesner again on August 17, 2016, and Petitioner reported improvement in right foot pain, having minimal to no pain on this date.(RX 8 p.16

Post-Accident Medical:

Petitioner was seen in the emergency room of St. Mary's Hospital on October 7, 2016. The history given at that time was "patient states just prior to arrival she was walking on carpeted floor in (sic) her shoe got caught on the carpet and she stumbled and twisted her right leg and fell to the floor." Physical examination at that time revealed mild edema about the right knee, tenderness to palpation on the lateral and posterior aspect of the right knee, increased pain with active flexion of the right knee, mild tenderness to palpation about the lateral aspect of the right ankle, and the Achilles tendon was intact. X-rays of the knee revealed an acute, comminuted and displaced fracture of the fibular head with migration of the fibular head fragments. X-rays of the right ankle revealed severe osteoarthritis of the ankle joint and intertarsal joints and marked soft tissue swelling. A knee immobilizer was placed on her right knee and she was use a walker and not weight bear on the right leg. (PX 1 p.2,4,7)

Petitioner was again seen in the emergency room of St. Mary's Hospital on October 11, 2016. With continued pain in her right lower leg. She had run out of pain medication and needed an extension of her work release until her appointment with Dr. Sullivan on the following Monday. She received a prescription for hydrocodone and a work restriction for one week, until seen by Dr. Sullivan. (PX 1 p.10-13)

Petitioner was seen by Dr. Sullivan at Decatur Orthopedic Center on October 17, 2016. History given at that time was of recently twisting her knee at work. She advised him of ankle pain and said she was unable to raise her foot. It was noted Petitioner had previously had surgery for instability. Physical examination did not show any swelling and was essentially normal with the exception of significant discomfort through the arc of motion of the knee. He diagnosed acute pain of the right knee and noted the previous finding at the hospital of a right lateral fibula neck fracture with foot drop. He told her she might require surgery and that she likely had significant osteoarthritis prior to this accident and was eventually going to require knee replacement. He wanted her to regain motion prior to surgery and said the knee immobilizer was only going to make her stiff and should be discontinued. He felt her foot drop would resolve, and if it did not he would order an EMG. He ordered an AFO brace at this visit. Petitioner was released to work but with weight-bearing protection via a walker, and no driving.(PX 2 p.2,3,6,7)

Petitioner received physical therapy at Apex Network Physical Therapy from October 20, 2016 to December 13, 2016 and from January 30, 2017 to February 13, 2017. Her history to that facility was of getting ready for a food drive, going to lift something, losing her balance, having her foot planted and wrenching her

knee. During that period of time her capabilities increased, her complaints decreased, but, to a lesser degree, persisted. (PX 3 p.3-43)

Petitioner saw Dr. Sullivan on November 14, 2016, having not yet received the AFO brace, and little change in her foot drop and continued lateral knee pain. Her examination showed no atrophy or muscle weakness but tenderness to palpation over the entire lateral knee. She continued to have significant discomfort through the arc of motion, but more so at the extremes. X-rays showed no healing of the fibular head fracture and diminished bone quality, as well as significant degenerative changes. Dr. Sullivan did not think physical therapy had helped. He ordered an EMG and felt she would require surgery. He wanted to wean her from the walker and ordered a hinged knee immobilizer which was to be unlocked to allow full motion. He released her to work but she was to use the AFO brace and the hinged knee brace at all times. (PX 2 p.8,9,12)

On November 23, 2016 Dr. Michaels performed EMG/NCV testing. That testing had findings consistent with a severe right peroneal neuropathy, extensive denervation and no voluntary motor unit potentials. There was also evidence of mild peripheral polyneuropathy. (PX 2 p.13)

Dr. Sullivan saw Petitioner again on December 12, 2016 and reviewed the neurologic testing with her. X-rays were performed and again showed no healing of the fibular head fracture. She continued to have a foot drop. He felt she definitely needed surgery at that point, a repair of the lateral ligament complex and a possible internal fixation of the fibular head, as well as a dissection and neurolysis of the peroneal nerve to determine the condition of the nerve. Petitioner also wanted the surgery so it was to be scheduled. Her restrictions remained the same. (PX 2 p.18,19,22)

Dr. Sullivan performed a peroneal nerve release and fibular head open reduction internal fixation and lateral ligament complex repair surgery at St. Mary's Hospital on December 23, 2016. He saw her post-operatively on January 5, 2017 and Petitioner was in her immobilizer and using a walker. Her knee appeared more stable. X-rays showed some approximation of the bone fragments at the fibular head. It did not appear that the surgery had helped her peroneal nerve problem, but he did not know if her nerve deficit was permanent. He ordered a custom AFO brace, and physical therapy was ordered to begin in one week. Her restrictions were essentially unchanged. (PX 1 p.18,19,29,30)

On February 6, 2017 Petitioner reported to Dr. Sullivan that she was tolerating the physical therapy well. Physical examination was appropriate according to the doctor for this point in her recovery. It was planned to allow her to start partial movement by unlocking her immobilizer to a set degree and then to increase the amount of flexion over a period of weeks. Her restrictions were to stay the same. Petitioner was again seen on March 20, 2017 and she reported she was doing fairly well, with minimal pain. Her physical examination was unchanged with the exception of Petitioner now having increased range of motion. Because of her increased stability Petitioner was allowed to advance to full weight bearing and the immobilizer was unlocked to full range of motion. She was to continue physical therapy and could be out of the immobilizer during that therapy. Petitioner's restrictions remained the same, but she was now allowed to drive. A shorter hinged immobilizer was also ordered. (PX 2 p.33,34,36-38,40,41)

Petitioner was seen at Pro Physical Therapy in South Carolina on January 9, 2017. Petitioner was seen on January 17 and 19, 2017 and on each occasion reported that her knee was doing better and the therapist on both occasions reported Petitioner was gaining knee motion. On January 23, 2017 Petitioner was seen for a

final time and in the discharge summary of that date it was noted that Petitioner had made gains with strength, motion and her sense of self-movement and body position. She was discharged as she was returning to Illinois. (PX 4p.1,3-6)

Petitioner received physical therapy from February 14, 2017 to September 21, 2017 at Athletico Physical Therapy. The history given to the therapist by Petitioner on February 14, 2017 was of her lifting a box at work and twisting, causing the injury. During the course of her therapy at this facility Petitioner reported increased activities at work, first with a walker as an aid, driving, and going out in the community to meet with clients, which she said went better than she thought it would. She reported that she had been able to go fishing and, though challenged by the uneven ground, she did okay. She also reported increases in her range of motion At times she noted a feeling like her leg would give out when not wearing her brace. She advised the therapist on September 7, 2017 that she felt she was doing as well as she thought she could. When last seen on September 21, 2017 Petitioner continued to have some functional deficits with strength and range of motion in the right ankle, but her balance had improved as had her eversion. Both of her short term goals had been met, but none of her four long term goals had been met. (PX 5 p.4,13,16,25,29,35,36,42,90.94,106,107)

Petitioner saw Dr. Kluesner, a podiatrist, at the Christie Clinic on April 3, 2017. The history to Dr. Kluesner was of an accident at work where she suffered a fall. She said she had diffuse pain in the right foot and ankle and wore an AFO brace for her right foot drop. His examination confirmed the right drop foot as well as diminished sensation along the areas innervated by the common peroneal, superficial and deep peroneal nerves. He felt Petitioner had a traumatic injury of the common peroneal nerve, osteoarthritis of the right ankle, right foot drop, gastrocnemius equinus of the right leg as well as the fracture at the proximal end of the fibula. He recommended an EMG/NCV to determine if the nerve was still functional. (PX 6 p.3,4)

A CT scan of the right knee was performed on April 7, 2017, and it showed the old fibular fracture with nonunion, and partial tears of muscles and tendons were of concern to the radiologist. (PX 6 p.6,7)

Dr. Kluesner saw Petitioner again on April 12, 2017 and complaints and physical examination findings were unchanged. His review of the CT scan found bony fragments along the lateral knee and proximal fibula in the distribution of the common peroneal nerve. Further treatment options were deferred until after the EMG/NCV was performed. (PX 6 p.9,10)

Dr. Habib performed an EMG/NCV study on May 10, 2017. He said it was an abnormal study as it showed evidence of a severe right common peroneal neuropathy. (PX 6 p.12)

Petitioner was seen by Dr. Kluesner on May 23, 2017 in follow up of the EMG testing. He reported his physical examination was essentially unchanged. He did palpate the peroneal nerve and that resulted in a positive Tinel's sign, in the area of the previous surgical incision which told him there was still some sensory function intact to the common peroneal nerve, and the possibility of restoring function to Petitioner's right foot and ankle with a nerve release. Petitioner said she was happy to just follow up with Dr. Kluesner at that time. Petitioner was then seen on June 16, 2017 with continued pain in the right foot and was being seen for presurgical consultation. Dr. Kluesner in his examination noted that Petitioner was recruiting her peroneal and extender tendons. Surgery to inspect and release the common peroneal nerve was then scheduled. (PX 6 p.20,21,24)

Petitioner was seen by Dr. Sullivan on June 19, 2017, six months from her fibula surgery. Petitioner reported she was doing fairly well, her pain was well controlled, and she had been weight-bearing as tolerated. Her knee was significantly more stable, but there was still some laxity, and she now had weak eversion. X-rays showed significant degenerative changes as well as some gapping of the lateral knee with weight-bearing, indicating some persistent instability. Dr. Sullivan felt Petitioner was doing relatively well, though she continued to need a knee brace. She had gained some aversion power, which was a good sign, He told her that because of her degenerative findings she might require a total knee replacement in the future, and to stabilize the knee she might need some revision implants. (PX 2 p.42,43)

Dr. Kluesner performed surgery on Petitioner on June 29, 2017, performing a neurolysis/decompression of the right common peroneal nerve and a fasciotomy of the right lateral compartment. He found Petitioner had significant scarring that was directly adherent onto the common peroneal nerve near the previous fibular head surgical site. He released the nerve from the scar tissue and from the fascia near the peroneus longus muscle. He said the nerve looked quite diseased because of the significant scar tissue. (PX 6 p.30-34)

Post-operatively Dr. Kluesner saw Petitioner on July 3, 2017 and July 17, 2017, and he noted it could take up to a year for the nerve to recover, if it recovered. He ordered physical therapy. On the latter date he allowed Petitioner to return to work with restrictions of limiting her squatting or stooping, but allowing her to drive. On August 28, 2017 Dr. Kluesner found Petitioner's toes had regained some strength and dorsal flexion of the toes, but she continued to have weakness. She was to continue in physical therapy, and her work restrictions continued. On October 11, 2017 Petitioner reported increased sensation on the top of her right foot and said she could bend her foot more than she had been able to do before. Petitioner was to perform stretching exercises, and her restrictions were to continue. (PX 6 p.36-40,42,43,45-47; RX 8 p.18,19)

Petitioner was seen by another podiatrist, Dr. Morris, on December 29, 2017, reporting that she had injured her tight foot a day earlier when she tripped and felt a popping sound in the foot. Physical examination showed all muscle groups on the left to be 5/5, with decreased dorsiflexion. X-rays showed a small fracture to the dorsal aspect of the proximal portion of the distal phalanx of the right hallux. It was suggested she just continue wearing her shoe as her AFO brace would reduce stress along the hallux. (PX 6 p.48-50)

Petitioner was seen by Dr. Sullivan on December 18, 2017, approximately a year after her fibula surgery. She said her pain was well controlled, was weight-bearing as tolerated, used her knee brace and required an AFO brace for her footdrop. She reported that the motor function in her foot was improving. She said she did not feel as stable when not wearing her brace. He encouraged Petitioner to use a cane to prevent falls. He urged her not to have the tendon transfer recommended by another physician. He suggested she return on an annual basis for films. No mention of restrictions was made in this office note. (PX 2 p.45,46)

Petitioner saw Dr. Kluesner on January 10, 2018. He noted she had definite improvement in recruiting the extensor digitorum longus as well as definite improvement on eversion against resistance, which felt was now 4/5. He noted she was able to hold her foot in the frontal plane and her previous varus alignment was improved. He wanted to see her back in three months to see if there was additional improvement. Dr. Kluesner saw Petitioner on March 7, 2018, and he found her to have additional improvement in strength on dorsal flexion of the right ankle and found she was able to fire the tibialis anterior tendon and the flexor digitorum longus, getting her ankle to about neutral. He noted she had relatively good strength on eversion against resistance. He

advised her to give it more time, as there was a certainty for continued improvement. He told her to work on strengthening the anterior compartment in hopes that with improvement she would not need the AFO brace. He said she had experienced significant improvement in the ankle, and he would see her again in three months. (PX 6 p.51-54)

When seen on June 5, 2018 Petitioner told Dr. Kluesner that she was doing well, had improved since her last visit, and had continued to see improvement in her strength. During his examination Dr. Kluesner noted she still had some numbness to the dorsal aspect of the right foot and anterior ankle in the area of the peroneal nerve. Petitioner could again almost get the ankle to neutral, and he said she definitely had improved strength on eversion and dorsiflexion, keeping her ankle in a neutral position and dorsiflexing the ankle to neutral. She was to continue using the AFO brace, but it was noted that she could see continuing improvement for another year. Petitioner returned to see Dr. Kluesner on September 5, 2018 with further improvement in eversion strength and improved dorsal flexion of the extensor digitorum longus. He prescribed a new carbon fiber brace. (PX 6 p.55,56,59,60)

On March 5, 2019 Petitioner told Dr. Kluesner that she was doing very well with mild, intermittent symptoms. Her eversion to resistance had improved to 5/5 and her dorsiflexion to 4/5. He found she was able to hold her ankle into neutral position on her own and there was no evidence of significant instability. He said she continued to improve. Petitioner was seen six months later on September 4, 2019 and her examination was similar to her last examination. The doctor advised Petitioner that she could continue to use the AFO brace is she wanted to, but she probably was not going to gain any more strength. Petitioner returned on December 4, 2019 with similar findings. Dr. Kluesner said Petitioner had regained about 50% of her strength but still need the AFO brace to walk. He noted her arthritic changes to the right ankle were likely present before the injury and were not causing her significant problems. As he had before, Dr. Kluesner discussed the possibility of a posterior tibial transfer through the interosseus membrane to restore dorsal flexion strength as well as a likely right tendo Achilles lengthening. Petitioner did not choose at this time to have those surgeries. (PX 6 p.61-64,72,73)

Petitioner was examined at Respondent's request by Dr. Farley on June 11, 2019. The history Dr. Farley received was that on October 7, 2019 Petitioner, "during normal work responsibilities" was in the break room at the office and was bending over to pick up some canned goods and the box she was holding started to give way, she shifted her position, her right foot got stuck in the carpet, and she felt immediate pain. Dr. Farley reviewed a great number of medical records. His physical examination of June 11 showed Petitioner's knees had a varus deformity when standing, and the fibular head was not in the usual position. He also found grade III insufficiency during flexion, and tenderness to palpation on the lateral aspect of the knee. He found Petitioner could bring her right foot to approximately neutral, but had 4/5 strength to resistance and 4/5 eversion testing. He said the ankle was somewhat globally tender, including at the Achilles insertion site and around the tip of the fibula, the tip of the lateral malleolus and the tip of the medial malleolus. She had some anterior joint line tenderness. Dr. Farley had x-rays taken of both the right knee and ankle. The right knee x-rays showed a chronic malunion of a proximal fibula fracture with proximal displacement of the fracture of 8 to 9 mm. There was no severe medial compartment loss, but the lateral compartment had a larger gap likely due to lateral ligamentous insufficiency due to the proximal fibula fracture. X-rays of the right ankle demonstrate degenerative change within the medial and lateral gutter with calcification of her deltoid and lateral ligamentous

structures consistent with previous trauma such as sprains or non-displaced fractures. The previous fracture of the right great toe was also seen. (PX 7 p.2-8)

Dr. Farley noted that on the day of the examination Petitioner's complaints were of pain, loss of motion, instability, and altered sensation in the right leg. He did not sense any malingering or symptom magnification. His diagnoses were consistent with Petitioner's treating physicians, instability of the right knee due to the displaced nonunion of the proximal fibula fracture and common peroneal nerve palsy with weakness of ankle dorsiflexion and eversion and decreased sensation of the right foot, as well as chronic post traumatic degenerative arthrosis of the right ankle. Dr. Farley felt Petitioner's right knee injury was related to the incident at work, and the peroneal nerve injury was a known complication of varus instability and therefore also caused by the incident of October 7, 2016. He said the chronic ankle degenerative joint disease had been set in motion many years earlier with a previous fracture of the ankle. (PX 7 p.8,9)

Dr. Bonutti saw Petitioner for her right knee pain on May 28, 2020. Petitioner was complaining of lateral right knee pain and she also described her right foot difficulties to him, but only said her foot was currently stiff. His physical examination revealed weakness of the tibialis anterior and peroneal musculature with some weakness with dorsiflexion, although Petitioner was able to get into a neutral position. She had diffuse tenderness about the ankle as well as diffuse tenderness about the ankle. Flexion of the knee was reduced. She had decreased sensation diffusely on the lateral aspect of the dorsum of the foot. He reviewed x-rays for the fibular head fracture. He suggested a fourth EMG to see if there was continued improvement or if Petitioner had plateaued. He also ordered an MRI of her right knee as her symptoms suggested possible meniscal pathology. He was not sure instability was her primary problem and whether she really needed a brace for stability, though he believed the AFO brace should be continued. (PX 8 p.2,4)

Dr. Mahmood performed an EMG/NCV study on Petitioner on June 1, 2020. He said it showed chronic right common peroneal mononeuropathy with ongoing denervation but with no evidence of myelinated fiber polyneuropathy, plexopathy or muscular disease. (PX 8 p.21,22)

An MRI of the right knee performed on June 2, 2020 showed deformity and scarring related to an old fracture with internal fixation in the had and proximal right fibula and around the periarticular soft tissues in the posterior lateral corner of the knee. It also showed evidence of an old partial tear of the anterior cruciate ligament. There was no evidence of a meniscal tear, but there was a small amount of effusion. (PX 1 p.5)

Petitioner was examined by Dr. Bonutti on June 9, 2020, and her examination was unchanged. He noted the MRI did not show any significant meniscal damage. He strongly believed diabetes was contributing to Petitioner's peripheral neuropathy and he wanted her to see a peripheral neural surgeon to assess whether fibular fragments had injured those nerves. He noted that while Petitioner subjectively complained of instability of the knee, he, objectively, could not find any instability, and he could not understand her complaints of instability. He said catching sensations could be a result of her use of the AFO brace and her guarding her ankle. He felt a change in her AFO brace might be an option. He said an arthroscopic examination was an option, but he did not see that it would be of substantive help with her symptoms. Petitioner wanted to consider the AFO change and an arthroscopic examination. She was to see Dr. MacKinnon, a neural surgeon, for possible repeat peroneal nerve release. (PX 8 p.10,11)

Petitioner had a telemedicine visit with Dr. MacKinnon on September 10, 2020. It was noted that Petitioner had addressed weight loss surgery several years earlier but the insurance company would not cover it at that time. After reviewing physical examination and radiographic records Dr. MacKinnon was of the opinion that Petitioner would be a candidate for a superficial peroneal nerve decomposition and, if needed, a third revision of her common peroneal nerve based on her ongoing weakness of dorsiflexion, positive Tinel's at the fibular head and at the superficial peroneal nerve, pain in a superficial peroneal distribution and a history of at least three falls in the preceding year. Dr. MacKinnon made it clear, however, that surgery was not safe with Petitioner's BMI and she would need to reduce her BMI to 30-35 prior to surgery. She recommended a bariatric surgery which would help Petitioner's overall health and make her a safer surgical candidate. (PX 9 p.7-9)

Dr. Zaidman at Washington University performed another EMG/NCV of Petitioner's right leg on September 28, 2020. He said the studies showed a right incomplete common peroneal neuropathy along with involvement of several other muscles indicating a possible superimposed incomplete right lumbosacral radiculopathy or incomplete right sciatic neuropathy with denervation seen in L5/S1 muscles to support radiculopathy with some findings arguing against sciatic neuropathy. (PX 9 p.15,16)

Petitioner saw Dr. Kluesner on September 29, 2020. She reported that she had been seen by the peripheral nerve surgeons at Washington University and they had recommended a follow up EMG which had been performed the day prior to this visit. She wanted to discuss the possibility of a tendon transfer if no nerve surgery was possible. At this examination Petitioner could hold her ankle into neutral position for a few seconds but then it would tire out. (PX 6 p.82)

Petitioner had a telemedicine visit with Nurse Practitioner Sparkman on October 19, 2020. This was a consultation for evaluation of medical problems caused or aggravated by morbid obesity. After a review of Petitioner's BMI, past medical and surgical history and physical examination, it was felt Petitioner was an excellent bariatric surgical candidate, and Petitioner wanted to have the gastric bypass surgery they discussed as soon as possible. (PX 9 p.21-24)

When seen by Dr. Bonutti on December 15, 2020 Petitioner was complaining of bilateral knee pain. She had seen Dr. MacKinnon told her she felt a third nerve surgery might help her peroneal nerve problem, but she would not perform the surgery until Petitioner had reduced her BMI from 55 down to 30. At this visit Petitioner was complaining "bitterly" of instability. On examination, Petitioner's knees appeared to be stable, until weightbearing, at which time, due to her 55 BMI, she stretched out her lateral collateral complex. She continued to have foot drop with peroneal nerve weakness and a positive Tinel's sign over the peroneal nerve. Dr. Bonutti felt the peroneal neuropathy was Petitioner's primary problem and that revision surgery of that could give her relief, but her severe diabetes, severe obesity and generalized weakness made him pessimistic. He thought her lateral collateral laxity was due in part to weakness in the ankle caused by the peroneal nerve damage. He agreed no surgery could be performed until her BMI was markedly reduced into the 30s. Because of this he was not sure he could help her. He suggested bariatric surgery, but she said her insurance company would not cover it. He offered to write a letter to the insurance company as due to her multiple problems she clearly needed it. Petitioner was argumentative and adamant she wanted surgery but the doctor, in their hour meeting, made it clear any repair would stretch out again due to other non-addressed problems, such as ankle

weakness. He gave her a prescription for a functional brace. He said while Petitioner told him she had lost 90 pounds, she did not look substantively different than she had at their last visit. He said she was upset at the end of their visit. (PX 8 p.25-27)

An MRI of the left knee performed December 23, 2020 showed small to moderate effusion, normal menisci, a thickened posterior cruciate ligament suggesting a partial thickness tear and moderate sprain injury and osteoarthritic degenerative changes. (PX 1 p.22)

Dr. MacKinnon had a telemedicine visit with Petitioner on January 7, 2021. An MRI of the lumbar spine had been performed, and Dr. McKinnon stated that it showed a moderate sized left central disc extrusion with a large migrated component causing severe central spinal canal stenosis and severe left lateral recess stenosis. The thecal sac stenosis was exacerbated by a congenitally narrow spinal canal. Peroneal nerve released was again discussed, but Dr. MacKinnon said that her BMI had to be reduced before surgery due to risks in healing caused by her comorbidities. It was noted that bariatric surgery was being discussed and Petitioner was on a weight loss program and, according to Petitioner, had already lost 40 pounds. (PX 9 p.26,27)

ARBITATOR'S CREDIBILITY ASSESSMENT

Both Petitioner and Mr. Flack appeared to be forthright in their testimony. Neither appeared to exaggerate, nor did either attempt to testify about things that were beyond their knowledge. Mr. Flack was quite frank about his not being able to remember exact dates and times he had conversations or did things, noting the long period of time between the date of accident and the date of arbitration. The facts both testified to remembering appeared to be accurate and neither attempted to avoid answering questions on cross examination. Both are found to have been credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on October 7, 2016, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, above, are incorporated herein.

Petitioner has the burden to prove by a preponderance of the credible evidence that her injury arose out of and in the course of her employment with Respondent.

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. Sisbro, Inc. v. Industrial Commission, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003); McAllister v. Illinois Workers' Compensation. Commission, 2020 IL 124848 , ¶32)

Section 11 of the Workers Compensation Act states that:

> Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program. (820 ILCS 305/11).

What appears to be the only voluntary recreation activity claim that has been decided by the Commission since *McAllister*, makes no reference to, nor does it rely on, *McAllister*. (Stevens v. Triad Community Unit School District #2, 21 IWCC 0280). The Commission in Stevens affirmed the arbitrator's finding that the accident in that case arose out of an in the scope of Petitioner's employment and the standard outlined in McAllister was not applied. The facts in Stevens are not similar to the case at hand, as the Petitioner in Stevens was a teacher who was injured when she went outside for assigned recess duty and played kickball with students and the Petitioner testified that "if she did not engage she might have lost her job for not performing her duties." No such evidence was presented by Petitioner in this case, both the Petitioner and her supervisor, Mr. Flack, testified that employees were not required to participate in the food drive, and Mr. Flack specifically told them that if they did participate it could not be on State time, it had to be on breaks or their lunch hour. While the teacher was paid for her time working in the recess area, Petitioner was specifically ordered not to perform these voluntary activities when she should be working.

Mr. Flack was asked by Petitioner's counsel whether he "physically instructed any of the employees with the Department of Human Services that they should not partake in the food drive," whether the community benefiting from the food drive included a lot of the clients that DHS provides services to, whether he was aware that there were flyers regarding the food drive in the building, whether he was aware there was a competition between the different agencies in the building regarding the amount of food collected, and, if anyone was reprimanded in relation the food drive and Petitioner's accident on October 7, 2016. The Arbitrator finds these inquiries irrelevant under the analysis that the Commission has previously applied in voluntary recreational cases. The Commission in Downes, v. SOI, Centralia Correction Center, 18 IWCC 508, found that Petitioner's injury sustained while playing basketball did not arise out of or in the course of his employment. There the Commission noted that:

> The Arbitrator erred in his analysis of Eagle Discount Supermarket v. Industrial Commission, 82 Ill.2d 331 (1980) and the personal comfort doctrine. Eagle Discount was decided prior to the enactment of Section 11 of the Act. Under the current Act, the first question to be determined is whether the claimant was engaged in a voluntary recreational program or activity. If so, then the injuries resulting from those activities are not compensable, regardless of any other theory of compensation. Kozak v. Industrial Commission, 219 Ill. App. 3d 629, 633, 579 N.E.2d 921, 162 Ill. Dec. 107 (1991). Here, having found that the Petitioner was engaged in a voluntary recreational program as encompassed under section 11 of the Act, the Commission finds that the Petitioner is precluded from receiving compensation for his injuries. His claim for compensation is, therefore, denied.

Similarly, in Tucker v. State of Illinois, Centralia Correctional Center, 18 IWCC 597, Petitioner was injured while playing pickleball in the employee and inmate gym, and the Commission noted that:

> Prior to the effective date of the amended § 11, courts determined the compensability of cases involving injuries relating to recreational activities using an analysis very different from the post-amendment cases. As such, the Eagle Disc. Court applied the personal comfort doctrine and affirmed the Commission's conclusion that the petitioner sustained an accident arising out of and in the course of his employment.

> In the current case, the Arbitrator focused on issues such as the alleged benefits to Respondent if Petitioner stays in shape, the fact that Respondent prohibits its employees from leaving the premises during their unpaid break, and whether Respondent acquiesced to employees playing pickleball during their break. The Arbitrator noted that Respondent supplies some of the pickleball equipment--the gym and the net--and in the past allowed employees to use the paddles and balls purchased by Respondent. These factors are essential to the Eagle Disc. personal comfort analysis, not an analysis pursuant to § 11.

The Commission in Tucker also noted that "Post-amendment, Illinois courts primarily focus on whether the employee's participation was voluntary, regardless of the employer's knowledge of or benefit from the activity."

Case v. Vienna Correctional Center, 17 IWCC 42, is instructive as well. The Petitioner in that case was participating in a voluntary weightlifting competition, which was held on Respondent's premises during his lunch break. The purpose of that weightlifting competition was to raise money for the Employee Benefit Fund and to promote awareness of the positive effects of exercising. The Arbitrator found that the participation in the weightlifting competition was within the personal comfort doctrine; the Commission disagreed, reversing the arbitrator, and found Petitioner's participation to be a voluntary recreational activity under Section 11 of the Act, while relying on the number of participants involved.

Petitioner in the case under consideration has presented no evidence that her participation in the food drive was anything other than voluntary. Petitioner testified that she did not participate in the 2015 food drive, but did not testify to any ramification for not participating or even any conversation from a supervisor or co-employee about her non-participation. Petitioner testified that she gave a monetary donation to the food drive in 2016. Petitioner testified that she was in her cubical until it was time for a photograph to be taken of everyone that had helped with the food drive. While Petitioner was on her way to the breakroom for this photograph, she also assisted in picking up spilled cans that were being collected for the food drive.

Petitioner's supervisor testified that the food drive was initiated by Work Force, which was not a State of Illinois agency but officed in their building. When asked if he ever physically instructed any of the employees to not partake in the food drive, Mr. Flack replied that "It was completely voluntary for them. It was something nice that we, you know, whoever wanted to participate could do it for the community. I never instructed anyone to or not to. It was completely up to them as long as they weren't using work time to do it."

The Arbitrator finds that Petitioner has failed to prove that she suffered an accident on October 7, 2016 10, 2017 which arose out of and in the course of her employment by Respondent. This finding is based on the facts elicited in the testimony at arbitration. Petitioner was engaging in a voluntary recreational activity when she was injured. She was not to participate in this activity during her work periods, she was never instructed to participate by her superiors, she had previously not participated with no negative ramifications, and while she testified that some of the clients she served received food assistance such as the type provided by this food drive, the food drive was not, apparently, intended only for clients of Respondent, and was sponsored and organized by a local radio station, not by Respondent State of Illinois. The local organization of the food drive was by an employee of Work Force, not an employee of Respondent. This was a personal, voluntary recreational activity.

Having found that Petitioner's injuries are not compensable under the Act, all other issues are declared moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC003597
Case Name	Robert Smith v. State of Illinois – Dept of Human and Family Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0288
Number of Pages of Decision	14
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	William LaMarca
Respondent Attorney	Kayla Koyne

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT SMITH,

Petitioner,

vs. NO: 13 WC 3597

STATE OF ILLINOIS,
HEALTHCARE and FAMILY SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability (TTD), and permanent partial disability (PPD), 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 28, 2021 is hereby affirmed and adopted.

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

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

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

August 9, 2022

CAH/tdm
O: 8/4/22
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC003597
Case Name	SMITH, ROBERT v. STATE OF ILLINOIS, HFS
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	William LaMarca
Respondent Attorney	Kayla Koyne

DATE FILED: 12/28/2021

/s/Edward Lee, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 28, 2021 0.21%

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

December 28, 2021

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Smith
Employee/Petitioner

v.

State of Illinois, HFS
Employer/Respondent

Case # **13** WC **003597**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **09/27/2021**. 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 **04/06/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,955.72**; the average weekly wage was $**787.61**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $525.07week for 57 weeks, commencing 06/26/12 through 06/27/12; 08/02/12 through 09/10/12 and 03/22/13 through 03/17/14, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Medical Bill Exhibit as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $472.57/week for 100 weeks, because the injuries sustained caused permanent partial disability to the extent of 20% loss of use of the man as a whole as provided in Section 8(c) of the Act.

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

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

Edward Lee

Signature of Arbitrator **December 28, 2021**

Robert Smith v. State of IL, HFS
13 WC 003597

STATEMENT OF FACTS

Initially at arbitration Petitioner's attorney moved to amend the date of accident indicated in the Application from April 4, 2012 to April 6, 2021. Respondent's attorney had no objection to Petitioner's request and the Arbitrator granted Petitioner's request.

Petitioner's attention was directed to April 6, 2012. Petitioner testified that at that time he was employed by the State of Illinois, Healthcare and Family Services agency as a Child Support Specialist Trainee. Petitioner testified his job duties involved working in a call center. He further testified at the time of his accident he was still in training. His primary job duties at that time would be to, "gather information and provide it to the individuals calling relative to their child support." (T.A. 8) Petitioner testified that prior to working for HFS he worked for the Department of Human Services working in a different capacity as a Security Therapy Aide providing therapeutic custodial care. Petitioner testified he is currently employed by the Department of Human Services as a Security Therapy Aide I in Rushville.

Petitioner was asked to describe what he was doing on the date of accident. Petitioner testified he was going to meet in a training area. He was obtaining certain supplies that were needed for the training program. In order to access the supplies, it was necessary to move certain boxes. Petitioner testified that while moving the boxes he injured his low back.

Petitioner testified that at the time of his injury he developed low back symptoms including severe spasming. Initially Petitioner sought medical care from Dr. Mosquera. Dr. Mosquera offered conservative treatment. His medical records were marked and introduced as Petitioner's Exhibit 1. Petitioner testified that he recalled Dr. Mosquera prescribing Gabapentin and that he had a reaction to the medication and was taken off work for a brief period of time. Petitioner testified that Dr. Mosquera referred him to Dr. Western and physical therapy at St. Johns. Dr. Western's records were marked and introduced as Petitioner's Exhibit 2. The physical therapy records were marked and introduced as Petitioner's Exhibit 3. The records confirm the onset of Petitioner's symptoms was April 6, 2012.

Petitioner testified that he underwent an MRI on June 18, 2012. The MRI report was marked and introduced as Petitioner's Exhibit 4. Petitioner confirmed he was referred to Dr. MacGregor for surgical consultation. Dr. MacGregor's records were marked and introduced as Petitioner's Exhibit 6. Petitioner testified Dr. MacGregor referred him for a CT scan and discogram. The CT scan and discogram report performed on September 25, 2012 was marked and introduced as Petitioner's Exhibit 7. The scan and discogram revealed annular tears at L3-4, L4-5 and L5-S1.

Petitioner testified he underwent surgery on March 22, 2013. The operative report was marked and introduced as Petitioner's Exhibit 8. A review of the surgical report reveals that the surgery was performed by Dr. MacGregor and assisted by Dr. Pineda. The procedure involved a laminotomy with discectomy, foraminotomy and partial discectomy, postural lateral fusion at the L4-5 and L5-S1 levels, an interbody fusion at the same levels and application of an interbody fusion device at the same levels. Petitioner testified he remained under Dr. MacGregor's care after surgery. At that time he was taken off work.

Petitioner was referred to Dr. Salvacion. Dr. Salvacion's records were marked and introduced as Petitioner's Exhibit 10. Dr. Salvacion's treatment involved pain management. Petitioner confirmed he also saw Dr. Narla by referral. Dr. Narla's office note was marked and introduced as Petitioner's Exhibit 12.

Petitioner testified he had seen Sandra Vicari, a physician's assistant for depression and anxiety. Petitioner confirmed he had been treating for these issues prior to his accident but sought treatment from Ms. Vicari due to the fact that his accident and post-accident condition seemed to aggravate these conditions.

Petitioner testified that he had seen Dr. Orji by referral from Dr. Peterson, his family physician at the time. Dr. Peterson's records were marked and introduced as Petitioner's Exhibit 17. Petitioner testified he saw Dr. Orji for consultation in an attempt to reduce his pain medication usage. Dr. Orji's records were marked and introduced as Petitioner's Exhibit 18.

Petitioner testified he recalled seeing Dr. Espinosa in 2018. Dr. Espinosa's office note dated October 18, 2018 was marked and introduced as Petitioner's Exhibit 22. Petitioner was asked if Dr. Espinosa ordered a CT scan. Petitioner was asked if after his surgery he developed any new symptoms. Petitioner testified that after the surgery his spasms had improved which were quite debilitating but then he then developed radiation on the right side into his buttock and right hamstring. He was referred by his family doctors to various pain management doctors after his surgery. He testified the treatment he received did provide some improvement in his condition. (T.A. 20)

Petitioner was asked if he was still under doctor's care for his back condition. Petitioner testified he sees his family doctor periodically who monitors his condition. At the present time he was not taking any medication.

Petitioner was asked what he notices about his back presently.

> The job I have is a pretty – is a pretty physical job. We have to monitor residents and they can become tense. So, if you are working as an escort depending on your job assignment you may be required or asked to walk 6 to 8 or as much as maybe 10 miles in a night making rounds. You may have to respond by trying to run. At my age that's the best response to try. But it can be physical, and regarding the back it just – there is bad nights. There is nights coming home working second shift that I for lack of a better treatment just go to bed; just take some ibuprofen of something, maybe try to ice, maybe try to heat. I have a heated recliner. Just kind of suck it up is what the mentality has become. (T.A. 21)

The Arbitrator asked Petitioner what symptoms he was noticing. Petitioner testified he had pain in the lumbar region and occasional pain radiating into his buttock or sometimes further down that is more of a burning sensation but with increased activity, more like pain. Petitioner was asked if anyone had recommended any further surgical treatment. Petitioner testified Dr. Orji had recommended a spinal cord stimulator, but Petitioner declined to have the stimulator installed. (T.A. 23)

Petitioner testified that in addition to his work activities he engages in other activities that also affect his low back and right leg symptoms. Petitioner testified he has a nine-year old son and engaging in activities with his son at times increases his pain and discomfort. (T.A. 23-24)

Petitioner was asked about his condition prior to his accident. Petitioner's attention was directed to 2010 at which time Petitioner saw Dr. Payne for a surgical consultation with complaints of low back and right leg pain. Dr. Payne's records are contained in Petitioner's Exhibit 25. Petitioner testified that he did see Dr. Payne who recommended physical therapy. Petitioner testified that after completing physical therapy his symptoms had resolved. (T.A. 24)

Petitioner testified that prior to his accident of April 6th he underwent an eight-week training program. Petitioner testified the program is rigorous requiring push-ups, leg lifts, crunches, running, farmers carrying dumbbells, wrestling, wind sprints and push-ups. Petitioner testified he was able to complete the training program with no

pain. Petitioner further testified that prior to his accident of April 6th he had never undergone surgery to his low back. (T.A. 25-26)

Petitioner was shown what had been marked and introduced as Exhibit 26. Petitioner confirmed the exhibit contained bills and a summary of bills pertaining to treatment he received for his low back as a result of his accident of April 6th.

On cross-examination Petitioner confirmed that he currently had no restrictions on his work activities. He also confirmed that he is not seeing a doctor specifically for his back. Petitioner confirmed his condition did improve after undergoing surgery, "spasms are gone." (T.A. 28) He also confirmed he is able to perform his job satisfactory. Petitioner also confirmed he had performed weightlifting activities as far back as high school but that, "I haven't been able to do a lot lately…" (T.A. 30)

Petitioner introduced 26 exhibits including a medical bill exhibit and summary marked and introduced as Exhibit 26. With respect to Petitioner's Exhibit 13, Respondent objected to the admission of a letter contained in the exhibit from Sandra Vicari dated November 18, 2014. Respondent's objection was sustained. The letter therefore will not be considered as evidence in the Arbitrator's decision. Respondent also objected to the admission of Petitioner's Exhibit 14, a letter dated November 25, 2014 from Dr. Gustavo Mosquera. Respondent's objection to the letter was also sustained. Therefore, the letter will not be considered as evidence in the Arbitrator's decision. Respondent introduced thirteen exhibits at arbitration. Petitioner had no objection to the introduction of Respondent's exhibits.

Petitioner's Exhibit 15 is the transcript of the deposition of Dr. MacGregor taken on May 1, 2017. Dr. MacGregor's office notes were marked and introduced as Petitioner's Exhibit 6. In her deposition Dr. MacGregor identified herself as a neurosurgeon in the central Illinois area performing among other things, surgery to the neck and low back. Dr. MacGregor testified she first saw Petitioner on August 27, 2012. Petitioner advised Dr. MacGregor on August 27th he had injured his back while he was at work moving boxes. Dr. MacGregor examined Petitioner and reviewed an MRI performed on June 18, 2012. Dr. MacGregor diagnosed Petitioner with stenosis at L4-5 and L5-S1 as well as an annular tear and lumbar spondylosis at L5-S1. It was Dr. MacGregor's opinion within a reasonable degree of medical certainty that Petitioner's accident in which he was lifting boxes at work was a causative factor in her diagnosis. (Dep. at 11) Dr. MacGregor's opinion was based in part on Petitioner's pain complaints which Dr. MacGregor believed were, "fully consistent with the annular tears that were noted, both on the MRI and then later on his discogram." Dep. at 11) Dr. MacGregor recommended surgery which she performed on March 22, 2013 involving a two level laminectomy, foraminotomy, fascectomy and two level fusion with instrumentation.

Dr. MacGregor also testified regarding Petitioner's post-operative condition and course of treatment. Dr. MacGregor confirmed she had taken Petitioner off work as of the surgery date on March 22, 2013 until he was released without restrictions on March 17, 2014. Dr. MacGregor confirmed the last time she saw Petitioner was March 17, 2014.

Dr. MacGregor was asked to assume that if Petitioner had undergone low back medical treatment that included an MRI in 2010 but that after a short period of medical treatment was released from medical care in 2010 with no further medical treatment until his accident whether that would change her opinion that Petitioner's accident in 2012 was a causative factor in the condition of his low back. Dr. MacGregor stated it would not change her opinion. She stated that unless the patient had ongoing treatment within 6 months of the injury it would constitute a new injury and be a contributing factor to the individual's back condition. (Dep. at 23)

On cross-examination Dr. MacGregor was asked to describe an annular tear. Dr. MacGregor described what an annular tear was and that it can be consistent with an acute injury. She believed Petitioner's symptoms that developed after his accident would be consistent with an annular tear, especially spasms and tightness in the

back. Dr. MacGregor was asked whether knowing that Petitioner in 2010 complained of radiation into his lower extremity, would that change her opinion reading causation or aggravation. Dr. MacGregor stated that no, that would not change her opinion. Dr. MacGregor was also asked on cross-examination whether the need for the surgery she performed on Petitioner could be from a degenerative state. Dr. MacGregor stated that no, because almost everyone has a certain degree of age-related changes that would show up on an MRI. The difference is Petitioner had a, "precipitating cause" that occurred prior to developing his low back symptoms. (Dep. at 24-26)

Petitioner was examined by Dr. Li at the request of Respondent. Dr. Li's deposition dated July 31, 2017 was marked and introduced as Respondent's Exhibit 8. It was Dr. Li's opinion that Petitioner sustained a strain that should have resolved in three months. He did not believe Petitioner's accident aggravated a pre-existing condition. On cross-examination Dr. Li admitted he does not perform back surgery but only treats back conditions non-operatively. Dr. Li also stated he did not review the MRI taken of Petitioner's back after his accident in 2012. He did however review a discogram performed at the request of Dr. MacGregor. He stated based on Petitioner's complaints and the discogram that the two-level fusion was appropriate. (Dep. at 12) Dr. Li further confirmed that after Petitioner underwent an MRI in 2010 and underwent treatment at that time and that his symptoms resolved in 2010 after a period of therapy. (Dep. at 13) Dr. Li acknowledged that he did not know the weight of the boxes Petitioner moved at that time of his accident in 2012 or the number of boxes Petitioner was required to move. (Dep. at 14) Dr. Li was asked on cross-examination about his opinion that Petitioner only sustained a strain and that it should have resolved in ninety days. Dr. Li admitted on that there was no evidence that after his accident Petitioner had ever reached a point where he had no back pain. (Dep. at 15)

Respondent's Exhibit 11 is marked as Pre-Existing medical records. One of the records is a note dated January 11, 2012 from Springfield Clinic. Petitioner apparently had injured his shoulder. A review of the record reveals that Petitioner described right shoulder pain. He also described a right wrist injury. There is no reference in the note to complaints of low back pain.

Robert Smith v. State of IL, HFS
13 WC 003597

FINDINGS AND CONCLUSIONS

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

Petitioner testified that prior to his accident on April 6, 2012 he was doing well with no low back or right leg symptoms. He also described a previous period of time in 2010 when he had experienced similar symptoms. However, on December 10, 2010 Petitioner advised Dr. Payne that physical therapy had been beneficial and he was released to return on an as-needed basis. Petitioner was no longer receiving medical treatment at the time of his accident on April 6, 2012 for the condition of his low back.

When he was first seen on April 12, 2012 by Dr. Mosquera Petitioner described his accident and developing back pain after moving some boxes approximately one week prior to the visit on April 12, 2012. His description of the accident and onset of his symptoms are consistent throughout his medical records.

The Arbitrator has reviewed his medical records. The Arbitrator has also reviewed pre-accident medical records introduced by Petitioner and Respondent. Petitioner testified to prior back and leg symptoms in 2010. The medical records introduced corroborate the time frame in which these symptoms occurred. The closest pre-accident medical record to the date of accident was introduced as part of Respondent's Exhibit 11. However, those records refer to Petitioner's shoulder and wrist. There is no reference in those records to low back or right leg pain. Those records do not reveal that Petitioner was having ongoing treatment or symptoms prior to his accident of April 6, 2012.

The Arbitrator has also reviewed the evidence depositions of Dr. MacGregor and Dr. Li. It was Dr. Li's opinion that Petitioner sustained nothing more than a lumbar strain that should have resolved within a matter of months. However, Dr. Li provided no explanation for Petitioner's persistent post-accident symptoms resulting in the need for surgery. Dr. MacGregor, on the other hand believed that Petitioner sustained annular tears requiring a two level fusion. Her opinion is supported by both an MRI and discogram. Dr. MacGregor's opinion that Petitioner's accident of April 6, 2012 is a causative factor in the condition of Petitioner's low back is credible and consistent with the testing performed and Petitioner's symptoms. In rendering her opinion regarding causation, Dr. MacGregor took into account Petitioner's prior complaints and findings. Dr. MacGregor did not believe Petitioner's lumbar condition was solely due to normal degenerative changes. The Arbitrator finds the opinion of Dr. MacGregor to be more credible than the opinion of Dr. Li.

Respondent on more than on occasion questioned Petitioner about his weightlifting. However, at no time did Petitioner testify that he had injured his low back while weightlifting.

Although there is evidence that Petitioner at times seemed to seek out pain medication, Petitioner was dealing with other medical problems including neck pain and carpal tunnel syndrome while continuing to recover from low back surgery. There are also references to Petitioner's demeanor while speaking to the doctor's staff. Again, while that is not the type of behavior one would want from a patient, it does not change the fact that Petitioner was still symptomatic, according to the medical records and dealing with other medical issues as well. There is even a reference in Dr. Narla's records that patient admitted he does not cope with pain very well. Petitioner mentioned to Dr. Peterson that he had been on pain medication for some time and it was his desire to get off of them. There is reference in Dr. Voights' records that Petitioner may have been seeking pain medication from more than one physician. However, he also indicated that Petitioner wished to discontinue

relying on pain medication. In that regard, Dr. Salvacion's office note confirms Petitioner discontinued the use of Hydrocodone. His discontinuation of narcotic pain medication is also confirmed in Dr. Espinosa's office note of October 18, 2018.

The Arbitrator concludes that Petitioner sustained accidental injuries that arose out of and in the course of his employment for Respondent on April 6, 2012 and that the condition of his low back and right leg are causally related to his accident of April 6, 2012. While Petitioner admitted he had had prior low back problems he was asymptomatic prior to his accident of April 6, 2012.

Robert Smith v. State of IL, HFS
13 WC 003597

What temporary benefits are in dispute? TTD

Petitioner alleges he was off work under doctor's care from June 26, 2012 through June 27, 2012, August 2, 2012 through September 10, 2012 and March 22, 2013 through March 17, 2014.

Regarding the initial period of TTD, medical records from Dr. Western marked and introduced as Petitioner's Exhibit 2 indicate that Petitioner underwent a lumbar epidural steroid injection on June 26, 2012. A Health Status Form dated June 28, 2012 confirms Petitioner was taken off of work by Dr. Western on June 26, 2012 and June 27, 2012.

In an office note dated August 2, 2012 Dr. Mosquera noted worsening low back complaints. Dr. Mosquera at that time increased Gabapentin to 300 mg at bed time. Also included in his office notes is a Health Status Form dated August 2, 2012 taking Petitioner off work until September 10, 2012.

Regarding the third period of TTD claimed by Petitioner, the Arbitrator notes that in Dr. MacGregor's medical records marked and introduced as Petitioner's Exhibit 6, Petitioner was taken off work as of the date of his lumbar surgery on March 22, 2013. Dr. MacGregor's records also contain a release to return to work full duty effective March 17, 2014. While Petitioner received a light duty release prior to March 17, 2014 there was no evidence presented that light duty work was offered to Petitioner at that time.

The Arbitrator concludes that Petitioner was temporarily totally disabled from June 26, 2012 through June 27, 2012, August 2, 2012 through September 10, 2012 and March 22, 2013 through March 17, 2014 for a total of 57 weeks.

Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner marked and introduced Petitioner's Exhibit 26, which contains a group of medical bills and a summary of medical expenses. The summary reflects the total amount of bill and balances due.

The Arbitrator has reviewed the medical exhibits introduced by Petitioner and the medical bills contained in Petitioner's Exhibit 26. The medical expenses appear to be reasonable and necessary and related to Petitioner's accident of April 4, 2012. Having ruled that Petitioner sustained an accidental injury that arose out of and in the course of her employment for Respondent and that Petitioner's current condition is causally related to her accident, the Arbitrator finds that Respondent is responsible for the payment of any and all unpaid medical expenses incurred by Petitioner for the treatment he underwent related to his accident of April 6, 2012.

What is the nature and extent of Petitioner's Injury?

Section 8.1(b) of the Act sets forth five criteria to be used in determining the extent of the claimant's permanent partial disability. Neither party offered an AMA impairment rating. Petitioner was 50 years old at the time of his injury. There is no evidence of a direct effect on Petitioner's earning capacity. Therefore, the Arbitrator gives no weight to those factors.

Petitioner's current occupation involves activity that Petitioner described as physical in nature requiring direct interaction with residents and prolonged walking. Petitioner testified he notices increased symptoms at times as a result of his job duties. He also testified about certain nonwork activities that increase his pain levels. The Arbitrator gives moderate weight to this factor.

Petitioner was 50 years old at the time of his injury. There is no evidence of a direct effect on Petitioner's earning capacity. Therefore, the Arbitrator gives no weight to that factor.

Petitioner underwent an extensive multilevel lumbar surgery that included fusion with hardware. Petitioner had a prolonged period of post-surgical treatment due to persistent symptoms. He testified about his attempts to alleviate these symptoms with home remedies. There was no evidence of malingering or symptom magnification. The Arbitrator gives great weight to this factor.

Based on the above, the Arbitrator concludes Petitioner sustained permanent partial disability to the extent of 20% loss of use of the person as a whole as a result of his accident of April 6, 2012

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC023796
Case Name	Kelly Melton v. Knight Hawk Coal LLC
Consolidated Cases	16WC023797; 16WC023798;
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	22IWCC0289
Number of Pages of Decision	3
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Gregory Keltner

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

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

KELLY MELTON,

Petitioner,

vs. NO: 16 WC 23796

KNIGHT HAWK COAL, LLC.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court of Illinois, Fifth District, Workers' Compensation Commission Division. This matter was consolidated at arbitration with case 16 WC 23797 and case 16 WC 23798. A separate Decision and Opinion on Remand has been issued for each case.

In its Order filed July 26, 2021, the Appellate Court affirmed in part and reversed in part the judgment of the circuit court of Randolph County which confirmed the Commission's decision in its entirety. Specifically, the Appellate Court

> [A]ffirmed the court's judgment confirming the Commission's decision to award claimant temporary total disability, medical expenses, and permanent partial disability related to his lumbar condition. We reverse the court's judgment confirming the Commission's decision finding no causal connection between claimant's current condition of ill-being in his cervical spine and his work-related accidents. Accordingly, we reverse the Commission's decision finding no causal connection and remand the case to the

Commission with directions to reinstate the reversed positions of the arbitrator's decision.

Therefore, based upon the directive from the Appellate Court, the Commission reinstates the Decision of the Arbitrator filed July 1, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 1, 2019, is hereby reinstated.

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.

August 9, 2022

/s/ *Christopher A. Harris*
Christopher A. Harris

CAH/tdm
O: 8/4/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC023797
Case Name	Kelly Melton v. Knight Hawk Coal LLC
Consolidated Cases	16WC023796; 16WC023798;
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	22IWCC0290
Number of Pages of Decision	3
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Gregory Keltner

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

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

KELLY MELTON,

Petitioner,

vs. NO: 16 WC 23797

KNIGHT HAWK COAL, LLC.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court of Illinois, Fifth District, Workers' Compensation Commission Division. This matter was consolidated at arbitration with case 16 WC 23796 and case 16 WC 23798. This case was adjudicated in companion case number 16 WC 23796. A separate Decision and Opinion on Remand has been issued for each case.

In its Order filed July 26, 2021, the Appellate Court affirmed in part and reversed in part the judgment of the circuit court of Randolph County which confirmed the Commission's decision in its entirety. Specifically, the Appellate Court

> [A]ffirmed the court's judgment confirming the Commission's decision to award claimant temporary total disability, medical expenses, and permanent partial disability related to his lumbar condition. We reverse the court's judgment confirming the Commission's decision finding no causal connection between claimant's current condition of ill-being in his cervical spine and his work-related accidents. Accordingly, we reverse the Commission's decision finding no causal connection and remand the case to the

Commission with directions to reinstate the reversed positions of the arbitrator's decision.

Therefore, based upon the directive from the Appellate Court, the Commission reinstates the Decision of the Arbitrator filed July 1, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 1, 2019, is hereby reinstated.

Bond has been assigned in this case as detailed in consolidated case 16 WC 23796. 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.

August 9, 2022

/s/*Christopher A. Harris*
Christopher A. Harris

CAH/tdm
O: 8/4/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC023798
Case Name	Kelly Melton v. Knight Hawk Coal LLC
Consolidated Cases	16WC023796; 16WC023797;
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	22IWCC0291
Number of Pages of Decision	3
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Gregory Keltner

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

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

KELLY MELTON,

Petitioner,

vs. NO: 16 WC 23798

KNIGHT HAWK COAL, LLC.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court of Illinois, Fifth District, Workers' Compensation Commission Division. This matter was consolidated at arbitration with case 16 WC 23796 and case 16 WC 23797. This case was adjudicated in companion case number 16 WC 23796. A separate Decision and Opinion on Remand has been issued for each case.

In its Order filed July 26, 2021, the Appellate Court affirmed in part and reversed in part the judgment of the circuit court of Randolph County which confirmed the Commission's decision in its entirety. Specifically, the Appellate Court

> [A]ffirmed the court's judgment confirming the Commission's decision to award claimant temporary total disability, medical expenses, and permanent partial disability related to his lumbar condition. We reverse the court's judgment confirming the Commission's decision finding no causal connection between claimant's current condition of ill-being in his cervical spine and his work-related accidents. Accordingly, we reverse the Commission's decision finding no causal connection and remand the case to the

Commission with directions to reinstate the reversed positions of the arbitrator's decision.

Therefore, based upon the directive from the Appellate Court, the Commission reinstates the Decision of the Arbitrator filed July 1, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 1, 2019, is hereby reinstated.

Bond has been assigned in this case as detailed in consolidated case 16 WC 23796. 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.

August 9, 2022

/s/ *Christopher A. Harris*
Christopher A. Harris

CAH/tdm
O: 8/4/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031267
Case Name	Pertrena Clement v. State of Illinois
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0292
Number of Pages of Decision	9
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Kayla Koyne

DATE FILED: 8/9/2022

/s/ Christopher Harris, Commissioner

Signature

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

PERTRENA CLEMENT,

Petitioner,

vs. NO: 18 WC 31267

STATE OF ILLINOIS HEALTHCARE AND FAMILY SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof.

The Commission finds that per the Application for Adjustment of Claim, the Request for Hearing and the medical records, the correct date of accident was May 25, 2016 and not May 25, 2017. The Commission therefore modifies the Arbitrator's Decision to reflect the correct date of accident of May 25, 2016.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 27, 2021 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act and per the stipulation of the parties.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $755.22 per week for 47.5 weeks because the

injuries sustained caused the 12.5% loss of use of the left hand and 12.5% loss of use of the right hand, as provided in Section 8(e)(9) of the Act.

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

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

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.

August 9, 2022

/s/ *Christopher A. Harris*
Christopher A. Harris

CAH/pm
O: 8/4/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031267
Case Name	CLEMENT, PERTRENA v. STATE OF ILLINOIS
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Kayla Koyne

DATE FILED: 12/27/2021

/s/ Edward Lee, Arbitrator
Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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

December 27, 2021

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Pretrena Clement
Employee/Petitioner

v.

State of Illinois
Employer/Respondent

Case # **18** WC **031267**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **September 28, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 25, 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 $**71,856.00** the average weekly wage was $**1,381.85**.

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

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

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

ORDER

PETITIONER HAS SUFFERED 12.5% LOSS OF USE OF A LEFT HAND, 12.5% LOSS OF USE OF THE RIGHT HAND THE TOTAL AMOUNT OF 47.5 WEEKS AT RATE OF $755.22 PER §8(E) 9 OF THE ILLINOIS WORKER'S COMPENSATION ACT.

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT AND PER THE STIPULATION OF THE PARTIES.

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

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

Edward Lee

Signature of Arbitrator

December 27, 2021

STATEMENT OF FACTS

Pertrena Clement, Petitioner, is 53 years old and is currently employed at the State of Illinois as Operation Analyst II. The Petitioner has worked for Respondent, the State of Illinois, since 2000. Her current position, something she has done for the past two years, is less clerical in nature than her past employment. Petitioner's past employment was as a disability claims adjudicator and human services case worker I and II. Those three positions were different in that Petitioner would be doing a lot more clerical work and typing for data input compared to her current position.

Petitioner's previous position required her to type 85 to 90 percent of the time and she worked normal business hours of 7:30 to 3:30 with two 15-minute breaks and a 30-minute unpaid lunch. The Petitioner identified Respondent exhibit 1 as a job description of Petitioner current job not the one she was performing in 2016. In 2016, the Petitioner was a human services case worker.

In June of 2016 the Petitioner noticed that she was suffering from tingling sensations in her hands when she was typing for her job position and sometimes when she was asleep. When she was at home during the weekend, not working, her symptoms would not be aggravated like they were at work. The Petitioner also testified she did not have a drop down keyboard at her desk.

On June 20th, 2016, Petitioner consulted with Dr. Trudeau due to pain in her hands. The EMG report notes Petitioner had complaints primarily in her right hand but was left-handed. The Petitioner reported issues with driving, using a comb, and driving. However, Dr. Trudeau also noted that Petitioner suffered problems with work from typing which she does 95-98% of each day.

On July 20th, 2016, the Petitioner treated with Dr. Neumeister. The Petitioner reported a 16-year work history that her pain has worsened in the last year when she types. Surgery was then scheduled while workers compensation was worked out.

Petitioner did have that surgery and continued to work but her pain continued to worsen so she returned to Dr. Neumeister in 2018.

On October 22nd 2018, the Petitioner returned to Dr. Neumeister office, at this point her right hand was noted as being worse then her left hand. Surgery was then scheduled.

On May, 28th, 2019, the Petitioner underwent a right carpal tunnel release.

The Petitioner followed upon on June 13, 2019, with a good result.

On June 27, 2019, the Petitioner scheduled left sided release as well. Petitioner's left hand was released on July 23, 2019.

Petitioner post operative consult occurred on August 5, 2019. The Petitioner reported doing very well post operatively and was released on a PRN basis.

The Petitioner testified her hands are mostly fine but that she notices some weakness to her hands that was present. However, she testified her hands are much improved from her surgeries.

Dr. Neumeister's deposition was taken on February 3rd, 2020. Dr. Neumeister testimony covered the treatment of Petitioner. Dr. Neumeister was given a hypothetical job history that was consistent with the testimony of Petitioner at the time of trial. Based upon this hypothetical Dr. Neumeister testified that Petitioner's job duties contributed to the development of her carpal tunnel condition. (PX-3 pg. 17) Dr. Neumeister also testified that a person's work station ergonomics could be a contributing factor the development of carpal tunnel. (PX-3 pg. 18-19)

Respondent Deposed Dr. Calfee on August 7th, 2020. Dr. Calfee reviewed Petitioner's work history, medical history and noted that Petitioner had various risk factors for carpal tunnel. Dr. Calfee testified that Petitioner was obese, borderline diabetic, and a left distal radius fracture. (RX-4 pg. 19-20) Dr. Calfee did not see a causal relationship between Petitioner's employment and her development of her carpal tunnel syndrome. (RX-4 pg. 21) Dr. Calfee did not believe typing was sufficient, combined with Petitioner's pre-existing conditions, to be a independent causal factor to the development of carpal tunnel syndrome. (RX-4 pg. 22)

On cross examination, Dr. Calfee agreed that treatment of carpal tunnel was symptoms based. (PX4-pg. 26) Dr. Calfee admitted in his report that carpal tunnel symptoms could be aggravated by typing. (RX-4 pg. 27, RX-3 in answer question 11)

ARGUMENT

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Workers' Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 11.2d 524, 106 Ill.. Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case…where an injury has been shown to be cause by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

To be entitled to compensation for an injury, Petitioner need not prove that her injury was the sole causative factor in her subsequent treatment and disability, but only that it was a causative factor. If a pre-existing condition is aggravated exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. Rock Road Construction v. Industrial Commission, 37 Ill.2d 123, 227 N.E.2d 65, 67-8 (1967).

Petitioner appeared both truthful and credible during her testimony. The Petitioner also gave a detailed description of her job duties that was unrebutted. The job description provided by Respondent and entered into evidence was not Petitioner's job at the time of injury. The job described was Petitioner's job at the time of trial. Concerning causation it is of little evidentiary worth.

The Petitioner credibly testified that she experienced pain and symptoms in her hands when she was typing. The Petitioner consistently told her physicians that her job was bringing on her hand

pain throughout all her treatment. Respondent entered evidence of a prior left-hand fracture, but the Arbitrator notes that Petitioner did not complain of hand numbness or that carpal tunnel symptoms were present during those visits, including her release. In fact, the only medical prior to the date of injury that mentioned carpal tunnel symptoms Petitioner, again attributed to her work with Respondent.

The Arbitrator found the testimony of Dr. Neumeister to be more persuasive than that of Dr. Calfee. Dr. Neumeister and Dr. Calfee agreed that Petitioner's job duties of typing could bring Petitioner's symptoms. In fact, Dr. Calfee, Respondent's physician, documented that Petitioner's typing could aggravate her condition. While Dr. Calfee did not think Petitioner's condition was caused by her employment, both physicians agreed her condition was aggravated by her work, specifically typing.

Therefore, for the above stated reasons, Petitioner has met their burden concerning accident and causation in this claim.

Findings on Disputed Medical:

Both testifying experts agreed with the treatment of Petitioner regarding her hands injuries. Therefore, with the Arbitrator finding in favor of the Petitioner regarding accident and causation the Petitioner requests that the Arbitrator award medical bills subject to any Section 8(j) credit and fee schedule.

Finding Regarding Permanency:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no AMA rating was provided for Petitioner's left and right hands. The Commission therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Petitioner resumed her previous position. *Some* weight was given to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the trial. Petitioner is fairly young and will need many more years of work. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings' capacity, Petitioner testified that she resumed her prior position after being released, this factor is given *little* weight.

With regard to subsection (v) of §8.1b (b), evidence of disability corroborated by the treating medical records, Petitioner has continued complaints of lack of strength. Because of her complaints were consistent with the record, therefore this factor is given *greater* weight.

Petitioner has suffered 12.5% loss of use of a left hand, 12.5% loss of use of the right hand the total amount of 47.5 weeks at rate of $755.22 per §8(e) 9 of the Illinois Worker's Compensation Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC011208
Case Name	Joshua Schwahn v. State of Illinois - Illinois Dept of Corrections
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0293
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mark Wilson
Respondent Attorney	Bradley Defreitas

DATE FILED: 8/9/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSHUA SCHWAHN,

Petitioner,

vs. NO: 16 WC 11208

ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary total disability (TTD) benefits, 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. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 19, 2021 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.

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

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

August 9, 2022

CAH/pm
O: 8/4/22
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC011208
Case Name	SCHWAHN, JOSHUA v. IL. DEPT OF CORRECTIONS
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Mark Wilson
Respondent Attorney	Bradley Defreitas

DATE FILED: 10/19/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 19, 2021 0.06%

/s/ Adam Hinrichs, Arbitrator
Signature

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

OCTOBER 19, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant 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)

Joshua Schwahn
Employee/Petitioner

v.

Illinois Department of Corrections
Employer/Respondent

Case # **16** WC **11208**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Bloomington**, on **8/26/21**. 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, **June 29, 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 $**52,837.68**; the average weekly wage was $**1,016.10**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **3** 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 $**93,694.64** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**93,694.64**.

Respondent is entitled to a credit **for all benefits paid through group insurance** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $677.40/week for 305 6/7 weeks, from July 14, 2015 through July 22, 2015 and from October 24, 2015 through August 26, 2021, as provided in Section 8 of the Act. The Respondent is entitled to credit for $93,694.64 in benefits it has paid to date.

Respondent is ordered to provide and pay for the total left shoulder arthroplasty and associated care recommended by Petitioner's treating surgeon, Dr. Blair Rhode.

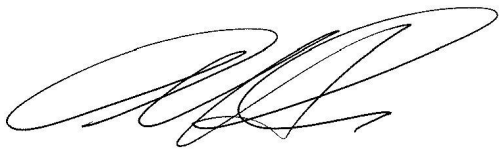
Respondent shall pay the outstanding reasonable and necessary medical services outlined in Petitioner's Exhibit 1, pursuant to the fee schedule, and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall pay these amounts directly to Petitioner.

Respondent is entitled to a credit for all benefits paid under its group health plan pursuant to Section 8(j). Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider for the services for which it is claiming said credit.

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

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

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



Signature of Arbitrator

OCTOBER 19, 2021

FINDINGS OF FACT

On June 29, 2015, the Petitioner was employed as a correctional officer by Respondent and has been since 2012. On that day, he was in the process of serving breakfast to the inmates, which required him to transport the trays of food on a cart from the inmate kitchen to the gallery. In performing this task, he had to carry a property box containing 20 to 30 trays of food up a flight of stairs. Petitioner testified the box weighed about 75 pounds. While carrying the box up the stairs, he heard a pop from his left shoulder. He testified that it was very painful, but he kept working as he thought that maybe it was a strain. After 2 or 3 days, he reported the accident and requested medical treatment.

On July 14, 2015, Petitioner received treatment at St. Mary's Health Care in Ottawa. The history shows patient was a prison guard who 2 weeks ago was carrying trays and cartons of food when he felt a sharp pain in the top of his left trapezius area. The pain had persisted and was now associated with paresthesias to the medial trapezius towards the neck, as well as some paresthesias to the axillary area. He was diagnosed with shoulder pain, prescribed Tylenol with Codeine and Medrol Dosepak, and given light duty restrictions. He was referred to Dr. Raymond Meyer, an orthopedist. (Px.2)

Petitioner testified that initially Respondent did not accommodate his light duty restrictions.

Petitioner testified that Dr. Meyer had performed left shoulder surgery prior to this accident on February 2, 2014. He testified that as of January 2015 he was returned to work full duty as a correctional officer and was having no problems performing his job duties.

On July 22, 2015, Petitioner saw Dr. Meyer. A consistent history of injury was provided. It was noted that he was doing well from the 2014 surgery prior to this new injury. He complained of pain over the anterior lateral and superior shoulder region as well as weakness. Upon examination, there was tenderness over the lateral acromion, deltoid, and at the AC joint. There was limited active and full passive range of motion. There was a positive impingement with abduction, internal greater than external rotation at 90 degrees of abduction, and diffuse rotator cuff weakness. There was discomfort with laxity testing. The assessments were left shoulder pain, strain; left shoulder impingement; and status post left shoulder arthroscopy, debridement, anterior labral repair/stabilization, subacromial compression, and AC joint debridement. Petitioner was prescribed Naprosyn, kept on light duty restrictions and started on physical therapy. (Px.3)

Petitioner testified that Respondent did accommodate his light duty restrictions for a 90-day period.

A left shoulder MRI performed on December 4, 2015 showed a non-distracted tear of the labrum from the posterior aspect of the superior labrum through the posterior superior quadrant; moderately severe acromioclavicular degenerative change; and possible humeral metaphysis intraosseous lipoma with calcified central nidus. (Id.)

Following the MRI, Dr. Meyer recommended surgery. The surgery was performed on September 27, 2016 and consisted of a left shoulder arthroscopy, debridement, SLAP tear repair, subacromial decompression, and acromioclavicular joint disease. The post-operative diagnosis was: left shoulder posterior-superior labral tear, impingement and acromioclavicular joint degeneration, SLAP tear (type II), anterior labral fraying, and glenohumeral degenerative joint disease. (Id.)

Following the surgery, Petitioner was kept off work and then released to light duty restrictions that Respondent did not accommodate. (Id.)

Petitioner followed up with Dr. Meyer on June 7, 2017. Overall, he had improved. He still had some discomfort with performing external rotation with his arm in neutral and still reported some tightness at the

extremes. He was encouraged to perform home exercises. He was kept on light duty restrictions and was to be released to full duty without restrictions on June 26, 2017. (Id.)

On June 22, 2017, Petitioner saw Dr. Blair Rhode, an orthopedist, for a second opinion. Upon examination of the biceps, he had a positive O'Brien's test and a positive biceps load test II for SLAP lesions. He was kept on light duty restrictions and an MRI was ordered. (Px.4)

A left shoulder MRI performed on September 25, 2017 showed tendinosis of the infraspinatus tendon, supraspinatus tendon, and cranial fibers of the subscapularis tendon, without evidence of a full-thickness rotator cuff tear with retraction; post-surgical changes related to interval labral repair with demonstration of a recurrent and more extensive labral tear as well as significant labral degeneration and tearing, which appears more extensive as compared to prior; progressive osteoarthritis of the glenohumeral joint with extensive articular cartilage loss; and post-surgical changes at the acromioclavicular joint due to subacromial decompression and AC joint resection. (Id.)

On December 12, 2017, Dr. Rhode performed a biceps tenodesis procedure. Petitioner's symptoms persisted following the surgery. On August 20, 2018, he followed up with Dr. Rhode. Petitioner was continuing to experience diffuse shoulder pain described as deep lancinating pain. Upon examination, he had pain with end range motion. He was tender to palpation with internal or external rotation. Dr. Rhode recommended Petitioner undergo a total shoulder arthroplasty. He noted that at the time of surgery there was multiple areas of screw breakthrough. He believed the proud anchors were causative to the patient's post-traumatic glenohumeral arthritis. (Id.)

Petitioner saw Dr. David Anderson for a Section 12 examination at the request of Respondent on April 4, 2016 and September 24, 2018. Dr. Anderson opined that the treatment Petitioner received until August 20, 2018 was causally related to the work accident and that the need for the total shoulder arthroplasty is due to arthritis unrelated to the work accident. (Rx.4)

On November 29, 2019, at the request of Petitioner's attorney, Petitioner attended Section 12 Examination with Dr. Paul Perona. (Px.5). In his report, Dr. Perona opined that Petitioner's condition of ill-being and the progression of the chondral injury to his glenohumeral joint is consistent with the initial injury and the need for surgery. He opined that his superior labral tear never healed from the initial injury and has progressively worsened over time. Additionally, "the potential suture irritation of the cartilage of the glenohumeral joint places his present condition directly related to the initial injury. Likewise, the need for total shoulder arthroplasty was causal from work injury." (Id.)

On August 17, 2020 the parties deposed Dr. Rhode, who is board certified in orthopedics and sports medicine. Dr. Rhode testified that the need for the total shoulder arthroplasty was causally related to the June 29, 2015 work accident. (Px.6, p.14). He opined that the Petitioner's pain was related to the glenohumeral chondral loss and that the chondral loss was secondary to the treatment for the labral pathology rendered by Dr. Meyer in the 2014 surgery and the September 2016 surgery. (Px.6, p.10). Dr. Rhode testified that the biceps tenodesis surgery he performed was to address Petitioner's persistent labral pathology. (Px.6, p.11). He testified that during that procedure he encountered grade 4 chondral loss and evidence of two anchors on the glenoid face that were an aggravating component to the acceleration of the chondral loss. (Id.) Dr. Rhode further testified that the glenoid chondral loss would not be the result of natural degenerative changes but would be a result of an anchor being put through the middle of the joint surface causing a residual hole and the proud suture, meaning above the chondral surface, acting as an abrasive to the chondral surface. (Px.6, pp.17-18, 20).

On April 28, 2021, the parties deposed Dr. Anderson, who is board certified in orthopedic surgery with a subspecialty in sports medicine. Dr. Anderson testified that chondral changes are degenerative arthritis, and that

he did not see any acceleration of the chondral changes other than the degenerative process. (Rx.6, pp.8-9). Dr. Anderson did testify that anchors above the articular surface can cause articular cartilage damage and wear. (Rx. 6, p. 9). On cross examination, Dr. Anderson acknowledged that Petitioner was doing well with regard to his left shoulder prior to the June 29, 2015 work accident and that he agreed that it was appropriate for Petitioner to be on work restrictions following the work accident up to the present. (Rx.6, pp.12-13). Dr. Anderson further testified that he was not aware of the Petitioner having an intervening accident from June 29, 2015 to the present. (Rx.6, p.13).

Petitioner testified that with regard to the left shoulder, he has pain at rest, difficulty with sleeping, and difficulty with range of motion and extending his arm. He always has pain that shoots to the shoulder blade and frequently shoots all the way down the arm. He testified that he really only uses his left arm more as a guide for his right as long as he keeps his elbow tucked to his side. Petitioner testified that were it authorized he would like to undergo the total shoulder arthroplasty.

The Arbitrator observed the Petitioner and notes that at hearing he kept his left upper arm close to his upper body, with his left elbow tucked in by his side, and his lower left arm and hand resting on his lap. The Arbitrator found Petitioner to be a credible witness whose testimony is supported by the medical records.

CONCLUSIONS OF LAW

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

It is undisputed that prior to the June 29, 2015 work accident, the Petitioner had undergone left shoulder surgery on February 4, 2014. It is also undisputed that as of January 2015 the Petitioner returned to work full duty as a correctional officer. The Petitioner's unrebutted testimony was that upon returning to work full duty he was having no problems performing his job duties as a correctional officer, nor was he having any difficulties at home in performing activities of daily living.

The Arbitrator notes that it is also undisputed that the Petitioner sustained a left shoulder injury as a result of a lifting injury on June 29, 2015. The Arbitrator also notes that all of the treatment Petitioner received following the June 29, 2015 work accident through August 20, 2018 is not disputed. Hence, Respondent has accepted the surgery performed by Dr. Meyer on September 27, 2016 consisting of a left shoulder arthroscopy, debridement, SLAP tear repair, subacromial compression, and acromioclavicular joint resection; and the surgery performed by Dr. Rhode on December 12, 2017 consisting of a left shoulder arthroscopy with biceps tenodesis as being causally related to the June 29, 2015 work accident.

On August 20, 2018, Dr. Rhode noted that Petitioner was continuing to experience diffuse shoulder pain described as deep lancinating pain. Upon examination, he had pain with end range motion. He was tender to palpation with internal or external rotation. Dr. Rhode recommended Petitioner undergo a total shoulder arthroplasty. (Px.4)

On March 8, 2019, Dr. Rhode completed a Physician's Statement and Physical Residual Functional Capacity Assessment in which he stated if Petitioner did not undergo the recommended surgery, he would be permanently restricted to no lifting more than 20 lbs., no lifting more than 20 lbs. frequently, and no lifting more than 10 lbs. occasionally. (Px.9)

Dr. Rhode opined that the Petitioner's pain was related to the glenohumeral chondral loss, and that the chondral loss was secondary to the treatment for the labral pathology rendered by Dr. Meyer in the 2014 surgery and the September 2016 surgery. (Px.6, p.10). Dr. Rhode testified that during the biceps tenodesis surgery he performed he encountered grade 4 chondral loss and evidence of two anchors on the glenoid face that were an aggravating

component to the acceleration of the chondral loss. (Px.6, p.11). Dr. Rhode further testified that the glenoid chondral loss would not be the result of natural degenerative changes but was the result of an anchor being put through the middle of the joint surface causing a residual hole and the proud suture above the chondral surface acting as an abrasive to the chondral surface. (Px.6, pp.17-18, 20).

Respondent's Section 12 physician, Dr. Anderson, testified that the chondral changes are degenerative arthritis only and that he did not see any acceleration of the chondral changes other than the degenerative process. (Rx.6, pp.8-9). Dr. Anderson did testify that anchors above the articular surface can cause articular cartilage damage and wear. (Rx. 6, p. 9). On cross examination, Dr. Anderson testified that Petitioner was doing well with regard to his left shoulder prior to the June 29, 2015 work accident and that he agreed that it was appropriate for Petitioner to be on work restrictions following the work accident up to the present. (Rx.6, pp.12-13). Dr. Anderson further testified that he was not aware of the Petitioner having an intervening accident from June 29, 2015 to the present. (Rx.6, p.13).

Dr. Rhode's explanation of the proud sutures being a competent abrasive structure along with the two holes in the cartilage surface from the prior surgery accelerating the chondral wear Petitioner sustained, is a more likely explanation of Petitioner's current condition than degeneration absent any acceleration from Petitioner's surgical interventions. Therefore, the Arbitrator finds the opinion of Dr. Rhode persuasive on the issue of causation.

Moreover, the Arbitrator recognizes that no evidence was presented demonstrating Petitioner was having any difficulties performing his regular job duties as a correctional officer prior to the June 29, 2015 work accident, nor was there any evidence presented of any type of intervening cause that would break the causal connection chain from the work accident and his current condition of ill-being.

The Arbitrator finds that Petitioner has met his burden of proving his current condition of ill-being is causally related to the accident of June 29, 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?

Incorporating the above, the Petitioner introduced evidence of medical expenses totaling $170,264.81 which he incurred during the course of his left shoulder treatment as follows: Rezin Orthopedics - $52,085.00; Anesthesia Consultants of Morris - $3,068.00; St. Mary's Hospital - $9,577.08; Oak Lawn Radiology - $210.00; OSF Healthcare - $32,145.20; Central Illinois Radiology - $913.00; Orland Park Orthopedics - $33,920.89; South Chicago Surgical Solutions - $24,489.15; Bob Rady Anesthesia - $4,233.60; WC RX Solutions - $4,456.53; and Persistent Med - $5,166.36.

Of the amounts billed, Respondent has paid $46,557.74, group health has paid $1,200.47, and discounts were given in the amount of $93,762.86.

$28,749.74 remains in unpaid bills to the following providers: OSF Healthcare - $8,697.45; Orland Park Orthopedics - $6,195.80; Bob Rady Anesthesia - $4,233.60; WC RX Solutions - $4,456.53; and Persistent Med - $5,166.36)

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary. The Arbitrator further notes that Respondent stipulated that if causation was found that it would pay all unpaid medical bills as set forth in Petitioners Exhibit 1. As such, Respondent is responsible for all the bills related to the treatment received by Petitioner as outlined in Petitioner's Exhibit 1, subject to the limitations of the medical fee schedule and as otherwise provided for in the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

Incorporating the above, the Petitioner testified that he wants to undergo the prescribed shoulder arthroplasty procedure. Having found causal relationship, the Arbitrator finds that the total left shoulder arthroplasty is reasonable, necessary and related to the June 29, 2015 work accident. Respondent shall provide and pay for said procedure, including all follow up appointments with Dr. Rhode and related aftercare.

Issue (L): What temporary benefits are due?

Incorporating the above, beginning on July 14, 2015, the Petitioner has either been completely off work or on restrictions per the recommendations of Dr. Meyer and Dr. Rhode. The Petitioner testified that other than a 90-day period of time, the Respondent did not accommodate the work restrictions. That testimony was credible and unrebutted.

The Arbitrator finds that the Petitioner was temporarily totally disabled from July 14, 2015 through July 22, 2015 and from October 24, 2015 through the August 26, 2021, a period of 305 6/7 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031066
Case Name	Thomas B Gunter v. Volume Trucking
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0294
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	James Keefe, Jr., Ron Coffel
Respondent Attorney	Christopher Gibbons

DATE FILED: 8/9/2022

/s/Carolyn Doherty, Commissioner

Signature

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

THOMAS B GUNTER,

Petitioner,

vs. NO: 20 WC 31066

VOLUME TRUCKING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical care, and "MMI", 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 22, 2022 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 $16,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 9, 2022
o: 08/04/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031066
Case Name	GUNTER, THOMAS B v. VOLUME TRUCKING
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Ron Coffel, James Keefe, Jr.
Respondent Attorney	Christopher Gibbons

DATE FILED: 2/22/2022

/s/ William Gallagher, Arbitrator

Signature

INTEREST RATE WEEK OF FEBRUARY 15, 2022 0.77%

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)

Thomas B. Gunter
Employee/Petitioner

Case # 20 WC 31066

v.

Consolidated cases: n/a

Volume Trucking
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on December 28, 2021. 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, October 4, 2020, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $67,979.08; the average weekly wage was $1,307.29.

On the date of accident, Petitioner was 57 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. The parties stipulated TTD and TPD were paid in full until October 5, 2020.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 14, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $871.53 per week for 13 5/7 weeks, commencing October 5, 2020, through October 26, 2020, and October 16, 2021, through December 28, 2021, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the C6-C7 disc replacement surgery recommended by Dr. Richard Kube and the diagnostic testing including sleep study recommended by Dr. Heidi Hunter.

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

February 22, 2022

William R. Gallagher, Arbitrator

Evidentiary Ruling

At trial, counsel for Respondent tendered into evidence records of Petitioner's prior workers' compensation settlements (Respondent's Exhibit 2). Petitioner's counsel objected to their admission into evidence on the basis of relevancy. The Arbitrator reserved ruling on the objection and directed counsel to address the issue in their proposed decisions.

Petitioner's counsel's position was that Petitioner informed the physicians who either treated or examined him of his pre-existing conditions and none of them either opined or testified Petitioner was not credible. Medical records pertaining to Petitioner's prior medical treatment were tendered into evidence by counsel for both Petitioner and Respondent. Further, there was no dispute as to the accident, with the primary disputed issues being causal relationship, the need for prospective medical treatment and payment of additional temporary total disability benefits. Petitioner's counsel argued that Petitioner's pre-existing condition and prior workers' compensation settlements were not relevant to those issues.

Respondent's counsel's position was that Petitioner previously received workers' compensation settlements based on his alleged significant permanent work restrictions, but he was subsequently able to return to work as a truck driver and performed physically demanding tasks. Respondent argued the preceding cast doubt on Petitioner's credibility.

The Arbitrator finds Petitioner's pre-existing medical conditions, work restrictions and prior workers' compensation settlements could arguably impact Petitioner's credibility. Accordingly, the Arbitrator overrules the objection and Respondent's Exhibit 2 is received into evidence. However, this is not a ruling on what probative value the Exhibit may or may not have.

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on October 4, 2020. According to the Application, Petitioner had a "Fall during course" and sustained an injury to "Multiple, including head and neck" (Arbitrator's Exhibit 2).

This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. In regard to temporary total and temporary partial disability benefits, Petitioner and Respondent stipulated the benefits had been paid in full with the exception of 13 5/7 weeks temporary total disability benefits, commencing October 5, 2020, through October 26, 2020, and October 16, 2021, through December 28, 2021 (date of trial). The prospective medical treatment sought by Petitioner was cervical disc replacement surgery at C6-C7, as recommended by Dr. Richard Kube, an orthopedic surgeon, and diagnostic testing, as recommended by Dr. Heidi Hunter, a rehabilitation specialist (Arbitrator's Exhibit 1).

Petitioner worked as a truck driver since 1994, and he usually drove a semi truck. Petitioner became employed by Respondent on September 29, 2020. Petitioner testified he passed the DOT physical and

drove a rental car to Georgia to pick up the semi truck and then drove to Tennessee to pick up the trailer.

Prior to becoming employed by Respondent, Petitioner worked for Taylor Express hauling carbon black from Illinois to Texas and Louisiana. Respondent subsequently obtained the contract to haul carbon black, so Petitioner sought for and obtained employment with Respondent.

On October 4, 2020, Petitioner was in the process of cleaning metal shavings from a hopper located at the bottom of the semi truck trailer. Photographs of the hopper were received into evidence at trial (Petitioner's Exhibit 1). As Petitioner was in the process of attempting to remove the dust cover, it gave way which caused Petitioner to fall forward striking the front and top of his head on the hopper. Petitioner fell to the ground landing on his hands and right elbow. At that time, Petitioner was dizzy and had blurred vision.

Petitioner reported the accident to Respondent shortly after it occurred. Petitioner informed Respondent he was not able to drive because he had headaches, right eye vision issues, dizziness, neck pain and tingling in his right arm. Respondent directed Petitioner not to drive.

Petitioner testified that later that week he contacted Respondent and advised he wanted to be seen by a doctor. He was informed he would have to wait until it was approved by the work comp carrier.

Petitioner was seen by Jeri Brinkley, a Physician Assistant, associated with the DuQuoin Ray Clinic from October 6, 2020, through October 26, 2020, but this was for a spider bite Petitioner sustained on October 3, 2020. Petitioner was not authorized by Respondent to be seen by PA Brinkley for his work injury until October 27, 2020. At that time, Petitioner informed PA Brinkley of the accident of October 4, 2020. Petitioner complained of headaches, blurred vision, dizziness and neck pain. PA Brinkley ordered an x-ray of Petitioner's cervical spine, a CT scan of Petitioner's head and authorized Petitioner to remain off work (Petitioner's Exhibit 2).

An x-ray of Petitioner's cervical spine and a CT scan of Petitioner's head were performed on November 16, 2020. They were both normal (Petitioner's Exhibit 9).

Petitioner was evaluated at the Marion Eye Center on November 19, 2020. At that time, Petitioner complained of headaches and blurred vision. Petitioner was directed to monitor the conditions and to follow up in one to four weeks (Petitioner's Exhibit 3).

PA Brinkley again saw Petitioner on November 23, 2020, and December 21, 2020. Petitioner continued to complain of headaches, blurred vision, dizziness and neck pain. PA Brinkley ordered physical therapy and referred Petitioner to Dr. Heidi Hunter, a physical medicine and rehabilitation specialist, because of the concussion Petitioner had sustained. She continued to authorize Petitioner to remain off work (Petitioner's Exhibit 2).

Petitioner received physical therapy from January 4, 2021, through April 21, 2021. Petitioner complained of headaches, blurred vision and numbness in both hands. Further, Petitioner stated he had neck pain which was worsened when the weight resistance was increased (Petitioner's Exhibit 5).

Petitioner was evaluated by Dr. Hunter on February 23, 2021. At that time, Petitioner advised he had headaches, right eye blurred vision and neck pain since the accident, but the dizziness had mostly resolved. Dr. Hunter treated Petitioner for his concussion symptoms with medication and authorized Petitioner to remain off work. She treated Petitioner through July 22, 2021 (Petitioner's Exhibit 13).

On June 2, 2021, Petitioner was evaluated by Andrew Kitterman, a Physician Assistant associated with Dr. Kube. PA Kitterman's record of that date contained a history of the accident of October 4, 2020, and that Petitioner sustained a head/neck injury. PA Kitterman also noted Petitioner had been previously treated by Dr. Kube for cervical and lumbar spine problems. At that time, Petitioner complained of neck pain with numbness/tingling in the fingers of his right hand. PA Kitterman ordered an MRI scan of Petitioner's cervical spine (Petitioner's Exhibit 7).

Medical records regarding treatment Petitioner received prior to the accident of October 4, 2020, were received into evidence at trial. On November 8, 2006, Petitioner was examined by Dr. Kee Park, a neurosurgeon, for neck, left shoulder/arm, back and bilateral leg pain. Dr. Park treated Petitioner primarily for a low back injury. He performed a microdiscectomy and fusion at L5-S1 on January 5, 2007. In regard to Petitioner's cervical spine, Dr. Park had an MRI of the cervical spine performed in November, 2016, and opined it revealed disc bulges at C5-C6 and C6-C7. No surgery was recommended or performed by Dr. Park on the cervical spine (Respondent's Exhibit 1).

Petitioner was subsequently evaluated by Dr. Daniel Kitchens, a neurosurgeon, on June 5, 2012, for cervical and lumbar spine symptoms. In regard to Petitioner's cervical spine, Dr. Kitchens reviewed an MRI of the cervical spine which was performed on January 27, 2012. He opined it revealed degenerative disc changes at C4-C5 and C5-C6 with disc bulging, foraminal narrowing at C5-C6 and C6-C7, but no disk herniations at any level. He opined Petitioner did not require cervical spine surgery (Respondent's Exhibit 1).

Dr. Kube saw Petitioner on June 26, 2012. At that time, Petitioner's primary complaints were to his lumbar spine and legs, but he also had some neck symptoms as well. Because of Petitioner's neck symptoms, Dr. Kube referred Petitioner to Dr. Edward Trudeau for EMG/nerve conduction studies (Petitioner's Exhibit 8).

Dr. Trudeau saw Petitioner on April 3, 2013, and performed EMG/nerve conduction studies at that time. Dr. Trudeau opined the test revealed left C7 radiculopathy which was moderately severe (Petitioner's Exhibit 10).

Dr. Kube evaluated Petitioner on April 19, 2013, and opined Petitioner had cervical radiculopathy on the left at C6-C7. He ordered a cervical myelogram (Petitioner's Exhibit 8).

The cervical myelogram was performed on May 10, 2013. According to the radiologist, there were no abnormalities. A post myelogram CT scan was performed that same day. According to the radiologist, the CT scan revealed minimal disc bulging at C6-C7 (Petitioner's Exhibit 8).
Dr. Kube saw Petitioner on June 12, 2013. He did not recommend any cervical spine surgery, but opined Petitioner might require a spinal cord stimulator (Petitioner's Exhibit 8).

Petitioner did not see Dr. Kube again until December 16, 2016, when Dr. Kube evaluated him for both his cervical and lumbar spine complaints. Dr. Kube did not recommend any surgery, but recommended Petitioner should undergo a Functional Capacity Evaluation (FCE). Petitioner did not seek any further treatment for cervical spine symptoms until he sustained the accident on October 4, 2020 (Petitioner's Exhibit 8).

The MRI (ordered by PA Kitterman) was performed on June 17, 2021. According to the radiologist, the MRI revealed a small central disc protrusion at C6-C7 (Petitioner's Exhibit 9).

Dr. Kube evaluated Petitioner on June 30, 2021. He noted he previously treated Petitioner for cervical and lumbar spine problems in the past. On examination, he opined Petitioner had C7 radiculopathy. Dr. Kube reviewed the MRI and opined it revealed a disc herniation at C6-C7. He recommended Petitioner undergo an epidural steroid injection at that level (Petitioner's Exhibit 7).

Dr. Kube saw Petitioner on July 14, 2021. At that time, Dr. Kube administered an epidural steroid injection at C6-C7. When Dr. Kube subsequently saw Petitioner on July 28, 2021, Petitioner advised the injection only provided marginal relief. Dr. Kube opined Petitioner still had C7 radiculopathy and recommended Petitioner undergo a decompression and disc replacement surgery at C6-C7 and imposed work restrictions limiting Petitioner to sedentary duties. Petitioner subsequently saw Dr. Kube on September 1, September 29, and December 22, 2021. On those occasions, Dr. Kube renewed his surgical recommendation and continued Petitioner's work restrictions (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Thomas Malbrough, an orthopedic surgeon, on July 27, 2021. In connection with his examination of Petitioner, Dr. Malbrough reviewed medical records and diagnostic studies provided to him by Respondent. On examination, Dr. Malbrough noted Petitioner had a fair range of motion of the cervical spine and Petitioner complained of pain/discomfort on the right side. He also found a positive Tinel's sign at the right elbow and wrist. He opined Petitioner had cervicalgia and myofascial pain related to the work injury of October 4, 2020, but the disc protrusion at C6-C7 was not causally related to the accident. This was based primarily on his review of prior diagnostic studies and the fact they revealed disc degeneration and protrusions at C5-C6 and C6-C7. He opined Petitioner was at MMI in regard to the cervical injury related to the accident. He also opined Petitioner was subject to work restrictions, but that these were not related to the accident (Respondent's Exhibit 3).

In regard to Petitioner's concussion symptoms including headaches and blurred vision, Dr. Malbrough opined those symptoms were related to the accident of October 4, 2020, and Petitioner was not at MMI regarding same. However, he further opined Petitioner had experienced significant improvement and was capable of working at full duty.

Petitioner was evaluated by Dr. Cynthia Montana, an ophthalmologist, on October 15, 2021, in regard to his vision problems. Petitioner advised his double vision issues had improved, but he reported starbursting in both eyes. Prescription glasses were ordered which Petitioner obtained on November 9, 2021 (Petitioner's Exhibit 4).

Petitioner was again seen by Dr. Hunter on October 27, 2021. At that time, Petitioner advised he experienced mild improvement of his headache symptoms, but had difficulty swallowing food since

the accident. Dr. Hunter authorized Petitioner to remain off work and ordered a sleep study (Petitioner's Exhibit 13).

At the direction of Respondent, Dr. Michael Racenstein, a radiologist, reviewed the MRI scan of Petitioner's cervical spine which was performed on June 18, 2021, as well as medical records provided to him by Respondent. He did not examine Petitioner and prepared a report dated December 11, 2021. Dr. Racenstein opined the MRI revealed a small central disc protrusion at C5-C6 and a central left sided disc protrusion at C6-C7. He opined there were no right sided findings at C6-C7 and there was no explanation for Petitioner having right sided complaints (Respondent's Exhibit 6).

Dr. Kube was deposed on October 28, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kube's testimony was consistent with his medical records for treatment he provided to Petitioner both before and after the accident of October 4, 2020. Specifically, Dr. Kube compared the MRIs of 2012 and 2021 and noted the MRI performed in 2012 did not reveal a disc herniation at C6-C7, but the MRI performed in 2021 revealed a disc herniation at C6-C7. Dr. Kube also noted Petitioner's earlier symptoms were left sided, but Petitioner's symptoms following the accident were right sided (Petitioner's Exhibit 6; pp 15-18).

Dr. Kube testified the accident likely caused the disc herniation. This was based, in part, on the fact that prior to the accident, Petitioner was working and not having any ongoing neck symptoms. He also reaffirmed his opinion Petitioner should undergo surgical decompression and disc replacement at C6-C7 (Petitioner's Exhibit 6; pp 23-28).

On cross-examination, Dr. Kube was interrogated about the MRI of June 17, 2021. He described the herniation as being central and going to the left and right, but a little further to the left. He also agreed Petitioner had signs of cubital tunnel and carpal tunnel syndrome on the right, but that Petitioner still required surgery on the cervical spine (Petitioner's Exhibit 6; pp 42-49).

Dr. Malbrough was deposed on November 11, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Malbrough's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, he testified Petitioner's neck complaints did not correlate with any nerve distribution. He also reviewed the MRI of June 17, 2021, and opined it revealed a left sided paracentral disc protrusion at C6-C7 which caused left sided stenosis and Petitioner's right sided complaints were inconsistent with the MRI findings (Respondent's Exhibit 4; pp 13, 32-33).

Dr. Malbrough testified Petitioner's headaches and vision issues were consistent with a concussion and Petitioner was not at MMI in regard to those conditions. He recommended Petitioner follow up with Dr. Hunter and the ophthalmologist (Respondent's Exhibit 4; p 37).

On cross-examination, Dr. Malbrough agreed he had not personally reviewed any MRIs of the cervical spine obtained prior to the accident of October 4, 2020. He also agreed the mechanics of the injury could cause Petitioner's neck pain (Respondent's Exhibit 4; p 46, 63-64).

Dr. Racenstein was deposed on December 21, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Racenstein's testimony was consistent with his medical

report and he reaffirmed the opinions contained therein. Specifically, Dr. Racenstein testified he reviewed the MRI of June 17, 2021, and observed a small central disc protrusion at C5-C6 and a central and left sided protrusion at C6-C7. He stated there was no extension of the C6-C7 protrusion to the right. Based upon the preceding, Dr. Racenstein testified there was nothing in the MRI which would explain Petitioner's right upper extremity symptoms (Respondent's Exhibit 7; pp 16-18).

On cross-examination, Dr. Racenstein agreed the only MRI he reviewed was the one from June, 2021, and he did not review a cervical MRI from 2012. He agreed the mechanics of the injury could contribute to the disc protrusions. Dr. Racenstein stated he does not perform physical and neurological examinations of the spine and could not opine as to the medical necessity of surgery (Respondent's Exhibit 7; pp 19-24).

At trial, Petitioner testified he currently has neck pain which is worse with movement in all directions. The pain radiates into his right arm going into the right thumb, index and middle fingers. Petitioner stated he does not have any left sided symptoms. Petitioner said he continues to have headaches and dizziness which cause him to experience a loss of balance when standing. The glasses he received have helped him with looking forward, but when looking to the right or left, Petitioner still experiences blurred vision. Petitioner is still unable to return to work as a commercial truck driver.

Petitioner acknowledged he had cervical spine problems prior to the accident of October 4, 2020, primarily neck pain going in to the left arm. However, no physician who evaluated him prior to October 4, 2020, recommended or performed neck surgery.

Petitioner agreed he had workers' compensation settlements prior to the accident of October 4, 2020, one of which was settled for $150,000.00. Subsequent to the settlement of that case, Petitioner passed a DOT physical and obtained employment with Taylor Express.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of October 4, 2020.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury on October 4, 2020, when he struck his head on a hopper underneath a semi truck trailer.

In regard to Petitioner's postconcussion symptoms of headaches, dizziness and vision issues, there was no dispute these conditions were related to the accident of October 4, 2020.

There was no dispute Petitioner had cervical spine symptoms prior to the accident of October 4, 2020; however, the prior upper extremity symptoms were to the left upper extremity and not the right.

None of the physicians who evaluated/treated Petitioner prior to October 4, 2020, recommended or performed any surgery on Petitioner's cervical spine, including Dr. Kube, who is presently Petitioner's primary treating physician and recommending he undergo C6-C7 disc replacement surgery.

The primary basis for Respondent disputing causal relationship is the opinions of both Dr. Malbrough and Dr. Racenstein, and their reading of the MRI of June 17, 2021. They both opined the MRI revealed a central left sided disc protrusion at C6-C7 and there was either no explanation for Petitioner's right sided complaints or they were inconsistent with the MRI findings.

Dr. Malbrough agreed he did not personally review any MRIs of Petitioner's cervical spine taken prior to October 4, 2020, and the injury could have caused Petitioner's neck pain.

Dr. Racenstein only reviewed the MRI of June 17, 2021, and while he testified there was nothing in the MRI to explain Petitioner's right upper extremity symptoms, Dr. Racenstein does not perform physical or neurological examinations of the spine.

Dr. Kube previously treated Petitioner and reviewed/compared the MRIs of 2012 and 2021. He opined the MRI of June 17, 2021, revealed a central protrusion at C6-C7, but the protrusions were both to the left and right, but a little further to the left. Dr. Kube also noted that, prior to the accident of October 4, 2020, Petitioner was not having neck symptoms and was able to work.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Kube to be more persuasive than those of Dr. Malbrough and Dr. Racenstein in regard to causal relationship.

The Arbitrator finds the fact Petitioner has had workers' compensation settlements prior to the accident of October 4, 2020, to have little or no probative value in regard to a determination of causal relationship or Petitioner's credibility.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 14 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the C6-C7 disc replacement surgery recommended by Dr. Kube and diagnostic testing including a sleep study recommended by Dr. Hunter.

In support of this conclusion the Arbitrator notes the following:

As noted herein, the Arbitrator found the opinion of Dr. Kube to be more persuasive than those of Dr. Malbrough and Dr. Racenstein in regard to causality. Further, Dr. Racenstein did not opine as to the need for Petitioner undergoing surgery.

There were no medical opinions contrary to that of Dr. Hunter in regard to Petitioner needing diagnostic testing including a sleep study.

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

The Arbitrator concludes Petitioner is entitled to additional temporary total disability benefits of 13 5/7 weeks commencing October 5, 2020, through October 26, 2020, and October 16, 2021, through December 28, 2021.

In support of this conclusion the Arbitrator notes the following:

In regard to the period of October 5, 2020, through October 26, 2020, the reason Petitioner did not seek medical treatment for his work injury until October 27, 2020, was because Respondent had not authorized same.

Petitioner continues to be unable to work primarily because of the cervical spine condition.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC034906
Case Name	Frank Campbell v. Securitas Security Services USA, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0295
Number of Pages of Decision	11
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Dirk May
Respondent Attorney	Patrick D. Duffy

DATE FILED: 8/9/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK CAMPBELL,
Petitioner,

vs. NO: 18 WC 34906

SECURITAS SECURITY SERVICES USA, INC,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 12, 2021 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $48,100.00. 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.

August 9, 2022
o: 08/04/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC034906
Case Name	CAMPBELL, FRANK v. SECURITAS SECURITY SERVICES USA, INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Dirk May
Respondent Attorney	Patrick D. Duffy

DATE FILED: 10/12/2021

/s/Adam Hinrichs, Arbitrator
Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

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

Frank Campbell
Employee/Petitioner

v.

Securitas Security Services USA, Inc.
Employer/Respondent

Case # **18** WC **034906**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Bloomington**, on **August 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 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*** 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 $**38,187.24**; the average weekly wage was $**734.37**.

On the date of accident, Petitioner was **30** 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 $**40,175.90** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**40,175.90**.

Respondent is entitled to a credit of $**795.62** under Section 8(j) of the Act.

ORDER

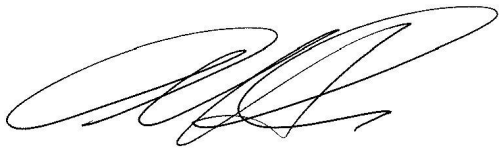
Respondent shall be given a credit of $795.62 for medical benefits that have been paid by its group health carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical services of $852.62, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $440.62/week for 200 weeks, because the injuries sustained caused the Petitioner a 40% loss of use to his person as a whole, as provided in Section 8(d)2 of the Act.

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

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



Signature of Arbitrator

October 12, 2021

FINDINGS OF FACT

On August 20, 2018, Petitioner worked as a security officer for Securitas. He was assigned to Illinois State University. While making a routine patrol, he slipped on grass, fell forward, and injured his right knee. After feeling severe pain in the knee, his knee went numb. While on the ground, he called 911.

Petitioner testified that the ambulance transported Petitioner to OSF St. Joseph emergency room. Petitioner presented to the emergency department reporting right knee pain after an accidental trip and fall at work. The ER physician noted that Petitioner arrived via ambulance and was unable to stand due to knee pain. X-rays of Petitioner's knee showed an avulsion fracture fragment adjacent to the fibular head, measuring 2.6 centimeters, along with a small knee joint effusion. The ER physician diagnosed "fibula upper end fracture" and right knee pain, and prescribed pain medication, a knee immobilizer, and crutches, and ordered Petitioner to follow up in the clinic in the next week. Petitioner was referred to an orthopedist, Dr. Mark Hanson, at McClean County Orthopedics. (PX 2.)

On October 23, 2018, Petitioner presented to Dr. Hanson and reported he slipped on wet grass on October 20, 2018 and that his knee went out in front of him. He fell on his leg and heard a pop and felt immediate pain. Petitioner reported he had been using a knee immobilizer after his emergency room visit and that his pain was only present when his pain medication would wear off. Petitioner also reported numbness and tingling down his leg. Dr. Hanson indicated that Petitioner had a possible ACL tear and lateral meniscus tear in addition to the right displaced fibular head avulsion fracture, and ordered an EMG and an MRI. Dr. Hanson also ordered a right ankle foot orthosis for right foot drop. (PX 3.)

On October 30, 2018, Petitioner presented to Dr. Craig Carmichael, a pain management physician, with complaints of right foot drop, but denied low back pain. Petitioner reported pain of 7/10, up to 10/10 at its worst, with pain radiating throughout his right lower extremity, numbness and tingling in his posterior calf, and weakness, stiffness, and spasms in his right lower extremity. Dr. Carmichael indicated that Petitioner was scheduled for an EMG in two weeks, and counseled Petitioner on the use of his medications. (PX 3.)

On November 6, 2018, Petitioner returned to Dr. Hanson, who noted that Petitioner had had an MRI of the right knee. The MRI was significant for a complete tear of the ACL, tear of the LCL, grade 1 sprain of the MCL, Baker's cyst, loose body, lateral tibial plateau fracture, and complete tears of the ligaments of the posterior lateral corner of the knee. Petitioner reported his pain was localized at the lateral corner of the knee, and described his pain as "aching." Dr. Hanson referred Petitioner to Dr. Joseph Norris at McClean County Orthopedics, and ordered Petitioner to remain off of work until that evaluation was complete. Petitioner was fitted for an Ankle Foot Orthosis ("AFO") brace on November 7, 2019. (PX 3.)

On November 12, 2018, Petitioner presented to Dr. Norris, a sports medicine specialist, reporting continued pain and swelling. Dr. Norris noted that Petitioner was difficult to examine given his large size, with a body mass index over 50. Petitioner is about 6'2" and 460 pounds. Dr. Norris noted that he did not feel that Petitioner could effectively exercise given the extent of his knee injury, and discussed the benefits of surgery, specifically, ACL reconstruction with posterolateral corner reconstruction and repair of any of the structures within the posterior lateral corner, including the avulsion fracture. Dr. Norris also noted that Petitioner had an peroneal nerve injury, and was unable to dorsiflex his ankle. Dr. Norris indicated that he would proceed with neural lysis at the time of surgery. (PX 3.)

Petitioner attended a Section 12 examination at Respondent's request with Dr. Lawrence Li on December 14, 2018. Dr. Li diagnosed right knee ACL, LCL and posterolateral corner tear. Dr. Li opined that Petitioner also suffered a peroneal nerve injury. Dr. Li opined that Petitioner's prognosis after reconstruction surgery was good, and that Petitioner should be able to return to his regular job and full duty. Dr. Li noted that Petitioner

needed a foot drop ankle-foot orthosis and a knee brace that would allow him to walk, and opined that Petitioner would be on sedentary duty until after surgery. Dr. Li found all medical care was reasonable and necessary, and that all of Petitioner's current symptoms and complaints were directly related to the work injury. (RX 4.)

Petitioner presented for an EMG on December 19, 2018. The study reportedly was abnormal, with a very severe peroneal neuropathy at the right fibular head. Petitioner returned to Dr. Carmichael that same day, who noted that Petitioner may repeat the EMG in eight weeks to assess for improvement. (PX 3.)

On January 22, 2019, Petitioner presented to Dr. Norris, who reiterated his surgical recommendation. Dr. Norris noted that Petitioner's EMG showed peroneal nerve pathology. (PX 3.)

On February 7, 2019, Petitioner underwent surgery with Dr. Norris and Dr. Oakey. Dr. Norris performed a right knee arthroscopy, anterior cruciate ligament reconstruction with bone patellar tendon bone allograft, and open posterior lateral corner repair. A peroneal nerve neuroma resection and repair was performed by Dr. Jerome Oakey. (PX 7.)

Petitioner testified that after surgery, his treatment consisted of physical therapy, injections, and assistive devices including a wheelchair, rollator, and cane.

On February 19, 2019, Petitioner returned to Dr. Norris, who noted that at the time of surgery, he found a proximal fibula fracture that had gone to non-union with the peroneal nerve entrapped within the fracture site, which had completely severed the peroneal nerve. Dr. Norris noted that Petitioner had activity within the tibial nerve, but no activity within the peroneal nerve. Dr. Norris recommended that Petitioner start physical therapy, and noted that long-term treatment of the peroneal nerve may include tendon transfers after a full recovery if the nerve did not heal or recover. X-rays of Petitioner's right knee reportedly showed a displaced fragment along the proximal fibula, with intact tunnels for the ACL and no signs of hardware migration or loosening. Petitioner was to remain off of work. (PX 3.)

On March 19, 2019, Petitioner returned to Dr. Norris, and reported that his pain was well-controlled with pain medicine. Dr. Norris recommended that Petitioner continue physical therapy and focus on gait training and start ambulating with a walker. Petitioner was advised to return in four weeks and remain off of work. (PX 3.)

On April 18, 2019 Dr. Norris noted Petitioner was doing well with respect to stability. Petitioner had noticed improvement in his sensation.

On June 6, 2019, Petitioner returned to Dr. Norris, who noted that Petitioner had shown significant improvement since his last visit with improving sensation throughout the peroneal nerve distribution, but no complete recovery. Dr. Norris noted that Petitioner had not felt feelings of instability aside from some lateral side movements intermittently. Dr. Norris recommended that Petitioner continue with strengthening and return in two weeks. (PX 3.)

On July 30, 2019, Petitioner returned to Dr. Norris, who noted that Petitioner had great stability in his knee, but lacked sensation along the peroneal nerve and still had a foot drop clinically. Dr. Norris issued a prescription for a cane and ordered Petitioner to obtain an EMG. Petitioner was to remain off of work and was to obtain an evaluation from an occupational therapist to see if he was fit for driving.

On August 14, 2019, Petitioner returned to Dr. Carmichael, who noted that Petitioner's EMG from that day showed "very severe peroneal neuropathy at the right fibular head." Dr. Carmichael indicated that if the nerve sheath was still intact, there would be the possibility of some regeneration, but at that point Petitioner's prognosis was uncertain and somewhat unfavorable. (PX 3.)

In therapy on August 22, 2019, Petitioner reported that his knee was "still a little painful", and felt tight, like it "needs to pop." Petitioner testified that during the August 22, 2019 therapy session he was working on a balance exercise between the balance bars. His knee buckled. The therapist stopped the session. The therapist's records do not reference this incident. (RX 3.)

On August 29, 2019, Petitioner presented to Alex Frantz, Dr. Norris's physician's assistant, and reported right knee pain and increased instability. Petitioner reported that he had a problem in therapy, when his knee hyperextended and he had pain. Petitioner reported he had pain diffusely throughout the knee, but more medially. X-rays reportedly showed tibial screws in excellent position with no signs of loosening or migration, and non-union of Petitioner's fracture, unchanged from previous radiographs. Mr. Frantz recommended an MRI, and opined that Petitioner may have exacerbated some of his chondromalacia, or sustained a meniscus tear. (PX 3.)

On September 10, 2019, Petitioner returned to Dr. Norris, who noted that Petitioner had not felt any episodes of instability in his knee until two weeks prior when he had a hyperextension episode in therapy. Dr. Norris indicated that most of Petitioner's pain was medial, which made him concerned for a medial meniscus tear. Petitioner was to hold off on any activity or therapy until he was done with the MRI. (PX 3.)

On October 15, 2019, Petitioner returned to Dr. Norris, who noted that Petitioner's MRI showed no signs of new structural pathology. Dr. Norris opined that he had nothing on an MRI to confirm that his instability pattern was due to a posterolateral corner injury, and did not feel comfortable proceeding with surgical intervention. Petitioner was to continue aquatic therapy and obtain a second opinion. Dr. Norris referred Petitioner to Dr. Brian Cole or Dr. Nikhil Verma at Midwest Orthopaedics at Rush, or Dr. Brett Wolters at Springfield Clinic. (PX 3.)

Petitioner presented to Dr. Cole on October 28, 2019 for an evaluation. He provided a consistent history of accident, along with his subsequent care and recovery. Examination revealed limited flexion and positive orthopedic tests. Dr. Cole reviewed October 11, 2019 MRI films and found no ruptured ACL or damage to the ACL posterolateral corner. Nor did the films reveal a meniscal tear. Dr. Cole's assessment was eight months status post ACL reconstruction, posterolateral corner reconstruction, fibular head open reduction and internal fixation, and peroneal nerve repair. Dr. Cole stated there was no need for surgery. Dr. Cole recommended a consult with a foot/ankle surgeon to address a possible tendon transfer for foot drop. (PX 4.)

Petitioner returned to Dr. Norris on December 4, 2019. An epidural steroid injection was administered into the right knee. (PX 3.)

On January 6, 2020 Dr. Norris noted that Petitioner reported significant improvement following the injection. He ordered additional therapy and referred Petitioner to Dr. Shawn Kink, an orthopedist at McLean Orthopedics specializing in treatment of the foot and ankle. (PX 3.)

On January 13, 2020 Petitioner presented to Dr. Kink. Dr. Kink noted Petitioner was severely obese. Petitioner complained of a chronic foot drop. He was able to push off but was unable to dorsiflex or evert the ankle. Dr. Kink's examination was positive for swelling and significant weakness of the right foot/ankle. Petitioner walked with a limp. Dr. Kink diagnosed a right foot drop and nerve damage following a knee dislocation. Surgical options included posterior tibial tendon and fusion of the ankle joint. Conservative options included over the counter medications, physical therapy, and AFO bracing. Dr. Kink thought that because of the extensive tendon damage, bracing was the best option available. Petitioner planned to have his brace adjusted. He was to return to Dr. Kink on February 10, 2020. (PX 3.)

On June 10, 2020 Dr. Kodros examined Petitioner at Respondent's request pursuant to Section 12 of the Act. His examination of the right foot was positive for severe weakness of the right foot and loss of sensation in the

peroneal nerve distribution. When barefoot, he walked with a foot drop pattern. While wearing his AFO brace and shoes, he walked without a limp. The right calf was 1-1/2 cm smaller than the left, and the right ankle was 1-1/2 cm larger than the left.

Dr. Kodros offered the following opinions:

1. Petitioner has a chronic peroneal nerve injury and right foot drop.
2. He recommended Petitioner continue to wear an AFO brace. He identified a surgical procedure for the foot drop, but was not confident it would be helpful.
3. He suggested Petitioner's car be modified to have a left foot accelerator pedal.
4. If Petitioner did not have surgery, he was at MMI.
5. Restrictions for ground level work only. (PX 6)

On July 13, 2020 Petitioner presented to Dr. Norris for his right knee condition. Dr. Norris's examination of the knee revealed crepitus, tenderness, and ligamentous instability. Petitioner reported the injury affected his activities of daily living. Petitioner reported that physical therapy and a December 4, 2019 steroid injection helped significantly. Dr. Norris did not have any additional treatment to recommend. He ordered an FCE and kept Petitioner off work pending the FCE. Dr. Norris also recommended a left foot accelerator modification for his car.

Petitioner participated in the FCE on July 28, 2020. The therapist described Petitioner as cooperative and willing to perform all tests that were requested that he perform. She added that that he was more willing to perform some tests than others. Petitioner stopped the testing on the ladder climb, gait, floor to waist lifting, and front carrying activities. His reason for stopping was pain or fear. He expressed anxiety over certain tests but attempted all tests except for the ladder climb.

Petitioner complained of discomfort in the knee and leg as part of the reason for limiting his lifting and carrying. He reported that he was having the worst pain since the time of his injury and thought that he may vomit, however, he finished all testing.

The therapist concluded Petitioner was able to sit and perform upper extremity tasks without limit, stand and walk for short periods as long as he was allowed a break, and able to perform unilateral carry of 20 to 25 pounds as long as he was able to take a seated break. Petitioner's limitations included increased heart rate and shortness of breath with strenuous activity. Gait and standing are limited to four to five minutes. He is unable to use a ladder or use stairs without a railing. Another barrier to Petitioner returning to full duty are unplanned scenarios for a security officer, such as slippery surfaces "or dangerous situations if walking students home at night." The Petitioner's abilities did not meet his job demands in his job for the Respondent. (PX 5.)

On August 3, 2020, Dr. Norris issued the following permanent work restrictions for Petitioner: use a cane as needed, able to sit 10 minutes every hour, lift/carry no more than 25 pounds, wear an AFO brace, and use a pad when kneeling. (PX 8.) At Petitioner's request Dr. Norris administered an injection.

Petitioner testified that he returned to work for the Respondent in September 2020. He sat at the front desk at a candy manufacturer. This was a temporary assignment. The job at ISU required that he walk between 10,000 and 20,000 steps per shift on all types of surfaces and in all weather. Respondent never offered Petitioner a permanent position.

Petitioner has changed jobs. He works for Wilber, a collection company. His first day was November 30, 2020. His wage is $13.20 per hour. He works 40 hours per week. There are monthly bonuses, but they are not guaranteed. The amounts have ranged between $30 and $100. He sits constantly. The only walking required is to attend a meeting. He has an adjustable desk which permits him to prop his foot up.

Petitioner testified he has good days and bad days. On bad days his pain is aching or shooting. He uses over the counter medicine ("OTC"), ice, and heat. He uses ice one or two times per week. He will apply it for 15 minutes and take a break and re-apply. He applies heat once or twice a week. When he uses heat, he applies it for 15 minutes. He will take Ibuprofen or Naproxen once or twice per week to help control pain and swelling.

Petitioner testified that his range of motion of the knee is pretty good. His knee strength is slowly returning, but he needs a cane to walk and is able to walk only one or two blocks. Standing is more difficult than walking. His right foot is numb. He has no motion of the right foot. If he does not prop his foot up at work, it swells by the end of the day. He limits his activities because of his limited ability to walk.

He started using a cane in 2019 which provides stability. He uses it at home and when he is out. He uses a shower chair. He fears slipping on the floor of the tub. He has a left foot accelerator because he cannot use his right foot to drive. He learned and became licensed to use his left foot. He wears an AFO brace because his foot dangles. He has used the same brace since November 2018. It has been adjusted a few times.

He had two injections to the right knee. The most recent injection was on August 3, 2020 at his last office visit with Dr. Norris. Prior to this work accident, Petitioner had no prior problems with or treatment to his right knee or foot.

Petitioner testified that he is a high school graduate. He attended an online program with ITT in criminal justice, but did not complete the program.

The Arbitrator observed the Petitioner and found him to be sincere, consistent and credible. Petitioner provided an account at hearing that matched his reports to his treating physicians and Respondent's examiners.

CONCLUSIONS OF LAW

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

The Arbitrator finds that as a result of the work accident on October 20, 2018, the Petitioner sustained a right knee anterior cruciate ligament tear, lateral cruciate ligament tear, posterolateral corner tear, peroneal nerve injury, and the need for permanent work restrictions. All of Petitioner's treating physicians, as well as all of Respondent's examiners, relate Petitioner's current condition of ill-being to his October 20, 2018 work accident.

The Arbitrator finds that the Petitioner has met his burden of proof, and that his current condition of ill being is causally related to this injury.

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

The Arbitrator finds the unpaid bills in Petitioner's Exhibit 1 are for reasonable and necessary treatment related to the accident. Respondent is responsible for these bills pursuant to Sections 8(a) and 8.2. The Respondent shall have a credit for any amounts paid.

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

An analysis applying the five statutory factors set forth in ILCS 305/8.1b(b) is as follows:

With regard to subsection (i): the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator has considered and gives no weight to this factor.

With regard to subsection (ii), the occupation of the employee: the Petitioner was employed as a security officer at the time of the accident, and he is not able to return to work in his prior capacity as a result of this work injury. The Respondent was unable to place the Petitioner in a permanent position given his restrictions. Petitioner sought a job within his restrictions, and found a sedentary job. The Petitioner lost his occupation. The Arbitrator has considered and gives significant weight to this factor.

With regard to subsection (iii): the Arbitrator notes that Petitioner was 30 years old at the time of the accident. Because of his young age, and the significant amount of time he will remain in the labor force, the Arbitrator gives moderate weight to this factor.

With regard to subsection (iv), Petitioner's future earnings capacity: The Arbitrator notes that the Petitioner is a high school graduate. Petitioner's current weekly wage is approximately 27% lower than his weekly wage with the Respondent at the time of the accident. Petitioner's permanent work restrictions are significant, limiting his marketability in the labor force. The Arbitrator has considered and gives significant weight to this factor.

With regard to subsection (v), evidence of disability corroborated by the treating medical records: the Arbitrator notes the Petitioner sustained significant injuries requiring a right knee arthroscopy, anterior cruciate ligament reconstruction with bone patellar tendon bone allograft; open posterior lateral corner repair; and right perineal nerve neuroma resection and repair. Petitioner now suffers from a chronic right foot drop, and needs an AFO foot brace and left foot accelerator for his car. Petitioners' treating physicians and Section 12 examiners relate Petitioner's complaints and need for this care to this work injury. Petitioner has significant permanent restrictions as a consequence of this accident that affect his ability to lift, stand, walk, and drive. Petitioner's right foot is numb and has no motion. The Petitioner manages his symptoms with ice, heat, and OTC medications. The Arbitrator has considered and gives significant weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 40% loss of use to his person as a whole, pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC040682
Case Name	Robert J Schlosser II v. Farmers Coop Association
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0296
Number of Pages of Decision	22
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Edward Januszkiewicz

DATE FILED: 8/9/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT SCHLOSSER,
Petitioner,

vs. NO: 14 WC 40682

FARMERS COOP ASSOCIATION,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and 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 January 24, 2022 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 $23,300.00. 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.

August 9, 2022
o: 08/04/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC040682
Case Name	SCHLOSSER, ROBERT v. FARMERS COOP ASSOCIATION
Consolidated Cases	
Proceeding Type	8(A)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Edward Januszkiewicz

DATE FILED: 1/24/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 19, 2022 0.37%

/s/Kurt Carlson, Arbitrator

Signature

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
8(A)

Robert Schlosser Case # **14** WC **040682**
Employee/Petitioner/ damon@damonyounglaw.com
v.
Farmers Coop Association
Employer/Respondent/ janusze1@nationwide.com

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 **Bloomington**, on November 30, 2021. 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 **causation, medical bills, prospective medical under 8(a)**

FINDINGS

On **November 12, 2014,** Respondent ***was*** operating under and subject to the provisions of the Illinois Workers' Compensation 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 $**28,600.00**; the average weekly wage was $**550.00**.

On the date of accident, Petitioner was **48** 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 $**1,031.32** for PPD/TTD, $**0** for TPD, $**0** for maintenance, and **0** for other benefits, for a total credit of $**1,031.32**.

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

ORDER

Because Petitioner failed to prove a causal connection between his present condition of ill-being and the work accident and after December 2, 2014, all benefits are denied after that date.

Because Petitioner failed to prove a causal connection between his present condition of ill-being and the work accident and after December 2, 2014, all medical bills, charges, and expenses incurred after that date are denied.

Because Petitioner failed to prove a causal connection between his present condition of ill-being and the work accident and after December 2, 2014, all prospective medical care recommended on or after that date is denied, including the prospective medical care recommended by Dr. Lawrence Li.

The Arbitrator finds Petitioner permanently and partially disabled to the extent of 12.5 % loss of use of the right arm under Section 8(e) plus 2.5% loss of use of person as whole, which amounts to 44.125 weeks 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.

Kurt A. Carlson **JANUARY 24, 2022**

Kurt A. Carlson

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS
ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT SCHLOSSER, Petitioner, v. FARMERS COOP ASSOCIATION, Respondent.	)))))))))	No.: 14 WC 40682

F. Is the Petitioner's present condition of ill-being causally related to the injury?

The Arbitrator finds that there is no causal connection between Petitioner's present condition of ill-being and the November 12, 2014 accident. However, the Arbitrator finds causal connection in favor of Petitioner from the date of the accident until December 2, 2014 against Respondent, Farmers Coop Association.

The Arbitrator in making this decision relies on the testimony and report of Dr. Joshua Alpert MD (US Inc. RX #2), (US Inc. RX # 3), as well as the initial treatment records of OSF Orthopedic/ Dr. Jeffrey Garst (PX #4); and OSF Prompt Care (PX #5).

Petitioner's failed to prove a causal connection for his work injuries after December 2, 2014 when he was last examined by Dr. Jeffrey Garst and then failed to seek any additional medical treatment until August 2019, a treatment gap of fours years and 8 months.

November 12, 2014 accident

Petitioner testified that in November 2014 he was employed by Farmers Coop Association as a grain handler (Ar. Tr. p 11). He testified that on November 12, 2014 he tried to dump a hopper on a semi; he tried to get it open but could not; he tried with both arms when his

right arm popped. Petitioner testified that the pop was in the bicep area (Ar. Tr p. 12). Petitioner testified that he felt pain in his right shoulder and bicep.

Initial treatment with OSF

Petitioner sought treatment at OSF PromptCare the following day, on November 13, 2014. Those medical records state he was "rotating a piece of farming equipment and felt a pop and pain in the right bicep area" (PX #5).

Petitioner followed up with Dr. Jeffrey Garst on November 17, 2014. On that date, Petitioner reported that he was using force to rotate something when he felt a pop in in upper arm. Dr. Garst diagnosed a right bicep tendon rupture and right shoulder pain, possible rotator cuff tear.

Petitioner returned to Dr. Garst again on December 2, 2014. Petitioner testified that on that date he discussed with Dr. Garst reverse total rotator cuff replacement but that Dr. Garst then did not recommend it (Ar. Tr. 17). Petitioner testified that he was released full duty back to work on December 2, 2014 (Ar. Tr 17-18).

Fifty-seven-month treatment gap

After being released from care, Petitioner testified that his shoulder still hurt. Nevertheless, he continued to work for the next 2 years and that his right shoulder got worse. He continued to work for Farmers Coop Association. He finally decided to get a second opinion (Ar. Tr. p21-22). Petitioner testified that he saw a television advertisement for Dr. Lawrence Li (Ar. Tr. p. 19).

Petitioner testified that he saw Dr. Li for a second opinion on August 7, 2019; that he discussed the right shoulder injury and accident facts with him and that he hurt his biceps and

shoulder. Petitioner testified that he had an MRI of the right shoulder on September 17, 2019 (Ar. Tr. 20). Petitioner testified that Dr. Li recommended a rotator cuff repair and biceps repair and that Petitioner wanted to undergo the surgery (Ar. Tr. p 20).

On cross-examination Petitioner testified that he first treated on November 13, 2014 with OSF PromtCare and Dr. Gruber. Petitioner reported to Dr. Gruber that he was working the day before, tried to rotate a piece of equipment and felt an acute pop and severe pain in his right bicep (Ar. Tr. p24). Petitioner admitted that when he woke up the next day, he noticed swelling in the biceps area and pain. Petitioner then followed up with Dr. Garst on November 17, 2014. Petitioner reported to Dr. Garst on 11/17 that he felt a pop in his upper arm and noted it was deformed. Petitioner admitted he was addressing the right bicep area. Petitioner admitted on cross-examination that Dr. Garst told him on November 17 that he would not recommend surgery for the bicep tendon. Petitioner admitted that when he treated with Dr. Garst in November and December 2014 that he did not recommend any surgery to his right shoulder or biceps (Ar Tr 28-29). Petitioner admitted that Dr. Garst released him to return to regular duty work on December 9, 2014; that he was instructed to follow up as needed but that he did not return to Dr. Garst after December 2, 2014 (Ar. Tr.p 30).

Petitioner admitted that he did not seek any medical treatment for his right shoulder for the next 4 ½ years until he saw Dr. Li on August 7, 2019. Petitioner testified that he returned to work for Farmers Coop in December; that he worked a couple of years but could not recall when he left (P 33). Petitioner testified that he did not work for a while and then got is laborer's card the year prior <2020>. Petitioner testified that he then returned to work for Local Laborers 996 holding stop signs and further testified that he renewed his laborer's card in 2019 but has worked as a laborer since 1990 (Ar. Tr. p 33). Petitioner testified that his first employment after Farmers Coop was the laborer's union; that that was the only company he worked for (Ar Tr p 33).

Petitioner testified on cross-examination that when he saw Dr. Li in August 2019 that he told him his left and right shoulders were the same and that he was laid off. (Ar. Tr p 34).

Petitioner testified that he was examined by Dr. Joshua Alpert on June 2, 2020. Petitioner admitted that he gave Dr. Alpert a history of the November 12, 2014 work accident but disputed that he told Dr. Alpert that he injured his left arm. On cross-examination, Petitioner could not recall what he told Dr. Alpert about current complaints; he could not recall if Dr. Alpert conducted a physical examination on both shoulders; but admitted that he would not dispute Dr. Alpert's report regarding a physical examination (Ar .Tr 51). Petitioner testified that when he returned to work for Farmers Coop that he returned to his old job but later moved to "loading trucks…not hard labor" but also admitted that he did not seek any medical treatment or obtain any medical note that placed him on restricted work (Ar Tr 52). Petitioner admitted that when he went back to work that he did the same work duties as before (Ar. TR 56). Petitioner admitted that when he saw Dr. Garst on December 2, 2014 he told Dr. Garst that he wanted to go back to work (Ar Tr p 56).

The Arbitrator notes the OSF Prompt Care records submitted by Petitioner (PX #5). Petitioner presented on November 13, 2014 for complaints of upper arm pain and swelling. Petitioner reported the accident from 1 day prior and further reported "he felt an acute pop, severe pain in his right biceps area" and further reported "Today when waking up he noted swelling in biceps area with associated pain" (PX #5). Petitioner was examined by Dr. Gruber. Her examination findings included "Deformity noted to right biceps with tenderness overlying area of deformity". While the Arbitrator notes physical examination documented right shoulder tenderness, Petitioner also showed Full ROM in the shoulder and additionally positive Speed's/Yergason's test which the Arbitrator notes for bicipital pathology only. Dr. Gruber diagnoses was biceps tendon rupture, right. Petitioner was referred to Great Plains for "Tendon

Injury" (PX #5). The Arbitrator finds compelling that just 1 day after the accident, Petitioner treats at OSF Prompt Care but did not report any right shoulder injury or complaints nor do the medical records document that Petitioner suffered any right shoulder injury. His only reported injury and complaints were in reference to his right bicep.

The Arbitrator notes OSF Orthopedic records submitted by Petitioner (PX #4). Petitioner was examined by Dr. Jeffrey Garst MD on November 17, 2014 and presented with "Chief Complaint: Deformity of right arm with some pain at the shoulder". Petitioner reported he felt a pop in his upper arm and deformity. Dr. Garst's examination revealed full range of motion about the right elbow, wrist and fingers. At shoulder, 150 degrees flexion and 140 degrees abduction with moderately positive impingement sign, but further noting no deformity about the shoulder but the arm had definite deformity (PX #4) with "Popeye deformity at the upper arm consistent with a long head of the bicep rupture". His diagnosis on this date was 1) right long head of biceps tendon rupture; and 2) right shoulder pain, possible rotator cuff tear. He recommended an x-ray and MRI of the right shoulder for further workup.

The Arbitrator finds even more compelling that on this date, just 7 days after the work accident, Dr. Garst did not recommend any bicep tendon repair surgery. He documents the following: 'With regards to the long head of the bicep itself, I told him that I would not do any surgery. That is usually left alone". The Arbitrator acknowledges that the note continues as "…however, this is often associated with shoulder pain or pathology for which something does need to be done" (PX #4). However, it is clear to the Arbitrator that Dr. Garst's only recommendation on this date was for Petitioner to complete an MRI and x-ray before further assessing treatment plans. Petitioner completed the MRI of the right shoulder on November 25, 2014. The Arbitrator notes the MRI report from that date revealed the following: 1) massive full-

thickness rotator cuff tear with findings of chronic rotator cuff arthropathy…; 2) Rupture long head biceps tendon with 6 cm down the groove.

Petitioner returned to Dr. Garst on December 2, 2014. His complaints were continued deformity right arm, with some pain in the shoulder. The Arbitrator notes that Dr. Garst conducted another physical examination and reviewed the MRI of the right shoulder. Dr. Garst's diagnoses on this date were as follows: 1) Large, longstanding, full-thickness rotator cuff tear, with early rotator cuff arthropathy; 2) right long head bicep tendon rupture. Of note, Dr. Garst then documents "There is no good surgical option for him. He is only 48 years old and does quite a bit of heavy work with farming activities he does." Dr. Garst documents that he did not think Petitioner was a candidate for a reverse total shoulder and that a rotator cuff repair was not possible (PX #4). At Petitioner's request, Dr. Garst released the Petitioner to return to regular work as of 12/09/14 and advised the Petitioner to follow up as needed. Based on the medical records of OSF Orthopedic records, included the records of Dr. Gruber and Dr. Garst, the Arbitrator finds Petitioner sustained right long head bicep tendon rupture on November 12, 2014 with shoulder pain.

The Arbitrator finds compelling that as of December 2, 2014, Petitioner was advised by Dr. Garst that he would not do any surgery to repair the bicep rupture; and further advised him that there was no surgical option for him, including that he was not a candidate for a reverse total shoulder and that a rotator cuff repair was not possible, ***but*** to follow up as needed. The Arbitrator notes that Petitioner did not return to Dr. Garst after December 2, 2014 nor did he seek any medical treatment concerning his right shoulder or bicep until August 2019, more than 4 ½ years after his last visit with Dr. Garst.

The Arbitrator notes Dr. Joshua Alpert's report dated June 11, 2020 (RX 3). Petitioner was examined by Dr. Alpert at the request of the Respondent, Farmers Coop Association.

Petitioner reported that on November 12, 2014 he was cranking a hopper on a semi-trailer and then he experienced significant pain in his left arm like a Charley Horse (RX #3). Petitioner reported to Dr. Alpert no complaints referrable to the right arm but that his left arm felt weak; that that was his main complaint, left arm, biceps and elbow (RX #3). Dr. Alpert conducted a physical examination of the right shoulder which revealed completely normal right shoulder exam, with full passive and active range of motion; excellent strength test; no weakness, no instability. Dr. Alpert noted his findings on the left shoulder and left elbow.

Dr. Alpert reviewed medical records from Great Plains Orthopedics, records from Dr. Kristen Gruber and Dr. Jeffrey Garst, medical records from Dr. Lawrence Li, the MRI reports of the right and left shoulders and radiographic reports. Dr. Alpert's diagnosis with regards to the right shoulder was right rotator cuff arthropathy with full-thickness rotator cuff tear; high-riding head; chronic, currently functioning well. Dr. Alpert opined that his current diagnoses for the right shoulder/arm were not related to the November 12, 2014 accident; that the medical records from November 2014 showed a proximal biceps injury only; and that the full-thickness chronically retracted rotator cuff tear with rotator cuff arthropathy, was chronic and not work related (RX #3, p 5). Dr. Alpert opined that Petitioner's right shoulder biceps rupture and shoulder strain had resolved; that all <current> symptoms were chronic in nature and that petitioner did not require any additional treatment. Dr. Alpert documented that Petitioner had continued to work full duty without restrictions "on the farm for five years." Dr. Alpert opined that the proposed bilateral shoulder surgeries were not reasonable and necessary to cure or relieve any effects from the November 12 accident, and further documenting that Petitioner had no limitations on his right shoulder; that his examination was normal; and that Petitioner reported to him that "his <right> shoulder was not bothering him whatsoever and not an issue" (RX #3, p 5).

Dr. Alpert opined Petitioner had reached maximum medical improvement from the November 12, 2014 injury.

The Arbitrator notes Dr. Alpert's deposition testimony submitted by Respondent, Farmers Coop Association (RX #1). Dr. Alpert testified that he was board-certified in orthopedic surgery with a specialty in sports medicine (RX #1, p 5). He testified that he examined the Petitioner on June 2, 2020. He testified that he took a history from the Petitioner; who reported that on November 12, 2020 he was cranking a hopper on a semi-trailer; used both arms…when he felt significant pain in his left arm, like a "Charley Horse" (RX #1, p 10). Dr. Alpert testified that Petitioner told him he had no issue with his right arm. Dr. Alpert testified that Petitioner reported no current complaints referable to his right arm. Dr. Alpert testified that Petitioner reported ***left*** arm weakness and that was his main complaint. Dr. Alpert testified that he completed a physical examination, and that Petitioner had a completely normal right shoulder exam with full passive and active range of motion with normal strength testing, no weakness. Dr. Alpert testified that Petitioner's ***left*** arm/elbow showed deformity at the elbow with an obvious retracted Popeye deformity where the biceps appeared to be retracted. Dr. Alpert testified that a Popeye deformity usually means that the bicep is torn in the elbow area and it moves toward the shoulder area (RX #1, p 16).

Dr. Alpert testified that the medical records from November and December 2014 addressed the right shoulder with full-thickness rotator cuff tear and that based on the MRI scans and records the condition was chronic. Dr. Alpert testified that the November 13, 2014 medical note documented a right shoulder biceps tendon rupture; that Petitioner was trying to rotate a piece of equipment and felt a pop and severe pain in the right bicep (RX #1, p 17). Dr. Alpert testified that the medical records documented that Petitioner tore his right proximal

biceps…where it attaches to the shoulder area and…a large full thickness rotator cuff tear that was pre-existing (RX #1 p4).

Dr. Alpert testified that he reviewed the medical records of Dr. Lawrence Li from August 7, 2019. Dr. Alpert testified that he reviewed the MRI of the right shoulder from November 25, 2014. Dr. Alpert testified that he reviewed Dr. Li's December 19, 2019 and that Petitioner did not want to have surgery but that he discussed treatment options with Dr. Li. Dr. Alpert testified that the medical records from November 2014 appeared to show that Petitioner had a right shoulder strain and irritated his pre-existing right shoulder cuff arthropathy in the proximal biceps tendon and that it was treated with conservative care. Dr. Alpert testified that Petitioner's primary complaint on the June 2, 2020 date was his left arm; that he had pain and deformity on the left elbow and that was where all his pain was on June 2 (RX #1, p 22). Dr. Alpert testified that the injury Petitioner sustained on November 12, 2014 was a proximal biceps injury <right> with proximal biceps injury to the right shoulder on November 12, 2014, with full-thickness retracted rotator cuff tear with rotator cuff arthropathy which was chronic and not work related. Dr. Alpert testified that there was no medical record regarding any left shoulder related injury or left shoulder related complaints (RX #1, p23). Dr. Alpert testified that he diagnosed the Petitioner with right shoulder rotator cuff arthropathy with full thickness rotator cuff tear, high-riding humeral head, chronic, and currently functioning well; with additional diagnoses of left shoulder rotator full thickness rotator cuff tear greater than 4 centimeters, chronic; and left elbow distal biceps rupture, chronic and retracted (RX #1, p 23-24). Dr. Alpert testified that he did not believe that any of his diagnoses were related to the injury from November 12, 2014; and that the basis of his opinion was that the medical records from that date referenced a right shoulder injury only and were consistent with a proximal biceps injury. The chronically retracted rotator cuff tear was not work related. Dr. Alpert further testified that the MRI findings from November 24, 2014,

including the full thickness chronic retracted rotator cuff tear with arthropathy were pre-existing November 12 and not related; that tendon on the MRI showed that it was retracted and the head, high riding; and that those were chronic findings and not from an acute injury (RX #1, p 25). He testified that "it's more likely…that the pop he heard or the pain he had was the biceps in the shoulder rupturing" or irritated, but it's not from the rotator cuff from the MRI findings which are chronic and pre-existing November 12 (RX #1, p 26). The Arbitrator finds this fact to be most compelling and proof that the accident did not cause, aggravate of accelerate Petitioner's pre-existing, fully torn, rotator cuff injury. Stated another way, a fully torn cuff cannot tear any further.

The Arbitrator notes Dr. Alpert's further testimony, and with regards to the right shoulder bicep rupture, that that condition resolved. Dr. Alpert testified this his examination was normal; that he was working full duty; and that Petitioner told him his right shoulder was not bothering him "whatsoever" (RX #1, p 26). Dr. Alpert testified that Petitioner had reached MMI for the shoulder strain and proximal bicep rupture and that MMI was within 3 months. Dr. Alpert testified that Petitioner did not require any additional treatment for the November 12, 2014 work accident; that Petitioner could work full duty; no restrictions on the right arm and shoulder (RX #1, p 28-29).

On cross-examination, Dr. Alpert admitted that his diagnosis was right shoulder large full thickness rotator cuff tear with rotator cuff arthropathy but that those findings were not present on physical examination. He testified that some patients have normal range of motion and normal strength on physical exam because other muscles may compensate. He testified that Petitioner told him he had no complaints regarding the right arm; that it wasn't bothering him. Dr. Alpert admitted that the right biceps tendon rupture was causally connected to the work accident. Dr. Alpert testified that Petitioner told him he hurt his left arm on November 12, 2014 while

cranking a hopper; he felt pain in his left arm. He testified that Petitioner told him his right arm didn't hurt at all and that his issue was in his left shoulder, his left bicep (RX #1, p 41). Dr. Alpert testified that Petitioner could have been mistaken but that he talked to Petitioner specifically about both arms; that he had a deformity on his left elbow (RX #1, p 42). Dr. Alpert testified that when he examined Petitioner on June 2, 2020, he reported no issues with his right arm; and that he continued to work full duty without restrictions "as a farmer on the farm for five years" (RX #, p 46). The Arbitrator finds Dr. Alpert's testimony credible. Based on the medical report of Dr. Alpert (RX #3) and Dr. Alpert's deposition testimony (RX#1) the Arbitrator finds Petitioner sustained a right biceps tendon rupture and right shoulder strain in the November 12, 2014 accident. The Arbitrator further finds that Petitioner had reached maximum medical improvement for the right biceps tendon rupture and right shoulder strain by December 2, 2014; as on that date Petitioner was released to return to work full duty, no restrictions and released by Dr. Garst to follow up as needed with no additional treatment recommendations after that date.

The Arbitrator notes Dr. Lawrence Li's records/Orthopedic & Shoulder Center records (PX #3). Petitioner initiated treatment with Dr. Li on August 7, 2019 for bilateral shoulders and was referred by a friend. Petitioner could not recall the exacts dates of his injury but that in 2014 and 2015 he injured both shoulders and left elbow. The Arbitrator notes that Petitioner did not report any complaints or issues as to his right bicep on this date. Petitioner presented to Dr. Li with persistent pain; pain in both shoulders but the "Left is worse". Petitioner reported that he was laid off. The Arbitrator notes Dr. Li's finding as to the right shoulder. Dr. Li's diagnosis on August 7 was history of multiple injuries to both shoulders. He wanted to obtain Dr. Garst's records to further understand the chronology of Pettioner's injuries (PX #3).

Petitioner returned to Dr. Li on September 5, 2019. He presented for follow up for bilateral shoulder treatment. Petitioner reported to Dr. Li that he injured his left shoulder when he

was on a platform; the platform was knocked over and he fell and injured his left shoulder. Petitioner reported to Dr. Li that he did undergo any treatment for his left shoulder; nor did he treat with Dr. Garst for the left shoulder in 2015. The Arbitrator notes the medical record from September 5, 2019 does not document any exam findings, diagnosis, or plan as it relates to the right shoulder or right bicep. The September 5, 2019 medical note does not document any history, onset or complaints as to the right shoulder or bicep only that Petitioner presented for follow up (PX #3).

Petitioner returned to Dr. Li on December 19, 2019. Petitioner presented for follow up of the right shoulder. Petitioner reported a work injury from 2014; that he treated with Dr. Garst and did not have surgery. Dr. Li further documents on this visit "There has been work compensation dispute and he is not wanting to have surgery" (PX #3). The Arbitrator notes Dr. Li's finding as to the right shoulder. Dr. Li's diagnosis on this date was old work-related injury back in 2014 that has not been treated surgically because of delays due to workers compensation. Dr. Li's recommendation was to proceed with a right arthroscopic rotator cuff repair. Petitioner returned to Dr. Li on January 20, 2020 with continued complaints of right shoulder pain. The Arbitrator notes the physical exam findings on this date (PX #3).

The Arbitrator notes Dr. Lawrence Li's deposition testimony (PX #2) and other medical records submitted by Petitioner. Dr. Li testified that he first saw the Petitioner on August 7, 2019; that Petitioner gave him a history of two accidents occurring in 2014 and 2015 but could not remember exact dates; that injuries involved his right shoulder, left shoulder and left elbow. Dr. Li testified he diagnosed the Petitioner with multiple injuries to his shoulders but also wanted to review Dr. Garst's records. Dr. Li testified that he reviewed OSF Medical Group records. He noted the following: Petitioner treated on November 13, 2014 for a right arm injury. Petitioner reported using a crank when he felt pain; that when he got home, he noticed his right bicep

bulging (PX 2 p 7-8). Petitioner reported to Dr. Gruber that he was rotating farm equipment when he felt a pop in his right biceps area. Petitioner reported to Dr. Garst on November 17, 2014, that he was using force to rotate something when he felt a pop in his right upper arm and notice deformity. Dr. Li testified that he saw Petitioner again on September 5, 2019 but only for the left shoulder. Dr. Li testified that Petitioner returned on December 19, 2019; that the history was the same; that Petitioner got hurt in 2014, had a full-thickness tear and now wanted to treat. Dr. Li testified that his diagnosis was right shoulder rotator cuff tear and biceps tendon tear. Dr. Li testified that the November 13, 2014 injury caused a long head biceps rupture and exacerbated a pre-existing rotator cuff tear (PX #2, p 13). Dr. Li testified that the MRI <November 2014> demonstrated an acute biceps tendon rupture and preexisting rotator cuff tear. Dr. Li testified that the rotator cuff tear and biceps tear could have gotten worse between 2014 and when he saw Petitioner <2019>. Dr. Li testified that the need for surgical repair of the rotator cuff and biceps tendon was related to the November 12, 2014 work accident (PX #2, p). The Arbitrator finds this testimony to be based more on speculation than fact. In contrast, Dr. Alpert's testimony is more compelling.

On cross-examination, Dr. Li testified that the November 2014 injury was to the right shoulder; that Petitioner ruptured his right bicep tendon and further tore his rotator cuff. Dr. Li admitted that he only reviewed 3 prior records including the 11/17/14 and 12/2/14 medical record and the 11/25/14 MRI of the right shoulder. Dr. Li further admitted that he reviewed the MRI report only and not the film. Dr. Li admitted that when Petitioner saw him on August 7, 2019 it was "more his left shoulder than the right"; that Petitioner's left shoulder was more painful; and that they did not discuss the right shoulder until December 19, 2019. Dr. Li admitted that the medical records from 12/2/14 documented that there was no good surgical option for Petitioner; that Petitioner was not a candidate for reverse total shoulder and rotator cuff repair was not

possible. Dr. Li agreed that as of December 2014 Dr. Garst did not recommend surgery including rotator cuff repair (PX #2, p 30-31). Dr. Li disputed that Petitioner had reached MMI for the right shoulder condition. Dr. Li disputed that the MRI findings from 11/25/14 pre-existed the November 12 accident date but then admitted that Petitioner rotator cuff tear was pre-existing, but the bicep rupture was acute (PX #2, p 38).

On cross-examination, Dr. Li testified that symptoms from a full-thickness rotator cuff tear would include pain and weakness and limited to the upper extremity (PX # 2, p38-39). Dr. Li admitted that his physical exam findings as to the right shoulder were unchanged from Dr. Garst's findings from five years prior (PX #2, p 42-43). Dr. Li agreed that Petitioner sustained a bicep rupture in the work accident but then when asked about current bicep complaints he testified that he could not isolate the bicep from the rotator cuff. Dr. Li admitted that he treated patients with bicep ruptures; that treatment can include conservative or surgical care and that patients can reach maximum medical improvement without surgery (PX #2, p 45). Dr. Li admitted that he did examine the Petitioner until 5 years after he last saw Dr. Garst and that he could not know the condition of the bicep rupture except from the medical records he reviewed from November 2014 (PX #2, p 45). Dr. Li agreed that as of December 2, 2014, Dr. Garst was not recommending any surgery (PX #2, p 46-47). The Arbitrator does not find Dr. Li's testimony as credible as Dr. Alpert.

The Arbitrator further notes that when Dr. Li was asked about Petitioner's work activities from December 2014 through August 2019, Dr. Li testified that he was aware that Petitioner worked; that it was his understanding that Petitioner did manual work including heavy work and farming activities and that Petitioner continued those work activities for almost 5 years. The Arbitrator finds Dr. Li's testimony consistent with Dr. Alpert's report and testimony that Petitioner did in fact continue to work in farming, heavy labor for several years ***after*** he last saw

Dr. Garst on December 2, 2014. Petitioner's testimony that he worked for only 2 years with the Respondent and then did not work again until he obtained in Laborer's card in 2019 was not credible.

In considering the treating records submitted by the Petitioner, specifically the Dr. Lawrence Li's medical records and his testimony and other medical records submitted by the Petitioner, the Arbitrator concludes that nothing in the clinical findings, examinations, and or recommendations of the aforementioned records establishes the requisite causal connection between the Petitioner's present condition of ill-being and the November 12, 2014 accident and after December 2, 2014.

The Arbitrator finds that the Petitioner failed to prove by a preponderance of the evidence that there was a causal connection between the Petitioner's present condition of ill-being to his right shoulder and right bicep and the December 2, 2014 accident date. The Arbitrator in making this decision finds the reports and testimony of Dr. Joshua Alpert (RX #1 and #3) and other evidence submitted by the Respondent, more credible than the Petitioner's testimony and the medical records submitted by him. Specifically, the Arbitrator concludes that the opinions of Dr. Alpert that Petitioner sustained a right biceps tendon rupture and right shoulder strain in the November 12, 2014 accident; that Petitioner had reached maximum medical improvement for the right biceps tendon rupture and right shoulder strain by December 2, 2014; as the last date he saw Dr. Garst; and/or in the alternative that Petitioner had reached maximum medical improvement but February 12, 2015, 3 months after the date of accident; to be more persuasive and credible that the records and evidence submitted by the Petitioner and/or his testimony.

J. Were the medical services that were provided to petitioner reasonable and necessary?

The Arbitrator finds there is no causal connection between the Petitioner's present condition of ill-being for the right shoulder and right bicep and the November 12, 2014 accident and ***after*** December 2, 2014, the Arbitrator denies all Medical bills, charges and expenses incurred after that date. Medical expenses are denied.

K. What amount of compensation is due for temporary total disability?

The Arbitrator finds no causal connection between the Petitioner's present condition of ill-being for the right shoulder and right bicep and the November 12, 2014 accident and after December 2, 2014, Arbitrator denies any claim for Temporary Total Disability ***after*** that December 2, 2014. TTD benefits are denied. Respondent to be awarded TTD credit for $1,031.32.

L. What is the Nature and Extent of the Injury?

No AMA impairment rating was submitted into evidence. Nevertheless, the Arbitrator has reviewed the five-factors enumerated in the Act (820 ILCS 305/8.1(b)) and finds Petitioner sustained a right biceps tendon rupture and right shoulder strain on November 12, 2014. As result of the above, the Arbitrator finds Petitioner is entitled to permanent partial disability for 12.5% loss of use of the right arm for the bicep rupture plus 2.5% person as a whole for the right shoulder strain.

O. Other: Causation, Prospective Medical Care?

On the issue of **[O] Other: Prospective Medical Care;** as the Arbitrator finds there is no causal connection between the Petitioner's present condition of ill-being for the right shoulder and right bicep and the November 12, 2014 accident and after December 2, 2014, the Arbitrator

denies all prospective medical care after the December 2, 2014 date. The Arbitrator denies prospective medical care after December 2, 2014 including any and all medical care being recommended by Dr. Lawrence Li.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC008966
Case Name	Salvador Porras v. American Bottling
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0297
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Matthew Novak

DATE FILED: 8/10/2022

/s/Maria Portela, Commissioner

Signature

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

SALVADOR PORRAS,

Petitioner,

vs. NO: 17 WC 8966

AMERICAN BOTTLING,

Respondent.

DECISION AND OPINION ON REVIEW

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

We are mindful that the initial medical records are ambiguous and do not clearly support either parties' position regarding the onset of Petitioner's left shoulder symptoms. Although Dr. Steven Chudik's first note, on March 15, 2017, does mention "shoulder" pain it is not clear to which side this was referring. Nevertheless, Dr. Chudik testified, "to clarify, his initial complaints on the day after injury was right knee, neck, both wrists, elbows and shoulders." *Px1 at 8*.

Despite several references in the Arbitrator's decision to Dr. Chudik's "intake sheet" or "intake form," this form is not in evidence. Based on our review of the records and testimony, it

appears that the "intake form" being referenced is actually the Patient Assessment Form completed for Dr. Leah Urbanosky, on April 12, 2017, that lists Petitioner's pain as being located in "[b]oth wrists elbows, shoulders" with an onset date of "3-14-17." It is difficult to read but it appears that Petitioner wrote that the problem occurred due to "fell slipt [sic]." *Px2 at 236; T.353*. However, although Petitioner clearly reported that he was having pain in "both" shoulders since the date of his work accident, Dr. Urbanosky's treating record on April 12, 2017 does not specifically mention any shoulder symptoms. *Px2 at 26; T.143*. In the same paragraph as the cervical spine examination, it states:

> Shoulder range of motion is full. Abduction is 5/5. Internal rotation is 5/5. External rotation is 5/5. Sensation is intact to light touch throughout. Reflexes are +1 and symmetric. Strength is full and symmetric throughout. Pulses are palpable.

Px2 at 26; T.143. It is unclear whether this examination was performed on the right shoulder, the left shoulder or both shoulders.

The first unambiguous record regarding Petitioner's left shoulder is the initial ATI Physical Therapy evaluation on April 18, 2017, which specifically mentions recent left shoulder pain interfering with Petitioner's activities of daily living and function and:

> Nature of injury: Pt reports he sustained multiple injuries to [bilateral upper extremities] as well as his [right] knee following a fall on ice while working as a technician for Dr. Pepper.

Px3, T.558.

Despite the ambiguity that exists in the initial treating records, we find that Petitioner had documented complaints of left shoulder pain within one month of his work accident. Subsequent records contain multiple references to "shoulder pain," "left shoulder pain," and bilateral "shoulder soreness," but the records are clearly focused more on Petitioner's right knee, for which he underwent an arthroscopy on May 11, 2017.

At Dr. Chudik's deposition on January 8, 2018, he testified that he was recommending a left shoulder MRI because:

> Well, according to the records, the description of the injury, the onset of symptoms at the time of the injury of left shoulder symptoms and their failure to improve despite significant time from the accident, it's more likely than not there is some pathology related to the accident that needs to be addressed and treated, and the next step is do an MRI and if we find a tear, need further treatment, and we may not find a tear, but it requires conservative treatment or physical therapy. *Px1 at 23*.

The MRI was performed on February 22, 2018, and the impression included, "[s]uspicious for a small focal tear at the chondrolabral junction of the mid posterior labrum." *Px2, T.248.* On February 28, 2018, Dr. Chudik reviewed the MRI and noted "an area with a possible injury to the labrum and some swelling around the rotator cuff." He diagnosed subacromial impingement in the left shoulder. *Px2, T.249*.

We find Petitioner proved by a preponderance of the evidence he sustained a left shoulder injury as a result of the stipulated work accident. The Commission also finds Petitioner's use of crutches while treating for the work-related right knee condition aggravated Petitioner's left shoulder condition. Dr. Chudik testified:

> Q. Can being on crutches actually aggravate the shoulder condition?
> A. Yes. If there is a shoulder condition going on, crutches will almost always aggravate it. *Px1 at 24.*

Respondent's §12 examiner, Dr. Nikhil Verma, testified that it was hypothetically possible for Petitioner's use of crutches to aggravate his left shoulder, but he did not see any "temporal relationship between the onset of symptoms or the reporting of symptoms, identification of a diagnosis in relation to the timeframe that crutches would be used after a surgical procedure" and it would be "highly unlikely." *Rx1 at 14-15*. He opined that Petitioner used crutches for eleven days "at most" based on the May 22, 2017 treating record. *Id. at 37*.

However, a review of the records indicates that Dr. Verma was incorrect in his belief that Petitioner used crutches after his knee surgery for eleven days "at most." Petitioner's surgery was on May 11, 2017, and the physical therapy records indicate that Petitioner remained on crutches for at least a month (and probably longer) based on the June 13, 2017 record indicating that Petitioner would "progress off of crutches this week."

We also find Dr. Verma's opinion unpersuasive because Petitioner actually used crutches for an extended period between his accident and his surgery. The records show:

3/14/17	Petitioner was prescribed crutches at Silver Cross Hospital.
4/5/17	Dr. Chudik noted Petitioner was continuing to ambulate on crutches and they are causing increased pain in both wrists and elbows.
4/12/17	The Patient Assessment Form indicates pain in "both wrist, elbows, shoulders." Dr. Urbanosky noted Petitioner's bilateral wrist and elbow pain "worsened with use of crutches."
4/18/17	ATI Physical Therapy evaluation reflects bilateral elbow, wrist/hand pain and recent left shoulder pain.

5/9/17	ATI Discharge record indicates bilateral shoulder soreness and left shoulder pain.
5/11/17	Right knee surgery
5/22/17	Dr. Chudik noted that Petitioner "continues to use crutches."
6/1/17	Athletico record indicates Petitioner was still using crutches.
6/13/17	Athletico record reflects Petitioner "will progress off of crutches this week."
8/23/17	Michelle Purcell, PAC recorded Petitioner's complaint of left shoulder pain and popping and noted, "He had this pain since work injury but is noticing more now."
9/13/17	Dr. Chudik recorded Petitioner's complaint of left shoulder pain and abnormal examination findings.

Therefore, Dr. Verma was also incorrect about there not being any temporal relationship between Petitioner's crutch use and an aggravation of his left shoulder condition. The records reflect that Petitioner used crutches for at least a few weeks after his work accident. This could explain the April 18, 2017 complaint at physical therapy about "recent" left shoulder pain. Further, since Petitioner continued to use the crutches for over a month after his surgery (at least through June 13, 2017), it makes sense that, at the August 23, 2017 visit with Michelle Purcell, the record reflects clear complaints of left shoulder pain that Petitioner "is noticing more now."

Dr. Verma's testimony that there was no documentation of an "ongoing left shoulder condition within the first six months of the injury" is also incorrect. *Rx1 at 52*. As pointed out above, the April 18, 2017 physical therapy record (approximately one month after the injury and after Petitioner had been on crutches for at least a few weeks) mentions recent left shoulder pain. And, the August 23, 2017 record (five months after Petitioner's work accident but only two months after Petitioner was "progress[ing] off of crutches") indicates that Petitioner's left shoulder was painful and popping "more now." We find that these records are significant evidence of a "temporal relationship" between Petitioner's left shoulder complaints and his extended use of crutches.

Although we find Dr. Chudik's causation opinion and treatment recommendations more persuasive than those of Dr. Verma, we clarify the decision regarding Dr. Verma's testimony. The Arbitrator wrote, "In his IME report, he denied causation for the shoulder because of a lack of contemporaneous "elbow" complaints. (RX1 p.23; RX2 p.5-6) Verma later admitted that elbow complaints had nothing to do with a shoulder injury. (RX1 p.23; RX2 p.5-6)." *Dec. 12*

(unnumbered). We clarify that Dr. Verma testified the reference in his report to delayed "left elbow symptoms" was a typographical error and his report should have stated, contemporaneous "left shoulder symptoms." *Rx1 23*.

Finally, in the Conclusions of Law for Issue F (Causal Connection), the Arbitrator cited the case of *Edward Hines v. IC* for the proposition that "treating physicians are generally considered to be more credible than hired examiners." *Dec. 12 (unnumbered)*. We strike that phrase and replace it with "the Commission is free to give more weight to the testimony of a treating physician."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 3, 2021, is hereby affirmed and adopted with the clarifications noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 10, 2022

/s/ *Maria E. Portela*

SE/
O: 6/14/22
49

/s/ *Deborah J. Baker*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC008966
Case Name	PORRAS, SALVADOR v. AMERICAN BOTTLING
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Matthew Novak

DATE FILED: 8/3/2021

THE INTEREST RATE FOR THE WEEK OF AUGUST 3, 2021 0.05%

/s/ Raychel Wesley, Arbitrator
Signature

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

Salvador Porras,
Employee/Petitioner
v.
American Bottling,
Employer/Respondent

Case # 17 WC 8966

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 **Raychel Wesley**, Arbitrator of the Commission, in the City of **Chicago**, on **May 6, 2021**. 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 **Respondent's liability for left shoulder treatment**

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**80,325.18**; the average weekly wage was $**1,544.72**.

On the date of accident, Petitioner was **41** years of age, ***married*** with three dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

ORDER

Respondent shall pay for treatment of petitioner's left shoulder injury, including the surgery recommended by Dr. Chudik.

Respondent retains its 820 ILCS 305/5(b) rights to reimbursement from the pending personal injury lawsuit.

All other disputed issues are reserved for future hearings, in accord with the agreement between the parties and the arbitrator, as well as the nature of this §8(a) hearing

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

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

/s/ Raychel Wesley **AUGUST 3, 2021**

Signature of Arbitrator

FINDINGS OF FACT

This hearing is solely limited to an 820 ILCS 305/8(a) inquiry as to whether petitioner sustained a left shoulder injury during his fall of March 14, 2017 and whether respondent is liable for treatment of the shoulder. All other potentially disputed issues are expressly reserved for future hearings by the parties.

Petitioner slipped on ice in a parking lot on March 14, 2017. (T.14) The accident happened quickly, and he hit the ground hard. (T.14) Petitioner did not clearly remember how his body impacted the ground, other than he thought he landed on the knees and braced with the hands, ending up on his side on the ground. (T.14-15) He remained on his side until paramedics came to the scene. (T.14; PX4 p.11) Petitioner visited the orthopaedic surgeon the next day. (T.17) Petitioner told Dr. Chudik about what was bothering him, including the shoulder. (T.17) Petitioner also documented the shoulder pain in his patient intake sheet. (T.17-18) Dr. Chudik initially focused on the knee and did not turn his attention to the shoulder until months after the accident. (T.18) This delayed focus on the shoulder is what is fueling respondent's dispute over whether the left shoulder was injured in the accident. The following facts include treatment for all the components of petitioner's injury, simply so the timeframes are clear as to the nature and duration of treatment.

Treatment

Paramedics responded from the Orland Fire Protection District and found petitioner still laying on his side in the parking lot, complaining of right knee pain. (PX4 p.11) Petitioner reported trouble bearing weight on the leg and a lot of pain when he went to bend the knee. He was transported to Silver Cross Hospital. (PX4 p.12) At the emergency room, petitioner was diagnosed with a right knee sprain and right-hand contusion. (PX4 p.15) Petitioner also reported pain the right hip. (PX4 p.17) X-rays were taken of the right hand, right leg and pelvis. (PX4 p.15) The attending physician, Dr. Cortez, detected subtle bruising in the palm of the right hand within the proximal third and fourth metacarpal area. (PX4 p.19) The right knee had tenderness, swelling, effusion and range of motion limitations due to pain. (PX4 p.19) Moderate swelling was detected in the knee, with tenderness from the mid-thigh to the distal third of the tibia. (PX4 p.19) Examination further revealed tenderness in the right lateral hip, sacrum and coccyx. (PX4 p.19) Petitioner was not able to bear weight on the leg. (PX4 p.19) Petitioner was given crutches for ambulation, a knee immobilizer and told to rest, elevation and ice the knee injury. (PX4 p.19) He was also instructed to use Ibuprofen regularly and Norco for severe pain. (PX4 p.19) Petitioner was also told to consult with an orthopedic physician. (PX4 p.19)

Petitioner saw an orthopedic specialist the next day, Steven Chudik MD. Petitioner's chief complaint was of right knee pain, at a pain level of 7/10 and worse with weight bearing. (PX2 p.18) Petitioner reported the accident to Dr. Chudik and explained that he was experiencing neck, right wrist, knee and shoulder pain after the fall. (PX2 p.18) Multiple x-rays were taken of the knee. (PX2 p.19) Dr. Chudik examined the right lower extremity, reaching a diagnosis of a right medial meniscal tear. (PX2 p.19) Petitioner was restricted from work and an MRI ordered. (PX2 p.20) The MRI revealed a predominantly horizontal oblique tearing of the posterior segment and posterior horn of the lateral meniscus down to the inferior articular surface of the compartment. (PX2 p.21) Moderate joint effusion was seen. (PX2 p.21) Petitioner returned to Dr. Chudik on 4/5/17 to review the MRI. (PX2 p.22) Petitioner reported that the crutches were causing "increased pain in both his wrists and elbows". (PX2 p.22) Dr. Chudik recommended an arthroscopic procedure to address the knee and sent petitioner to his colleague, Dr. Urbanosky for evaluation of the wrists and elbows. (PX2 p.23) He also recommended some preoperative therapy. (PX2 p.23)

Petitioner saw Dr. Urbanosky on April 12, 2017 complaining of bilateral wrist and elbow pain. (PX2 p.25) Petitioner completed a Patient Assessment Form for this visit. (PX2 p.236) The assessment form documented pain in petitioner's wrist, elbows and shoulders. (PX2 p.236) The pain was worse with use of the crutches. (PX2 p.25) Location of the pain was both wrists and elbows, at a 6/10 pain scale, symptoms occurred during activity, with aggravation through movement, lifting and holding objects. (PX2 p.25) Dr. Urbanosky's cervical examination revealed tenderness in the right and left paraspinals and tenderness in the trapezial region. (PX2 p.26) There was a negative Spurling's result and no pain with axial compression of the cervical spine. (PX2 p.26) The shoulder range of motion was normal, and strength was grossly intact. (PX2 p.26) The right elbow examination revealed lateral epicondyle tenderness, olecranon tenderness and no cubital tunnel tenderness. (PX2 p.26) Strength findings were normal. (PX2 p.26) However, petitioner had pain with resisted supination, resisted wrist extension, wrist flexion, resisted elbow extension. (PX2 p.26) Tinel's was positive at the cubital tunnel. (PX2 p.26) Identical findings were made for the left elbow. (PX2 p.27) Examination of both wrists revealed positive Tinel findings. (PX2 p.27, 28) The right wrist also had swelling and tenderness to palpation over the volar aspect of the wrist, on resisted volar flexion of the wrist and on dorsiflexion of the wrist. (PX2 p.27) The left wrist exam reported volar wrist tenderness to palpation, tenderness with passive wrist dorsiflexion, and with active wrist and finger palmar flexion. (PX2 p.28) X-rays of the left elbow revealed some lateral compression of the radial head suggesting a healed intraarticular radial head fracture. (PX2 p.28) There was no evidence of spurring. (PX2 p.28) X-rays of the right wrist revealed a radiolucency in the metaphyseal region of the distal radius measuring 2x2 cm in a medial to lateral orientation, but the scan was too poor to measure how far the lateral orientation of the finding stretched. (PX2 p.28) X-rays of the right elbow detected a buckling deformity of the radial head with slight lateral tilt possibly representing healed extraarticular radial head fracture. (PX2 p.28) Dr. Urbanosky diagnosed petitioner with bilateral elbow lateral epicondylitis and provided him with cockup splints. (PX2 p.28) She prescribed use of Lipoderm base cream. (PX2 p.29) Dr. Urbanosky also sent petitioner for therapy at ATI for his hands and elbows, with diagnoses of flexor tendinitis of wrist, triceps tendinitis and lateral epicondylitis. (PX3 p.28-29)

ATI evaluated petitioner for therapy on April 18, 2017. (PX3 p.205) Petitioner's primary complaints involved bilateral elbow, wrist and hand pain and left shoulder pain which were interfering with ADLs. (PX3 p.211) The examination was limited to the wrists and elbows, with bilateral motion deficits in wrist flexion and extension and bilateral strength deficits for wrist extension as well as with wrist extension on the left side. (PX3 p.211) Positive bilateral epicondylitis findings were documented and positive bilateral Finkelstein's tests, with right side being more painful than left. (PX3 p.211) No examination was made of the shoulder or other body parts. Petitioner attended nine therapy visits, seeing improvements with range of motion and strength. (PX3 p.188) However, his pain levels did not reduce, and therapy was discontinued on May 9, 2017. (PX3 p.188) The discharge summary reporting the same complaints he initially reported, including the continuing left shoulder pain. (PX3 p.188) Palpation at the time of discharge detected bilateral shoulder soreness, difficulty sleeping and primarily left sided neck pain. (PX3 p.188) As with the initial therapy visit, no examination findings or tests were documented as having been done for the shoulder. (PX3 p.188)

Dr. Chudik performed surgery on the right knee on May 11, 2017. (PX2 p.35) A 15x8 mm lesion was found in the patellar cartilage requiring an abrasionplasty and debridement. (PX2 p.36) A 10x12 mm lesion was found at the trochlear cartilage requiring the same type of procedure. (PX2 p.36) A vertical flap tear was identified in the lateral meniscus which was addressed. (PX2 p.36)

Petitioner had his first post-operative therapy visit the following day at Athletico. (PX2 p.38) Petitioner appeared with his crutches. (PX2 p.38) Therapy focused on his lower extremity only. At the May 22, 2017 visit, Dr. Chudik documented that petitioner continued using the crutches to walk. (PX2 p.43) Dr. Chudik advised petitioner to discontinue crutch use as tolerated and he told him to continue with therapy. (PX2 p.43) Work restrictions were continued. (PX2 p.44)

On May 25, 2017, petitioner saw Dr. Urbanosky who reported that petitioner had developed bilateral ring and small finger numbness and tingling since he started using the crutches. (PX2 p.45) Bilateral wrist and elbow pain was documented. (PX2 p.47-48) Dr. Urbanosky documented petitioner's antalgic gait. (PX2 p.46) Dr. Urbanosky diagnosed petitioner with the bilateral epicondylitis, as well as bilateral cubital tunnel syndrome which she opined was likely related to using crutches with tension of the medical triceps fascia on the ulnar nerve on both sides. (PX2 p.48) She recommended that he change to using platform crutches until he was able to independently ambulate as these type of crutches would lessen the effect of the triceps fascia on the ulnar nerves. (PX2 p.48) He was told to continue using cockup wrist splints and to continue occupational therapy for the wrists. (PX2 p.48) He was also told to continue using joint pain cream for the elbows.

Therapy resumed on May 31, 2017, for bilateral lateral epicondylitis. (PX2 p.50) Petitioner's symptoms interfered with his progress in therapy. (PX2 p.57, 60) In the June 26, 2017 progress note, the therapist noted petitioner's gains with range of motion and strength. (PX2 p.61) However, the pain and numbness had not improved, and his strength was still below normal. (PX2 p.61) Examination revealed greater motion deficits in the left elbow and wrist, as well as continuing bilateral strength deficits. (PX2 p.61) Positive Tinel's findings were also made at the both elbows. (PX2 p.62) Treatment again was limited to the upper extremities below the shoulders.

Petitioner followed up with Dr. Urbanosky on June 30, 2017 for bilateral lateral epicondylitis and cubital tunnel syndrome. (PX2 p.66) The left epicondylitis has resolved but the right had not. (PX2 p.68) the doctor thought the nighttime extension splints were making the bilateral cubital tunnel syndrome worse. (PX2 p.68) Given the lack of improvement, Dr. Urbanosky sent petitioner for EMG/NCV testing. (PX2 p.68) She renewed the script for the pain cream for the right epicondylar area and right extensor carpi ulnaris. (PX2 p.68) She also continued restricting petitioner from work. (PX2 p.68)

During the July 10, 2017 visit with Dr. Chudik, petitioner reported continuing soreness along the medial joint line and under his patella. (PX2 p.80) He also reported "catching" of the patella during therapy and swelling in the knee. (PX2 p.80) Dr. Chudik noted that petitioner was slowing improving and that lateral meniscal injuries usually took longer to heal. (PX2 p.81) Much of petitioner's current complaints were patellofemoral which were expected to improve as strength improves through therapy. (PX2 p.81) Petitioner was told to avoid high impact activities in favor of low impact activities. (PX2 p.81) Work restrictions were renewed. (PX2 p.82)

Dr. Bardfield performed the EMG/NCV on July 26, 2017, finding evidence of irritation of the left ulnar nerve at the elbow. (PX2 p.83) He returned to Dr. Urbanosky on July 28, 2017, reporting that his condition had not changed since the last visit. (PX2 p.84) His left arm was worse than the right. (PX2 p.84) Wrist extension caused pain and his wrist hurt when lifting things. (PX2 p.84) He also experienced numbness and tingling from the medial elbow down into the little finger, usually when his elbows were flexed. (PX2 p.84) Examination further revealed left thumb CMC tenderness. (PX2 p.87) The diagnosis included bilateral epicondylitis with an improvement on the left, bilateral cubital tunnel

syndrome, right extensor carpi ulnaris tenderness and left thumb CMC synovitis. (PX2 p.87) A cortisone injection was given to the left thumb and a cubital tunnel syndrome release was recommended for the left side. (PX2 p.87)

Petitioner had a follow up visit with Dr. Chudik on August 23, 2017, reporting no progress in the knee with therapy. (PX2 p.93) He was waiting for elbow surgery with Dr. Urbanosky. (PX2 p.93) He was also complaining of his left shoulder pain and popping in the joint. (PX2 p.93) The doctor noted that petitioner had experienced the pain since the accident but was noticing it more now. (PX2 p.93) He was told to continue with therapy and to limit prolonged walking and standing. (PX2 p.94) They scheduled a separate visit to address the shoulder. (PX2 p.94) Work restrictions were continued. (PX2 p.94)

Petitioner returned to Dr. Chudik for the left shoulder evaluation on September 13, 2017. (PX2 p.95) Dr. Chudik note that the left shoulder pain began with the March 2017 fall when he fell on ice, but they had focused on the more pressing injuries up to that point. (PX2 p.95) Examination revealed a 4+/5 strength finding for abduction with pain, external rotation with pain and tenderness about the AC joint. (PX2 p.96-97) Dr. Chudik suspected a left shoulder rotator cuff injury versus a labral tear and he sent petitioner for an MRI. (PX2 p.97) He also noted that the condition was causally related to the slip and fall on ice in March 2017. (PX2 p.97)

During his follow up with Dr. Urbanosky on September 22, 2017, petitioner reported that the cortisone injection had not provided relief. (PX2 p.104) Dr. Urbanosky again focused on the upper extremities below the shoulder. She noted she was still waiting for approval for the left-sided cubital tunnel release, wear splints on the hands and she injected cortisone into the carpi ulnaris. (PX2 p.107) She renewed the recommendation for the cream. (PX2 p.108)

During the October 20, 2017 visit, Dr. Urbanosky detected early onset of weakness associated with the left sided cubital tunnel syndrome. (PX2 p.112) The findings were confirmed by EMG/NCV. (PX2 p.112) She again requested the left cubital tunnel release. (PX2 p.113) She noted that Chudik was treating the knee and shoulder. (PX2 p.112)

At the November 1, 2017 visit, Dr. Chudik documented that the insurance carrier had denied treatment for the left shoulder as well as any more therapy for the right knee. (PX2 p.114) The carrier had scheduled him for an IME visit on November 23, 2017. (PX2 p.114) Walking produced pain in the lateral side of his right knee. (PX2 p.114) The more he walked, the worse the pain got. (PX2 p.114) And his left shoulder continued bothering him with certain movements. (PX2 p.114) His right Achilles heel was also painful. (PX2 p.114) Dr. Chudik renewed his recommended for the shoulder MRI and also ordered a right knee MRI to assess whether petitioner was now suffering from a stress fracture to the lateral femoral condyle. (PX2 p.115) The restrictions from work were continued. (PX2 p.115)

Dr. Urbanosky saw petitioner next on December 6, 2017 with continuing bilateral wrist and elbow pain. (PX2 p.117) The right elbow examination had improved. (PX2 p.117) The left elbow still showed a positive Tinel's finding as well as a positive hyperflexion pinch test result. (PX2 p.118) Weakness was detected on the left side. (PX2 p.118) Dr. Urbanosky again diagnosed petitioner with left cubital tunnel syndrome, identifying very early muscle weakness despite the therapy. (PX2 p.120) She renewed her prescription for a cubital tunnel release and continued to restrict petitioner from work. (PX2 p.120)

A right knee MRI was done on December 9, 2017. (PX2 p.123)

Petitioner returned to Dr. Chudik on December 27, 2017 to review the results of the latest MRI. (PX2 p.125) He continued experiencing swelling with catching and locking in the knee at times. (PX2 p.125) The December 11, 2017 MRI revealed a flattening of the cartilage in the lateral compartment as compared with the pre-operative MRI. (PX2 p.126) Dr. Chudik recommended a cortisone injection and continued restricting petitioner from work. (PX2 p.127)

Petitioner returned to Dr. Chudik on February 7, 2018, reporting that the cortisone injection had not helped much, and he still had pain along the lateral aspect of his knee when walking and using stairs. (PX2 p.128) Dr. Chudik further noted the continuing left shoulder pain which had been going on since his fall. (PX2 p.128) Dr. Chudik noted that petitioner had several injuries from the fall, but he focused first on the most painful. (PX2 p.128) Dr. Chudik recommended a Synvisc injection along with a lateral unloader brace to address the knee. (PX2 p.129) He also renewed the recommendation for an MRI to evaluate the left shoulder for a rotator cuff tear. (PX2 p.129) He continued restricting petitioner from work. (PX2 p.129)

The left shoulder MRI was done on February 22, 2018, with the radiologist reporting a small focal tear at the chondrolabral junction of the midposterior labrum. (PX2 p.131)

Dr. Chudik reviewed the MRI at the February 28, 2018 visit. (PX2 p.132) Petitioner reported continued catching in the shoulder and pain. (PX2 p.132) Dr Chudik read the MRI as showing the labral tear and swelling around the rotator cuff. (PX2 p.134) Petitioner was now using an unloader brace for the knee which helped with longer walking or standing. (PX2 p.132) Chudik recommended therapy for the shoulder if it did not interfere with the surgical plan for the hand. (PX2 p.134)

On April 8, 2018, petitioner reported that workers comp had not approved the shoulder therapy. (PX2 p.135) Petitioner asked Dr. Chudik for an injection to the shoulder and a trial return to work. (PX2 p.135) The injection was given, and he was released to return to work on April 18, 2018 as workers comp had stopped his payments. (PX2 p.137)

Petitioner also told Dr. Urbanosky at his April 19, 2018 visit that he needed to return to work to support the family. (PX2 p.138) Dr. Urbanosky released him to work while still recommending the cubital tunnel release with ulnar transposition. (PX2 p.142)

Petitioner returned to work and experienced continuing problems with the knee, shoulder and left arm cubital tunnel injury. Petitioner noted that his Synvisc injection had helped the knee, but he still had lateral and anterior knee pain and popping with stair use. (PX2 p.144) He was also still having left shoulder pain and popping, and he was developing right shoulder pain as he was overusing the right arm to accommodate the injured left arm. (PX2 p.144) He was told to continue wearing the unloader brace for the knee. (PX2 p.145)

At the September 26, 2018 visit, he reported that his knee was getting worse as well as the left shoulder. (PX2 p.147) His shoulder was catching and popping, and he had to circumduct his shoulder multiple times for it to loosen up. (PX2 p.147) Dr. Chudik recommended updated MRIs for the left shoulder and right knee. (PX2 p.150, 152) Dr. Chudik reviewed the new MRIs on October 17, 208, recommending a diagnostic arthroscope of the right knee and a repair of the posterior labrum of the left shoulder. (PX2 p.156)

Respondent refused to authorize treatment for anything at this point. (PX2 p.158) So Chudik performed Cortisone injections into the shoulder and knee on April 8, 2019. (PX2 p.160)

Respondent obtained another IME from Verma on April 11, 2019 and while Verma conceded causation for the knee, he denied that another surgery would help. (PX2 p.162-3)

At the February 12, 2020 visit with Chudik, petitioner reported the continuing problems with the right knee and that his left knee was starting to hurt as he was overcompensating for the right knee problem. (PX2 p.166) His shoulder was now getting stuck with certain movements and was in constant pain. (PX2 p.166) Dr. Chudik noted that he needed new MRIs for the body parts and those scans were done on 2/22/20. (PX2 p.168, 169, 171) Dr. Chudik renewed the recommendations for the surgeries. (PX2 p.175)

An updated knee MRI was performed on 3/7/20. (PX2 p.177)

The parties took Verma's deposition and respondent ultimately authorized the knee surgery. Dr. Chudik performed the surgery on September 17, 2020, noting the surgery took longer as he had to address the significant amount of scar tissue which had developed in the anatomy since the earlier surgery. (PX2 p.189) Therapy resumed at Athletico and his functional improvements are noted in the records.

By the November 18, 2020 visit, petitioner reported to Dr. Chudik that he was doing well, his range of motion was improving but he was still having pain with deep squatting exercises. (PX2 p.204) He continued recommending the left shoulder scope. (PX2 p.206) Petitioner was again returned to a trial of unrestricted work as of 2/15/21. (PX2 p.216) His shoulder had not improved by the February 18, 2021 visit with Dr Chudik and the doctor renewed the script for the surgery. (PX2 p.219, 221) The same recommendation was made at the 3/3/21 visit (PX2 p.223), the 3/17/21 visit (PX2 p.130) and the final visit before trial on April 28, 2021 (PX2 p.234).

Testimony of Steven Chudik MD

Dr. Chudik is a board-certified orthopaedic surgeon specializing in the treatment of shoulders and knees. (PX1 p.4-5) He has numerous peer reviewed publications and his main area of research involves injury mechanisms for the shoulders and knees. (PX1 p.5) Dr. Chudik saw petitioner the day after the fall. (PX1 p.6) Petitioner experienced neck pain, wrist pain, knee pain and shoulder pain from his fall. (PX1 p.7) An intake sheet which petitioner completed reported complaints in the right knee, neck, both wrists and elbows and shoulders. (PX1 p.7) The knee injury was the main focus of the initial visit. (PX1 p.6-7) Dr. Chudik worked up the right knee, identified a traumatic lateral meniscal tear and he performed a lateral meniscectomy. (PX1 p.8) The knee treatment was extensive and Chudiks' testimony about that treatment will not be set out in detail for this hearing.

As to the left shoulder, Dr. Chudik was recommending an MRI for the shoulder at the time of his deposition. (PX1 p.20) Chudik noted that petitioner had complained of shoulder pain during his treatment for the knee, but his treatment plan initially focused on the knee issues. (PX1 p.20) The shoulder complaints persisted and petitioner's condition did not improve. (PX1 p.20) Dr. Chudik had mentioned the shoulder complaints in each of his notes following the accident. And Dr. Urbanosky's examination from September 13, 2017 found a decrease in left shoulder range of motion in comparison with the right shoulder and 4 out of 5 pain when resisted abduction on the left side. (PX1 p.21)

Dr. Chudik explained that a 4/5 strength finding is a pretty abnormal finding. (PX1 p.22) Patients with normal arms should be able to hold the arms out to the side while resisting the examiner's downward oppositional force. 4/5 meant that the examiner could easily break through petitioner's efforts to resist the examiner's resistance. (PX1 p.22) That suggested a potential problem in the rotator cuff, and it might also indicate a labral pathology. (PX1 p.22-23) Dr. Chudik felt that the MRI was reasonably necessary to treat for the injuries sustained in the accident. (PX1 p.23) No MRI had been done by the time of Dr. Chudik's deposition. However, his clinical examination suggested labral and rotator cuff pathology in the shoulder and he recommended an MRI to assess the structures. (PX1 p.20-21)

On causation, Dr. Chudik related the left shoulder injury to the work accident, explaining that the shoulder complaints onset from the accident and they persisted for a significant period of time while they were focusing on the knee. (PX1 p.23) Dr. Chudik also explained that it was really difficult to rehabilitate a concurrent shoulder injury while the patient is on crutches. (PX1 p.24) Crutch use can actually aggravate a shoulder injury. (PX1 p.24) While he had not come to a final diagnosis on the shoulder due to the lack of an MRI, he recommended that petitioner avoid repetitive reaching, avoid overhead activities or lifting above waist level. (PX1 p.24-25) He had reviewed Dr. Verma's IME and noted that Verma's examination of the shoulder was similar to his own examination findings. (PX1 p.25) Both physicians documented objective deficits in that shoulder. (PX1 p.26) Petitioner had not reached MMI as the shoulder had not been worked up yet. (PX1 p.26)

On cross-examination, Dr. Chudik was asked whether falling on the opposite arm would be a competent mechanism for injuring the left arm. (PX1 p.28) Dr. Chudik noted that the falls happen so quickly that patients often do not know what exactly happened. They don't understand the mechanisms of how a body part can sustain injury. (PX1 p.29) So the clinician must identify the pathology and determine logically whether it came from the fall. (PX1 p.29) In petitioner's case, Dr. Chudik considered when the left shoulder complaints started as well as his objective findings. (PX1 p.30) Dr Chudik admitted that he really only focused on the knee injury during the initial course of treatment following the accident. (PX1 p.31) The only body part he examined the day following the accident was the knee even though petitioner was reporting pain in multiple areas. (PX1 p.31) The knee injury was an obvious structural issue which needed to be immediately addressed. (PX1 p.31) Dr. Chudik explained that his notes were a reflection of what he was focusing on at the time of the visits rather than a reflection of whether petitioner had pain in his shoulder. (PX1 p.32) He then started focusing on the shoulder when petitioner started feeling better with the knee treatment. (PX1 p.33) Dr. Chudik simply recorded what he was actively treating at the time of the visits and what he was billing for. (PX1 p.34) Dr. Chudik also noted that the initial therapy record from 4/18/17 documented the left shoulder symptoms as well as strength deficits in the left shoulder during the examination. (PX1 p.35-36) Dr. Chudik acknowledged that petitioner's shoulder injury was documented in his own notes, a contemporaneous intake form and the initial therapy record. (PX1 p.36) There was also no evidence in any of the records or reports that the left shoulder problems existed before the accident. (PX1 p.37)

Testimony of Nikhil Verma MD

Respondent sent petitioner for an IME with Dr. Nikhil Verma. Dr. Verma performs five to seven IMEs per week, 80% for the defense. (RX1 p.44) On cross, Dr. Verma put his reasons for disputing causation on the shoulder in his report. (RX1 p.22) For his causation opinion, he thought the shoulder was not related to the accident as petitioner had no left elbow complaints at the outset of treatment. (RX1 p.23) He later admitted that elbow symptoms wouldn't have anything to do with a shoulder injury. (RX1 p.23) He claimed it was a typo and he meant that there were no shoulder complaints documented in the

records after the accident. (RX1 p.23) Of course, Chudik saw petitioner the day following the accident and he documented pain in petitioner's shoulder. (RX1 p.27) But Verma denied there were any ongoing complaints and Verma disputed that a surgeon would treat only one body part at a time. (RX1 p.27-28) Dr. Verma also had not seen the very first therapy note which also documented left shoulder complaints. (RX1 p.28) Dr. Verma suspected that petitioner had a rotator cuff issue, but he would not relate it to the accident. (RX1 p.49-50) He did not believe that petitioner had a labral issue. (RX1 p.49) When asked to clarify his denial on causation for the shoulder, he criticized Dr. Chudik for focusing treatment on the knee first rather than treating both components of the injury at the same time. (RX1 p.53-54) Had Dr. Chudik evaluated the shoulder at the time of his initial evaluation with petitioner and said that the left shoulder was one of the components of the injury from this fall, he would concede causation. (RX1 p.55) But then he denied he would admit causation even if Dr. Chudik told us the left shoulder was injured in the accident. (RX1 p.55) Dr. Verma did not believe that Chudik would remember the shoulder being injured if he did not mention it in his notes. (RX1 p.56) Dr. Verma could not explain why he was ignoring the shoulder injury references in Chudik's note from the day after the accident, or the April 5, 2017 note or any other early notes. (RX1 p.66-69) Dr. Verma claimed he did not understand the treatment plan and he might change his mind on causation if he saw a treatment plan for the shoulder close to the time of the accident. (RX1 p.71) He had no explanation as to why the only physician who was ignoring shoulder references in the records was the doctor getting paid by the insurance company to defend the case. (RX1 p.71)

CONCLUSIONS OF LAW

Issue F - Whether Petitioners Condition of Ill-being in the Left Shoulder Is Causally Related to The March 14, 2017 Accident

Respondent disputes causation for the shoulder injury and treatment. Petitioner had no limitations or symptoms in his left shoulder before the accident. (T.16-17) The trial record also contains no evidence that petitioner had any problems with his left shoulder during the 41 years of life preceding his fall. The March 14, 2017 fall occurred quickly and his impact with the ground was hard. (T.31) Petitioner knew his shoulder was hurting after the fall, but admitted that a lot of his body was hurting after the accident. (T.27) He recalled telling the hospital personnel about the shoulder but he had no idea what body parts they documented in the notes as he had not seen the records. (T.27, 31-32) The main focus of treatment at the scene and the hospital was the severe knee complaints. Petitioner could not even get up off the ground on his own after the fall. Shoulder pain is mentioned in the very first orthopedic note on the day after the accident (PX1 p.7), a Patient Assessment Form (PX1 p.7), the first therapy note from April 18, 2017 (PX3 p.211) and following notes. Dr. Chudik admitted that he focused on the structural knee injury initially as it was the most pressing issue at the beginning of treatment. (PX1 p.31) Dr. Chudik explained that accidents like this fall occur so quickly that the patient often cannot identify exactly what happened during the accident. (PX1 p.29) When this happens, Dr. Chudik has to figure out whether the injuries logically coincided with the accident mechanism. (PX1 p.29) In petitioner's case, the shoulder injury was documented in his own notes, a contemporaneous intake form and the initial therapy record. (PX1 p.36) Dr. Chudik thought the left shoulder was clearly injured in the fall. (PX1 p.23) The shoulder complaints did not resolve while he was treating the knee, so he turned his attention to the shoulder. (PX1 p.23) This is a logical sequence of events, for which there is documented references in the medical notes.

Dr. Verma denied causation for the shoulder, but his IME effort was not persuasive. Dr. Verma initially denied causation, in large part, because there were no left shoulder complaints in the records until well after the accident. (RX1 p.30) That was not true as the shoulder is mentioned in Chudik's note the day after the accident, first patient assessment note, first therapy note, etc. When confronted with the fact that the shoulder was mentioned in the early notes, Dr. Verma still would not concede causation. (RX1 p.23-24) Dr. Verma downplayed the importance of shoulder references by telling us that everything would be hurting after the fall. (RX1 p.27) Dr. Verma's ignoring of shoulder references is only one of many reasons why Verma's opinions in the case are not persuasive. In his IME report, he denied causation for the shoulder because of a lack of contemporaneous "elbow" complaints. (RX1 p.23; RX2 p.5-6) Verma later admitted that elbow complaints had nothing to do with a shoulder injury. (RX1 p.23; RX2 p.5-6) Verma then criticized the surgeon for focusing first on the more pressing structural knee injury before addressing the shoulder. (RX1 p.30-31) It is important to recognize that Dr. Verma missed the labral injury diagnosis for the shoulder, which Dr. Chudik thought was there and which the MRI arthrogram later verified. (RX1 p.49; PX2 p.131) Dr. Chudik offered the correct diagnosis before the MRI was done. (PX1 p.22)

Dr. Verma's denial of the need for additional knee treatment also calls the credibility of his effort into question even though it does not directly address the shoulder issue. Verma's second deposition focused on why Verma was claiming that petitioner's knee would not respond well to the additional surgery which Dr. Chudik had recommended for it. (RX11) Respondent eventually disregarded Verma's opinions about the surgery and authorized the knee surgery. The post-surgical notes document a significant improvement in petitioner's knee function and complaints with that surgery, just as Chudik predicted would happen and Verma claimed would not happen. (RX11 p.103-105) Dr. Chudik is clearly more credible in his analysis of the case than Dr. Verma. Dr. Chudik made the correct diagnoses, he laid out logical treatment plans and he achieved positive results with his treatment which Verma said would not follow. Verma simply changed his rationale for denying that certain injuries came from the fall and he missed the shoulder diagnosis in the first instance. Even if Dr. Verma's analysis had been on point, treating physicians are generally considered to be more credible than hired examiners. See *Edward Hines v. IC*, 356 Ill.App.3d 186, 196 (2005). There is no intervening injury in the record which could possibly derail petitioner's showing on causation. See *Par Electric v. IWCC*, 2018 IL App (3d) 170656WC *P63. We are also not looking at a serious gap before the shoulder was documented as being injured in the fall. The shoulder is mentioned in the note the day after the fall.

The primary goal of the Workers Compensation Act is to protect and provide for injured workers. *Peoria Belwood v. IC*, 115 Ill.2d 524, 529 (1987). The Act must be liberally construed to achieve its goal of providing financial protection for injured workers. *Id.* at 529. Petitioner has proven that his left shoulder was an injury from the March 14, 2017 fall and there is no reason to conclude otherwise.

Issue O - Whether Petitioner Should Receive Treatment For The Left Shoulder

Petitioner has proven that his left shoulder should be repaired at respondent's expense. Dr. Chudik first recommended the arthroscopic procedure for the shoulder in October of 2018, after conservative treatment did not resolve the problem. Respondent denied the treatment as well as treatment for the knee and elbows and wrists. Respondent even cut off TTD payments and petitioner forced himself back to work while the lawyers fought for his disputed treatment. (T.21-22) The medical records document petitioner forcing himself back to work. (PX2 p.137) Even though he returned to work, the left shoulder continued catching and hurting with the work activities. (T.23) Those continuing complaints

are also documented in Dr. Chudik's office notes. Most recently, Dr Chudik renewed the surgery request in his February 18, 2021 note (PX2 p.219, 221), the March 3, 2021 visit (PX2 p.223), the March 17, 2021 visit (PX2 p.130) and the final visit before trial on April 28, 2021 (PX2 p.234). Petitioner's left shoulder is not resolving on its own. Petitioner wants the surgery to fix the shoulder. (T.23) Dr. Verma admitted the posterior labrum could be repaired and the purpose was to eliminate symptoms. (RX11 p.91) Verma conceded the treatment plan was appropriate. (RX11 p.95-96) Thus, respondent shall provide the surgery.

Respondent shall obviously retain its reimbursement rights under 820 ILCS 305/5(b) against the personal injury case relating to the fall.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC002631
Case Name	Jose Quintino v. Earle M Jorgensen Steel Co
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0298
Number of Pages of Decision	46
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Michael Wojtas
Respondent Attorney	Tina DiBenedetto

DATE FILED: 8/11/2022

/s/Marc Parker, Commissioner

Signature

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Quintino,

Petitioner,

vs. No. 15 WC 002631

Earle M. Jorgensen Steel Company,

Respondent.

DECISION AND OPINION ON REVIEW

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

The facts of this claim are well summarized in the Arbitrator's Decision. Petitioner, a 30-year maintenance employee with a 4th grade education in Mexico, injured his neck while turning his head to operate a forklift in reverse on October 7, 2014. He underwent a 3-level cervical fusion on March 8, 2016, after which he was given permanent light duty restrictions which Respondent could not accommodate. After Respondent terminated Petitioner, he commenced an unsuccessful 3-year self-directed job search, between September 2016 and August 9, 2019.

Both parties' vocational rehabilitation experts agreed Petitioner's restrictions prevented him from returning to his previous occupation as a maintenance worker. Respondent's vocational rehabilitation expert, Kathleen Mueller, opined Petitioner's self-directed job search was lacking, and identified multiple positions which he could perform within his current restrictions, given his education, knowledge and transferrable skills. Petitioner's expert, Susan Entenberg, also acknowledged that Petitioner could perform jobs as assembler, counter clerk and light delivery

driver, though he would have better success finding employment if he had job placement assistance and a GED.

The Arbitrator found Petitioner proved accident and causation. The Arbitrator did not, however, believe Petitioner was an odd-lot perm-total for multiple reasons, set forth in the Arbitration Decision. The Commission agrees, and affirms and adopts those findings.

In assessing the nature and extent of Petitioner's disability and awarding him 40% loss of the person as a whole under §8(d)2, the Arbitrator considered the five factors set forth in §8.1b(b) of the Act. The Arbitrator assigned no weight to the first factor, Disability Impairment Rating, because neither party offered a disability rating into evidence. The Arbitrator assigned significant weight to the second factor (Employee's Occupation) and to the third factor (Employee's Age), finding that Petitioner was a 54-year-old maintenance worker on the date of accident, who would likely have remained in the workforce for another eleven years, had his accident not taken place. The Commission agrees with and adopts the Arbitrator's assessment and weighting of factors (i) through (iii) of §8.1b(b).

The Arbitrator considered and discussed the fourth factor of §8.1b(b), Future Earning Capacity, but did not assign a weight to that factor. The Arbitrator found the permanent restrictions imposed by Dr. Bernstein prevented Petitioner from resuming his longtime job with Respondent. The Arbitrator also found that the alternative jobs identified by the parties' experts would pay lower wages than what Petitioner had earned at Respondent. The Arbitrator also considered, but did not assign a weight to, the fifth factor of §8.1b(b), Evidence of Disability Corroborated by the Treating Records. The Arbitrator noted with approval Dr. Bernstein's testimony that Petitioner had been doing "reasonably well" following his 3-level fusion, though he was at risk for adjacent segment problems that could require more surgery.

The Commission agrees Petitioner proved that his Future Earning Capacity (factor (iv)) has been reduced as a result of his inability to return to his prior occupation. Both vocational rehabilitation experts agreed that Petitioner could not return to his usual occupation, and that he would earn less in other jobs which he is now capable of working. As a result, he has suffered a loss of occupation. The Commission therefore assigns significant weight to factor (iv) of §8.1b(b).

With regard to factor (v) of §8.1b(b), the Commission has considered the evidence of Petitioner's disability corroborated by his treating records. In addition to Petitioner's restrictions on lifting and overhead activities, he has an increased risk for adjacent segment degeneration, which could be clinically significant and even require surgery. Petitioner still continues to experience neck pain which increases with physical activity. Dr. Bernstein noted Petitioner could also experience other recurrent symptoms. The Commission therefore assigns significant weight to factor (v) of §8.1b(b).

Considering the evidence as a whole, the Commission finds it appropriate to modify the Arbitrator's §8(d)2 award by increasing it from 40% person as a whole, to 50% person as a whole, for Petitioner's loss of occupation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2022, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $648.60 per week for a period of 250 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 50% loss of the person as a whole.

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

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

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

August 11, 2022

MP/mcp
o-07/21/22
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/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC002631
Case Name	QUINTINO, JOSE v. EARLE M JORGENSEN STEEL CO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	42
Decision Issued By	Molly Mason, Arbitrator

Petitioner Attorney	Michael Wojtas
Respondent Attorney	Tina DiBenedetto

DATE FILED: 1/13/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/Molly Mason, Arbitrator

Signature

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

JOSE QUINTINO Case # **15** WC **002631**
Employee/Petitioner

v.

EARLE M. JORGENSEN STEEL CO.
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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **November 18, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 7, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current post-operative cervical spine condition of ill-being ***is*** causally related to the accident. Petitioner established causation as to the need for the three-level fusion performed by Dr. Bernstein. See the attached decision for further detail as to the Arbitrator's causation findings.

In the year preceding the injury, Petitioner earned $**54,132.00**; the average weekly wage was $**1,081.00**.

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 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 $**35,529.75** for non-occupational indemnity disability benefits, for a total credit of $**35,529.75**. Arb Exh 1.

Respondent is entitled to a credit of $**25,286.62** under Section 8(j) of the Act. Arb Exh 1.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $720.67/week for 55 5/7 weeks, commencing 8/20/15 (the date Dr. Bernstein took Petitioner off work, PX 22) through 9/12/2016 (the date Dr. Bernstein imposed permanent restrictions, PX 22), as provided in Section 8(b) of the Act.

Maintenance
Respondent shall pay Petitioner maintenance benefits of $720.67/week for 151 4/7 weeks, commencing 9/13/2016 through 8/9/2019, as provided in Section 8(a) of the Act.

Respondent shall have credit for its payment of $35,529.75 in non-occupational indemnity disability benefits. [While the letter of 2/26/21 reflects a payment of $35,516.91 in such benefits (PX 36), the parties stipulated to a slightly different amount, $35,529.75. The Arbitrator views the stipulation as binding. Arb Exh 1.]

Medical benefits
Respondent shall pay Petitioner reasonable and necessary medical services of $113,117.98, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $25,286.62 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. Arb Exh 1.

Permanent Partial Disability
The Arbitrator finds that Petitioner failed to prove entitlement to permanent total disability benefits under an "odd lot" theory. Respondent shall pay Petitioner permanent partial disability benefits of $648.60/week for 200 weeks, because the injuries sustained caused the 40% 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.

Molly C Mason

Signature of Arbitrator

JANUARY 13, 2022

ICArbDec

HotJose Quintino v. Earle M. Jorgensen Steel Company
15 WC 2631 and 15 WC 27124 (consolidated)

Summary of Disputed Issues in Both Cases

Petitioner was born in Mexico on December 18, 1959. He attended school through the fourth grade in Mexico. He came to Elgin, Illinois, at age 17 ½ and began working and learning English. He began working steadily for Respondent in 1983. In 1999 or 2000, he began performing preventive maintenance, repairing forklifts and tools.

Petitioner denied having any neck problems before his initial claimed accident of October 7, 2014 [15 WC 2631]. T. 28-29. He claims cumulative trauma to his neck from intermittently operating a forklift in reverse while looking backward. He underwent treatment at an occupational medicine facility, where Dr. Baksinski diagnosed cervical and thoracic strains. After a course of therapy, Dr. Baksinski referred Petitioner to Dr. Norek, who diagnosed cervical spondylosis and myofascial pain, among other conditions, and continued the previous work restrictions. Petitioner also saw his primary care physician, Dr. Florentino, who referred him to a neurosurgeon, Dr. Cascino. Petitioner testified he never had the opportunity to see Dr. Cascino. On February 25, 2015, Dr. Graf conducted a Section 12 examination of Petitioner. Dr. Graf opined that the accident resulted in only cervical and thoracic strains and that Petitioner was at maximum medical improvement. He found Petitioner capable of full duty. Petitioner resumed full duty.

Petitioner testified his neck pain persisted after he resumed working. On April 2, 2015 [15 WC 27124], he was descending stairs to gain access to a large steel table where he performed repairs. He stumbled near the bottom of the stairs and began to fall. He intentionally moved to his left, in an effort to avoid striking the table. He acknowledged there was "nothing unusual" about the stairs. He testified he aggravated his neck and injured his low back, legs and ankle when he fell. Eventually, he began seeing Dr. Bernstein, who performed a three-level cervical fusion on March 8, 2016. Following a valid functional capacity evaluation, Dr. Bernstein imposed permanent restrictions on September 12, 2016. Respondent then advised Petitioner he would not be accommodated and was being separated from employment effective September 26, 2016. PX 29.

Respondent provided no vocational rehabilitation assistance. Petitioner conducted a self-directed, ultimately unsuccessful job search between May 2017 and August 2019. He seeks an award of permanent total disability under an "odd lot" theory.

The disputed issues in both cases include accident, causal connection, medical expenses, temporary total disability and nature and extent. Maintenance is also at issue in 15 WC 2631.

Arbitrator's Findings of Fact

Petitioner testified in English. He indicated he was born in Mexico on December 18, 1959. He is currently 61 years old. In Mexico, he stopped attending school after the fourth grade because his father died and he needed to work. He came to Elgin, Illinois, at age 17 ½. He began studying English at a community college so that he could go through the naturalization process. He never obtained a GED. He worked at a country club for a while, cutting grass and maintaining equipment. He also took a two-year correspondence course to become a locksmith but testified he never worked as a locksmith.

Petitioner testified he first worked for Respondent in 1981. He worked for one month, hooking and loading bundles of steel, and was then laid off. He returned to work for Respondent in 1983 and resumed his former duties. He also filled and tagged orders. He worked exclusively for Respondent over the years that followed. In 1999 or 2000, he began performing a preventive maintenance job. He repaired "Raymond" forklifts, which move sideways, and various tools, including air guns. He described PX 30 as a "pretty much accurate" description of his job. He was required to lift items weighing between 25 and 100 pounds. He sometimes worked overhead in the sense that he had to use elevated walkways to access cranes that were not working.

Petitioner denied having any neck problems or undergoing any neck treatment prior to his initial claimed accident of October 7, 2014. He testified he was able to perform his job duties prior to this accident. T. 28-29. On October 7, 2014, he started working at 6 AM and began operating a forklift while unloading skids. He testified he had to operate the forklift in reverse, for safety reasons, because the skids were stacked higher than usual. It was not typical for him to have to do this. For about 1 or 1 ½ hours, he intermittently drove in reverse, while looking to his right to see if anyone was behind him. His neck became sore and his body was aching. He noticed these symptoms around 9:20 AM but did not report them to anyone because it was typical for him to experience aches and pains on the job. By the time his shift ended, at 2 PM, his neck, back and whole body hurt. His symptoms worsened after he went home. He took Aleve, which helped. He worked the next day, despite ongoing pain. He did not report his symptoms to anyone because he hoped he would improve. The following day, October 9, 2014, he was still symptomatic. He decided to report his accident because he no longer believed he would get better. He told Steve Meyers, a maintenance supervisor. He watched Meyers complete an accident report. He identified PX 1 as the report Meyers completed. [The Arbitrator notes that PX 1 consists of only one page, although it indicates at the top that a supervisor or manager is to complete both page one and page two.] On this report, Meyers indicated that Petitioner "strained his neck" while operating a forklift in reverse for a period because "the boxes were stacked higher than usual." It appears that Meyers identified the neck as the injured body part and that someone else, using different handwriting, identified "cervical spine, thoracic spine, degenerative disease, cervical spine." Petitioner testified he was never told he had degenerative disease and did not tell Meyers he had this condition.

Petitioner also offered into evidence an unsigned Form 45 dated October 11, 2014. PX 2. This document reflects that Petitioner developed pain on October 7, 2014 while backing up a forklift and turning his neck and upper back "to see behind."

Petitioner denied sustaining any injuries between the time he developed symptoms at work on October 7, 2014 and the time he reported the accident to Meyers.

Petitioner testified he initially underwent treatment at "CDH," an occupational medicine facility. His supervisor told him to go to this facility. T. 37.

Records in PX 3 reflect that Petitioner initially saw Patricia Colledge, a nurse practitioner at an urgent care facility, CDH Bloomingdale, on October 11, 2014. Colledge noted that Petitioner injured himself at work four days earlier while driving a forklift in reverse "with back and neck turned to see behind." Petitioner reported having taken Tylenol and one Naprosyn the previous day. Petitioner also reported an onset of left lower quadrant pain the previous day. On examination, Colledge noted a reduced range of neck motion, tenderness in the left lower quadrant and a decreased range of lumbar motion. She ordered cervical and thoracic spine X-rays. The cervical spine X-rays showed moderate multi-level spondylytic changes at C4-C5, C5-C6 and C6-C7 while the thoracic spine X-rays showed mild multi-level degenerative changes. Colledge conducted drug testing and administered an injection of Toradol for pain. Due to Petitioner's chest symptoms, she arranged for Petitioner to be transferred to the Emergency Room at Advocate Sherman Hospital. She prescribed Naprosyn and Norco and placed Petitioner on light duty with no forklift operation. PX 3.

Petitioner saw Dr. Sims at Advocate Sherman Hospital's Emergency Room on October 11, 2014. The doctor noted a primary complaint of left-sided chest pain secondary to a work injury occurring earlier that week. He indicated that Petitioner was operating a forklift in reverse, "unlike the norm," due to the load being too heavy to drive "frontwards." He noted that, in order to drive in reverse, Petitioner had to stretch his right arm out behind him and twist his trunk to the right so that he could look backward. He ordered an EKG, which was normal. He described the pain as "clearly musculoskeletal in nature." He discharged Petitioner from care and told him to follow up with his primary care physician. RX 18.

Petitioner testified that Respondent accommodated the restrictions that Dr. Colledge imposed.

Records in PX 5 reflect that Petitioner saw Dr. Adrienne Baksinski at Cadence Occupational Health Clinic on October 13, 2014. The doctor's description of the October 7, 2014 accident echoes the Form 45. She indicated that Petitioner complained of pain radiating from his neck down both arms but especially down the left arm to the biceps area. She also noted a history of hypertension and gout. She indicated that Petitioner's symptoms worsened when he turned his head and body and "improved with Norco, Naproxen." On examination, she noted pain with Spurling's testing and pain to palpation into "bilateral PVM." She prescribed Norco, to be taken after work and at bedtime, and told Petitioner to "continue" the

Naproxen and start taking a muscle relaxant. She released Petitioner to restricted duty with no forklift operation, no bending or twisting, no lifting over 5 pounds, no pushing/pulling over 10 pounds and no ladder usage. On a form labeled "visit summary for employer," she identified "Patty Hammers" as the "contact person" at Respondent. PX 5.

Petitioner returned to Cadence on October 17, 2014 and again saw Dr. Baksinski. The doctor noted 50% improvement and indicated that Petitioner rated his pain at 4/10. She continued the medications and work restrictions. PX 5.

At the next visit, on October 22, 2014, Dr. Baksinski described Petitioner as "80% improved" but indicated that Petitioner was still experiencing some pain in his right lateral neck and shoulder. She continued the medications and revised the restrictions to allow Petitioner to lift, push and pull up to 20 pounds. PX 5.

On October 29, 2014, Dr. Baksinski noted that, while Petitioner was feeling better, he had started experiencing pain between his shoulder blades the previous day and was still experiencing slight pain in the right side of his neck and his right shoulder. She continued the medications and restrictions and directed Petitioner to begin physical therapy. PX 5.

Petitioner underwent an initial physical therapy evaluation at Accelerated Rehabilitation on November 5, 2014. The evaluating therapist recorded a consistent history of the events of October 11th and subsequent treatment. On examination, he noted tenderness to palpation over the T7-T8 junction and levator scapulae as well as upper extremity strength deficits.

Petitioner continued attending therapy thereafter, while periodically returning to Cadence. He testified that the therapy "did not help." On November 14, 2014, Dr. Baksinski described Petitioner as still experiencing pain radiating from his neck to his mid back and right shoulder. On December 1, 2014, Dr. Baksiniski described Petitioner as feeling "about 70% better." On December 15, 2014, she noted that Petitioner's pain increased to 6/10 when reaching overhead. She also indicated that, at best, Petitioner "feels only 75% better." She prescribed cervical and thoracic spine MRIs to evaluate "pain into neck and scapular border and also to the posterior right ear with headache." PX 5.

The cervical spine MRI, performed without contrast on December 22, 2014, showed a left-sided herniation at C5-C6 with underlying bulge and disc-osteophyte complex and right foramen, bulging of the C3-C4, C4-C5 and C5-C6 discs and mild stenosis and minimal impingement on the cord. PX 6. The thoracic spine MRI, performed without contrast the same day, showed diffuse spondylosis and multi-level degenerative disc disease but "no definite MRI evidence for an acute osseous abnormality." PX 7.

On December 29, 2014, Dr. Baksinski noted that Petitioner reported being "in more pain after PT." She also noted that Petitioner was now experiencing low back pain radiating to his right leg and numbness in his right thigh as well as neck pain. She indicated that Petitioner "never had [the lumbar spine and leg] complaints previously." She indicated it was "difficult to

conclude that there is a causal relationship to his injury or to his treatment." She reviewed the MRI findings with Petitioner, continued the work restrictions and recommended a consultation with pain management. She also recommended that Petitioner see his primary care physician for his back complaints. PX 5.

Petitioner testified that Dr. Baksinski arranged for him to see Dr. Norek, a pain physician. Before he saw Dr. Norek, however, he saw his primary care physician, Dr. Florentino.

Dr. Florentino's handwritten note of January 13, 2015 sets forth a consistent history of the October 7, 2014 accident and subsequent care. The doctor noted that Petitioner had stopped attending therapy as it was aggravating his lower back. On examination, he noted tenderness in the right side of the neck radiating to the shoulder and scapula. He also noted a limited range of head motion. He diagnosed right cervical radiculitis. He continued the Naprosyn and work restrictions and prescribed Lidoderm patches. He also recommended that Petitioner see a pain specialist. PX 9.

Petitioner first saw Dr. Norek on January 15, 2015. In her note of that date, Dr. Norek indicated she was seeing Petitioner "at the request of Dr. Baksinski." She also indicated that, on October 7, 2014, Petitioner had to operate his forklift in reverse as the load was too high to see over and developed pain in his neck and shoulder which worsened over time. She noted that Petitioner initially underwent therapy at Accelerated, through November, but began developing increased symptoms after he "switched to PT through Cadence." She described Petitioner's gait as within normal limits and noted Petitioner was "able to get on and off the exam table independently." On examination, she noted tenderness to palpation and tightness in the right greater than left cervical paraspinals, the right thoracic paraspinals and the right rhomboid and bilateral levator scapula muscles. She further noted a reduced range of motion, especially with rotation, and a right rhomboid strength deficit which she rated 4/5. She diagnosed myofascial pain, cervical spondylosis, displacement of cervical disc and thoracic sprain/strain. She started Petitioner on Tramadol and ordered additional therapy. She directed Petitioner to return to her in one month. PX 10. She also issued a note indicating she was continuing the restrictions "as issued by Dr. Bakinski." PX 10.

Petitioner returned to Dr. Florentino on February 16, 2015 "for a referral to see a neurosurgeon." Dr. Florentino indicated that Petitioner underwent more therapy but it "did not help much." He described Petitioner as experiencing pain radiating to his right arm and hand and "some numbness." He diagnosed cervical radiculopathy. He referred Petitioner to Dr. Cascino, a neurosurgeon. PX 9.

Petitioner saw Dr. Florentino again on February 19, 2015, for "an extension for him to RTW today with restrictions." The doctor again noted complaints of "cervical pain with radiation to right arm accompanied by numbness." He again recommended that Petitioner see a neurosurgeon. PX 9.

Petitioner testified he was willing to see Dr. Cascino but did not have the opportunity to do so because workers' compensation would not authorize a visit. He did not return to Dr. Norek because no one contacted him to tell him he had an appointment.

At Respondent's request, Dr. Graf, an orthopedic surgeon, conducted a Section 12 examination of Petitioner on February 25, 2015. In his report of that date, Dr. Graf indicated he used an interpreter during the examination. Dr. Graf described Petitioner as a mechanical technician whose job was "heavy at times." He noted that, on October 7, 2014, Petitioner loaded a truck with a forklift and "had to drive the forklift backwards" because "the load was too high and he could not see in front of him." He also noted that Petitioner reported twisting his neck and upper back while driving in reverse and felt a "small pain" which worsened over the next days. He indicated that Petitioner rated his current pain level at 5/10 and reported having pain on the right side of his neck and head as well as into the right shoulder blade to the center and the lower back. He also indicated that Petitioner was continuing to work "with a 40-pound weight lifting restriction." He noted a history of gout.

Dr. Graf described Petitioner's gait as normal. He noted that Petitioner was able to toe and heel walk and squat. On cervical spine examination, he noted a full range of motion and negative Spurling's signs bilaterally. He noted normal sensation and no strength deficits. On shoulder examination, he noted a full range of motion bilaterally and no impingement signs or atrophy. On thoracic and lumbar spine examination, he noted no spasm and no pain to palpation. Sitting and supine straight leg raising were negative bilaterally. He noted no non-organic pain signs.

Dr. Graf indicated he reviewed records from Cadence, Advocate Sherman Hospital, Accelerated Rehabilitation and Dr. Norek in connection with his examination. He also indicated he personally reviewed various cervical and thoracic spine X-rays as well as the cervical and thoracic MRI images.

Dr. Graf concluded that Petitioner's injury "should be considered a cervical and thoracic strain." He causally linked this condition to the work accident and characterized the treatment to date as reasonable, necessary and causally related to the accident. He noted that, while the cervical spine MRI showed a left-sided herniation at C5-C6, Petitioner's clinical symptoms did not correlate with this finding. He found no causal relationship between the accident and Petitioner's lower back complaints, indicating those complaints did not surface until December 2014, "more than two months following the injury in question." He also noted that Petitioner did not voice any low back complaints at the time of his examination. He found Petitioner to be at maximum medical improvement. After noting that Petitioner was currently working with a 40-pound weight limit, he indicated there was "no objective reason why he cannot return to his full duty level job as described." RX 2.

Petitioner testified he resumed full duty at Respondent after Dr. Graf's Section 12 examination. His neck did not improve. He took Aleve for his pain. The pain was "like a

toothache." He continued experiencing the pain during the week leading up to his second claimed accident, on April 2, 2015.

Petitioner denied having any problems with his feet and legs before the accident of April 2, 2015. On that date, he had to repair some equipment. He typically performed repairs on a large steel table that was beneath a set of stairs. He used these stairs five or six times per shift. The stairs are not open to the public. The table is waist high and approximately 10 feet by 5 feet in size. It is anchored to the ground. At about 12:20 PM, he was descending the stairs. There was nothing on the stairs and "nothing unusual" about the stairs. He was not carrying anything. When he was close to the bottom of the flight of stairs, he began to stumble and fall. He intentionally moved his body to the left to avoid striking the table. He did this because he felt like he would have been killed if he had struck the table. Two months later, Respondent "removed the stairs" and moved them to the west side of the building, away from the table. After he fell, his neck "really hurt" and he also felt low back pain. A co-worker came to his aid. He reported his accident the same day to Steve Meyers. Meyers completed an accident report.

PX 12 is a partially completed, unsigned accident report. It consists of one page but, at the top, there is an indication that a manager/supervisor is to complete both page one and page two. The accident is not described. The report merely indicates that, at 12:20 PM on April 2, 2015, Petitioner twisted his ankle and experienced "shooting pain in right leg up to back and neck." The "injured body parts" include the "ankle, lower back, middle back, neck." PX 12.

Petitioner testified that, after he fell, he continued working in pain until his shift ended at 2 PM. He did not work the following day because he was not scheduled to work. His whole body was sore so he took Aleve. He was also not scheduled to work on April 4th or 5th. He experienced pain in his neck, low back and legs. He reported to work on April 6th. He was able to work but complained of his pain to Steve Meyers. Meyers sent him to Cadence Occupational Health.

Records in PX 13 reflect that Petitioner saw Dr. Baksinski at Cadence on April 6, 2015. The note of that date sets forth the following "patient description of accident":

> "On 4/2/15, fell while walking down 3 stairs, tried to avoid falling to steel table. Fell onto floor. Denies head trauma. C/o headache, with pain to neck, right upper back, lower back, right hip, entire right leg to toes."

The note also reflects that Petitioner "states that he is not sure why he fell" and that Petitioner "landed on his left knee but [was] otherwise not sure of his positioning." Dr. Baksinski noted that Petitioner was using a cane and that he complained of posterior neck pain, right upper back pain, pain below the scapula, lower back pain, right hip pain, pain in the entire right leg to the toes and numbness to the right toes. Petitioner rated his right hip and right leg pain at 8/10 and his other symptoms at 5 or 6. On examination, Dr. Baksinski noted a limited range of neck motion, indicating this might be Petitioner's baseline, along with pain and spasm along the right

scapular border, a limited range of lumbar spine motion, weakness with extension from the right knee and dorsiflexion of the right great toe, pain with right straight leg raising, an inability to toe walk, negative McMurray's, a limited range of right ankle motion and pain to palpation along the middle of the right foot near the third metatarsal.

Dr. Baksinski obtained X-rays of the lumbar spine, right ankle and right foot. She indicated the lumbar spine X-rays showed anterior osteophytes and no acute fracture. She also indicated she was awaiting the final radiology reports.

Dr. Baksinski diagnosed a low back strain with radiculitis, a right ankle sprain and a thoracic strain with a worsening of pre-existing pain. She described the left knee as asymptomatic and indicated that Petitioner's neck complaints "may be aggravated from previous injury to neck and upper back." She noted that Petitioner had seen Dr. Graf, "who discharged him from care." She prescribed Tramadol and Flexeril and recommended ice applications. She released Petitioner to "sit down work only." PX 13.

The preliminary X-ray reports showed mild multi-level osteophyte formation in the lumbar spine, no evidence of fractures in the right foot or ankle, diffuse soft tissue swelling and mild osteoarthritic changes at the first MTP joint. PX 13.

On April 8, 2015, Dr. Baksinski created another note, after receiving a call from radiology. She indicated that, according to the radiologist, the lumbar spine X-rays were "positive for small protrusions at L4-L5 and L5-S1 without effacement." She recommended that Petitioner undergo an MRI and begin physical therapy. She again restricted Petitioner to seated work. PX 13.

The lumbar spine MRI, performed without contrast on April 8, 2015, showed no acute fracture or dislocation, no significant disc protrusion or central canal stenosis and mild bilateral neural foraminal stenosis at L5-S1. PX 14.

A note in the Cadence records reflects that "Patty" of Respondent contacted Dr. Baksinski's staff concerning Petitioner's therapy regimen and indicated that Petitioner had told her he was in so much pain he felt he should not work and would be unable to go to therapy. PX 13.

A note dated April 10, 2015 reflects that a member of Dr. Baksinski's staff called Petitioner on April 10, 2015 and "convinced" him he needed to start therapy. The note reflects that Petitioner had not returned calls from the therapy facility. PX 13.

The same day, April 10, 2015, Petitioner returned to Dr. Baksinski and complained of bilateral leg numbness and 9/10 low back pain radiating down the right leg into the great toe and down the left leg into the lateral ankle and "just beginning into the great toe." Petitioner indicated he felt physically unable to attend therapy. Dr. Baksinski indicated she reviewed her previous notes and noted that Petitioner's radicular complaints were in a "different

distribution" at that time. She reviewed the MRI results with Petitioner and changed his medication. The doctor discontinued the Tramadol and Flexeril and started Petitioner on Valium, Hydrocodone and Neurontin. She again restricted Petitioner to seated work.

On April 10, 2015, Petitioner underwent an initial physical therapy evaluation at CDH Bloomingdale Rehab. Petitioner provided a history of the work fall. He reported numbness and tingling in both legs that had started the previous night. Petitioner also complained of low back pain radiating down his right leg. PX 13.

On April 12, 2015, Petitioner called Dr. Baksinski's office and indicated his bilateral leg pain had worsened. On April 13th, the doctor returned Petitioner's call and instructed him to go to the nearest Emergency Room that day. PX 13.

Petitioner testified he went to Advocate Sherman Hospital via ambulance after talking with Dr. Baksinski on April 13, 2015. He was admitted to the hospital for observation.

Petitioner offered into evidence excerpts from the Advocate Sherman Hospital records concerning his April 13, 2015 admission. PX 15. The Arbitrator notes that the records reflect a total of 198 pages but that Petitioner offered only a portion of these pages. A run sheet reflects that, on April 13, 2015, Petitioner described his April 2, 2015 work fall to Elgin Fire Department paramedics and told them he had been able to walk up until the previous Friday, at which point his pain and swelling prevented him from walking. Petitioner denied any intervening injuries or falls and related his symptoms to the work fall. At the Emergency Room, Petitioner complained of intractable back pain, bilateral leg pain, left leg numbness and knee and ankle pain and swelling. Hospital personnel noted that an MRI had shown "no evidence of any acute emergent pathology." They also noted a history of hypertension and gout, with Petitioner indicating he had discontinued his gout medication because he had not had an episode for 1 ½ years. Petitioner was given "multiple rounds of IV narcotic pain medication with only minimal symptom relief." A physician's assistant noted that Petitioner's right ankle and foot were swollen and that his left ankle was minimally swollen. She described Petitioner's left knee as "slightly edematous" compared with the right knee. Dr. Sood also evaluated Petitioner. He commented that Petitioner's complaints were "unlikely related to previous history of gout" but nevertheless obtained a uric acid level. This level was 3.9, with the doctor noting that Petitioner took Allopurinol for his gout only sporadically. Petitioner's blood sugar level was noted to be 192. The doctor indicated Petitioner's symptoms "most likely represent acute pseudogout, judging by the normal uric acid and the absence of regular Allopurinol and chondrocalcinosis and the timing and location." He recommended a course of Colchicine for acute gout. Another physician, Dr. Barclay, indicated that Petitioner's MRI findings did not explain his right leg symptoms. She suspected an inflammatory condition. She ordered ankle and knee X-rays. These studies showed no acute findings and some effusion in both knees. The records reflect that Petitioner also saw Dr. Lichtenberg, a rheumatologist, but his consultation note does not appear in PX 15. The physician's assistant also diagnosed a right ankle sprain and placed Petitioner in an air cast. The physician's assistant indicated that Petitioner could follow up with Dr. Stanley, an orthopedic surgeon, in two weeks.

Petitioner testified he did not return to Dr. Baksinski or physical therapy following his hospitalization.

At Respondent's request, Dr. Graf re-examined Petitioner on April 20, 2015. In his report of the same date, the doctor indicated that he used a Spanish-speaking interpreter during the re-examination. The doctor noted that Petitioner had resumed working about a month earlier and "was doing okay but had some back pain." He also noted that, on the day before Good Friday, Petitioner was descending stairs at work when he slipped on the third step from the bottom, tried to avoid falling and "landed onto his left knee." He further noted that Petitioner began experiencing pain in his low back, right leg and left knee the following day and went to Cadence per his supervisor on Monday. He indicated that Petitioner had undergone X-rays and an MRI and was currently off work. He noted that Petitioner denied having pain before the work fall and rated his current pain at 7/10.

Dr. Graf described Petitioner as using a cane and demonstrating an "extremely antalgic gait." He noted that Petitioner refused to attempt heel/toe walking and squatting. He deferred a cervical spine examination "secondary to no complaints." On right lower extremity examination, he noted that Petitioner "demonstrates the inability to break the strength of my single index finger." He described seated straight leg raising as negative "in the distracted scenario" and positive on the right "in the informed scenario." He noted six out of six non-organic pain signs. He indicated a self-reported Pain Disability Questionnaire score of 91, noting that this meant Petitioner viewed himself as moderately disabled.

Dr. Graf indicated he reviewed records from Cadence, physical therapy and Dr. Florentino, along with the lumbar spine MRI images, in connection with his re-examination. He interpreted the MRI as showing "mild degenerative changes but no notable disc herniation." He indicated he was "unable to substantiate [Petitioner's] subjective complaints of pain given lack of objective findings." He also noted that Petitioner voiced similar complaints prior to the work fall. He found Petitioner to be at maximum medical improvement and capable of full duty. He characterized the treatment to date as "reasonable and medically necessary."

Petitioner testified he saw Dr. Cannestra for his right ankle and left knee on April 24, 2015. A medical history form in Dr. Cannestra's chart documents a referral from Dr. Florentino. On this form, Petitioner described the mechanics of the April 2, 2015 work fall, indicating he fell from "the third step down" and "tried to avoid falling to a [sic] steel table." He indicated he "fell onto floor with pain to neck, right upper back, lower back, right hip, entire right leg to toes." The doctor noted a complaint of significant back pain radiating down the right leg to the toes. He also noted that Petitioner reported a history of gout and was "initially diagnosed with gout involving his elbows." He indicated that Petitioner was still wearing an AirCast on his right ankle and had been unable to work since the accident. He noted that Petitioner's neck pain had resolved. On cervical spine examination, he noted a "pain-free range of motion." On left knee examination, he noted exquisite tenderness along the medial joint line, a varus alignment, pain with range of motion and difficulty extending the knee actively.

Straight leg raising was negative bilaterally and the doctor noted "no radicular findings." He also noted moderate edema laterally in the right ankle and some mild edema in the dorsal midfoot region as well as significant tenderness along the posterior tibialis tendon and peroneal tendons. He reviewed the recent right ankle and left knee X-rays. He diagnosed "probable gout of the left knee and ankle," moderate medial compartment arthritis of the left knee, a probable left medial meniscus tear, posterior tibialis and peroneal tendinitis of the right ankle and a lateral collateral ligament complex sprain to the right ankle. He replaced the AirCast with a Cam boot and recommended that Petitioner bear weight as tolerated. He offered Petitioner a left knee injection but noted that Petitioner deferred this. He also noted that Petitioner deferred physical therapy. He prescribed Vimovo and recommended that Petitioner return in four weeks for X-rays. He took Petitioner off work, noting that Petitioner did not feel able to work "given that both lower extremities are involved with these injuries."

A separate note of April 24, 2015, dictated by a physician's assistant affiliated with Dr. Cannestra, reflects that Petitioner was using a rolling walker at the suggestion of his wife. PX 17.

On April 27, 2015, Petitioner underwent an initial physical therapy evaluation at ATI in Elgin. On a medical history form, Petitioner described the accident of April 2, 2015 and indicated he was chiefly experiencing pain in his right ankle and shooting pain in his right leg "up to back and neck." The therapist noted that the accident occurred the day before a holiday and that Petitioner described his symptoms as worsening once he resumed light duty. Petitioner underwent ankle therapy on April 28, May 1 and thereafter. PX 18.

On May 1, 2015, Petitioner saw Dr. Stanley at the Midwest Bone & Joint Institute. Dr. Stanley noted a referral from Dr. Florentino. He recorded the following history:

> "Back in October, [Petitioner] had to turn his neck while driving a forklift. He developed acute onset of neck pain radiating down to his right hand. He was treated conservatively and the pain going down his arm resolved but he has had persistent neck pain ever since then. He does not have any pain radiating down his arm at this time. He does not notice any weakness, numbness or tingling. It is just the neck pain."

Dr. Stanley indicated he reviewed the images from the December 22, 2014 thoracic spine MRI and the report concerning the cervical spine MRI. He noted no abnormalities on examination of the cervical spine and upper extremities. He obtained cervical spine X-rays which showed "advanced degenerative changes but no evidence of dynamic instability." He directed Petitioner to return in one week with his cervical spine MRI. PX 17.

On May 1, 2015, Petitioner also saw Dr. Lichtenberg, a rheumatologist, in follow-up from his hospitalization. The doctor recorded the following history:

> "This is a 55 y.o. male who is here for follow up of suspected CPPD arthritis of the R ankle 7-10 days after a fall (during which there was no direct trauma to the ankle) at work. He had been placed on Allopurinol and was given Colchicine by me in the hospital where he was hospitalized for LE pain. He stopped Allopurinol as the clinical dx was changed from gout to pseudogout and given an acute single day dose of Colchicine in the hospital. Subsequently he relapsed in the outpatient setting and responded to Prednisone, 10 mg daily, which he continues. Presently, while much better, there is still some ambulatory pain."

Dr. Lichtenberg described Petitioner's gait as normal. On examination, he noted osteoarthritis of the left ankle and midfoot with mild secondary enlargement but no ankle joint effusion and mild chronic deformity. He attempted to aspirate Petitioner's right ankle but noted an aspirate amount of "0 ml." He diagnosed Petitioner with "acute self-limited pseudogout R ankle." He attributed Petitioner's ongoing symptoms to "underlying premorbid osteoarthritis of the R ankle." He discontinued the current Prednisone regimen and told Petitioner to take Prednisone 5 mg daily for three to four days for pseudogout, although he indicated Petitioner "may never have another attack." He directed Petitioner to return in three months, "sooner if needed." PX 16.

On May 4, 2015, Petitioner was discharged from physical therapy due to non-compliance. The note reflects that Petitioner had attended only one session to date. PX 13.

Petitioner returned to Dr. Stanley on May 8, 2015 and brought his cervical spine MRI along, as directed. The doctor interpreted the MRI as showing a left-sided disc protrusion at C5-C6, "contralateral to [Petitioner's] symptomatic side." He noted some mild foraminal stenosis on the right at the same level but indicated this was "from a chronic degenerative osteophyte, not from any type of acute pathology." He indicated that, overall, the MRI findings were "more consistent with a chronic degenerative condition." He stated that he "told [Petitioner] that his persistent neck pain is secondary to chronic degenerative arthritis, not secondary to his work injury." He noted that Petitioner had already been released to full duty and that he agreed with this. He stated that Petitioner "should be able to return to work full duty without any restrictions." He told Petitioner he could return to him as needed. PX 17.

A therapy note dated May 18, 2015 reflects that Petitioner was still experiencing pain along the inside of his right ankle and was "eager to be discharged of his air boot." PX 18.

Petitioner returned to Dr. Cannestra on May 22, 2015 and related that physical therapy was "helping immensely" with his right ankle and left knee. Petitioner described these body parts as "70% improved." Petitioner indicated he felt ready to progress out of the CAM boot and wanted to finish his last two weeks of therapy. The doctor obtained a standing AP view of the left knee. This X-ray showed "moderate medial compartment arthritis" and chondrocalcinosis of the menisci. Dr. Cannestra indicated that Petitioner's osteoarthritis was

improving but that it was possible he had a meniscal tear based on the chondrocalcinosis. He injected the left knee with Cortisone and provided Petitioner with an AirCast for his right ankle. He prescribed two more weeks of therapy. He indicated he reviewed the treatment plan with a case manager, Elizabeth Yarrington. He released Petitioner to full duty as of June 8, 2015 and recommended that Petitioner return in five weeks. PX 17.

Petitioner began seeing Dr. Bernstein on May 26, 2015. Petitioner provided a history of both work accidents and indicated he had been off work since his ankle injury of April 2nd. He complained of lateral neck pain to the tops of the trapezial muscles bilaterally, without radicular symptoms. PX 27, p. 10. On examination, Dr. Bernstein noted some slight guarding of neck motion and some mild tenderness to palpation. He described Petitioner as "neurologically intact." He reviewed the cervical and thoracic spine MRIs as well as cervical spine X-rays. He diagnosed "chronic neck pain following a work injury" and prescribed symptomatic care. He believed that Petitioner had "aggravated a degenerative condition of his cervical spine." PX 27, pp, 12-13. He found Petitioner capable of working with respect to his neck. PX 20.

A therapy note dated June 2, 2015 reflects that Petitioner was still experiencing right ankle pain but was walking more easily. PX 18.

Dr. Cannestra prescribed work hardening on June 5, 2018. PX 18.

Petitioner returned to Dr. Lichtenberg's office on June 10, 2015 and saw a different physician, Dr. Ansari-Ali. The doctor noted complaints of pain from the right foot to the hip. He also noted that Petitioner complained of "pain all over" on "most days." He indicated that a cervical spine MRI had demonstrated "DJD" and that Lyrica was "no help." He described Petitioner's gait as abnormal and indicated Petitioner was wearing a boot on his right foot. He also noted "chronic decreased abduction of shoulders to 90 degrees due to neck pain." He described Petitioner as having "progressive OA issues." He started Petitioner on a trial of Plaquenil and recommended he continue physical therapy for his right foot and neck issues. PX 16.

On June 11, 2015, the work hardening therapist at ATI indicated that Petitioner was at a light medium physical demand level and that upper extremity work had been limited due to Petitioner's neck complaints. Petitioner was discharged from work conditioning on June 26, 2015, with the therapist noting that Petitioner could walk for about two hours before his ankle symptoms became unbearable. PX 18.

Petitioner returned to Dr. Cannestra on June 26, 2015. In his note of that date, the doctor indicated that Petitioner obtained relief from the left knee injection and described the knee as "95% improved." He also indicated that Petitioner described his right ankle as "90% improved." He noted that Petitioner had resumed full duty and was "overall very pleased with the results of the treatment." On examination, he noted no erythema, edema or tenderness in the knee or ankle and a full range of motion of both of these body parts. He discharged Petitioner from care, noting that Petitioner had "minimal pain and no functional limitations."

He again indicated he reviewed Petitioner's treatment with a case manager, Elizabeth Yarrington. PX 17.

On August 5, 2015, Petitioner returned to Dr. Lichtenberg. The doctor noted a "stiff neck and painful movement of the R shoulder with improved knees and R ankle joint" symptoms. On examination, he noted "painfully mildly limited R shoulder and cervical" range of motion and a full range of motion "in all other joints." He also noted "osteoarthritis/chronic deformities" of the right midfoot. He diagnosed Petitioner with knee, right foot and cervical osteoarthritis and right ankle pseudogout. He recommended that Petitioner apply Capsaicin to his right shoulder and wear a soft cervical collar in flexion at night. He directed Petitioner to return in four months. PX 16.

Petitioner returned to Dr. Bernstein on August 13, 2015. Petitioner informed the doctor that he had resumed regular work and was experiencing severe neck pain "in a cape like fashion over the back of the neck and the tops of the shoulders and into the scapula." PX 27, pp. 13-14. Petitioner also complained of some low back pain that was less problematic than his neck pain. PX 27, p. 14. Dr. Bernstein re-reviewed the cervical spine MRI, noting a shallow protrusion at C4-C5, a central left-sided herniation at C5-C6 and a small central protrusion at C6-C7. PX 20. He concluded that Petitioner was suffering from discogenic neck pain, "meaning pain that emanates from the discs themselves." He recommended that Petitioner undergo a repeat cervical spine MRI "of the highest quality." PX 27, p. 15.

On August 20, 2015, Dr. Bernstein took Petitioner off work until the post-MRI follow-up visit. PX 22.

The repeat cervical spine MRI, performed without contrast on September 25, 2015, showed minimal/mild disc bulges at C3-C4 and C4-C5, mild stenosis at C5-C6 due to disc bulging and endplate osteophytes, mild to moderate right neural stenosis due to uncovertebral osteophytes and facet arthrosis and minimal spinal canal narrowing at C6-C7 due to disc bulging with endplate osteophytes. PX 23.

Petitioner returned to Dr. Bernstein on October 5, 2015 and again complained of "marked neck pain." PX 20. The doctor interpreted the repeat MRI as showing "degenerative changes in the cervical spine, most severe at the C5-C6 level." He recommended a three-level discogram, from C4 to C7. PX 20. PX 27, p. 16. PX 20. He continued to keep Petitioner off work. PX 20.

Petitioner underwent a cervical discogram and post-discogram CT scan on December 4, 2015. Only the first page of the discogram report appears in PX 24. The second page is missing. The physician who conducted the study noted that his attempts to access the C6-C7 level "were unsuccessful secondary to the patient's body habitus." Dr. Strimling, the radiologist who interpreted the post-discogram CT scan, noted disc bulging with osteophyte formation and facet arthropathy at C4-C5, C5-C6 and C6-C7. He indicated that the C4-C5 and C5-C6 levels

demonstrated post-discography findings of diffuse disc degeneration and annular disruption as well as a posterior central radial tear at C4-C5. PX 24.

Petitioner saw Dr. Lichtenberg again on December 7, 2015. The doctor noted that Petitioner had not suffered any additional pseudogout attacks and complained only of shoulder pain, "depending on the weather." He started Petitioner on a trial of twice daily extra strength Acetaminophen and directed Petitioner to return in six months. PX 16.

Petitioner saw Dr. Bernstein again on December 10, 2015. The doctor noted that the physician who performed the discogram was only able to evaluate two levels, C4-C5 and C5-C6. That physician had been unable to insert a needle into C6-C7. That physician documented "severe concordant pain" at the two tested levels. PX 27, p. 17. Dr. Bernstein recommended a three-level cervical fusion. He felt that Petitioner's only other option was living with his pain. PX 27, p. 20. PX 20. He continued to keep Petitioner off work. PX 22.

Petitioner returned to Dr. Bernstein on February 11, 2016. On that date, the doctor discussed the possible benefits and risks associated with the recommended three-level fusion. Petitioner indicated he was trying to obtain approval for the fusion from the workers' compensation carrier. PX 27, p. 21.

On March 8, 2016, Dr. Bernstein performed an anterior microdiscectomy and fusion at C4-C7. At his subsequent deposition, the doctor testified that, during this surgery, he identified central disc herniations at all three levels, C4 to C7. PX 27, p. 21.

At the first post-operative visit, on March 14, 2016, Dr. Bernstein evaluated Petitioner's incision and took X-rays. Petitioner complained of some mild swallowing difficulty but was otherwise pleased with how he felt. PX 27, p. 23. The doctor fit Petitioner for a bone growth stimulator and indicated he should remain off work. PX 20, 22. At the next visit, on April 11, 2016, repeat X-rays "looked good" and Petitioner's range of neck motion was gradually improving. The doctor indicated that Petitioner should remain off work and hold off from starting therapy to allow additional healing. PX 27, p. 23. PX 20, 22. On May 23, 2016, Petitioner indicated that his pre-operative neck pain was gone but that he was seeing Dr. Bresch, Dr. Bernstein's colleague, for right shoulder pain. Dr. Bernstein imposed restrictions of no lifting over 15 pounds and no overhead work activity. PX 27, p. 24. PX 22.

On July 25, 2016, Petitioner returned to Dr. Lichtenberg's office and saw a different physician, Dr. Ciangreco. The doctor noted that Petitioner's right ankle pain and swelling were "well-controlled" but that Petitioner "reported continued pain and stiffness in the bilateral knees and hand joints." On hand examination, he noted tenderness to palpation of the first CMC joint bilaterally and knee crepitus bilaterally. He recommended Indomethacin and Tylenol Arthritis. He also suggested physical therapy but noted that Petitioner "declined."

Petitioner returned to Dr. Bernstein on August 15, 2016. Repeat X-rays showed a healed fusion. Flexion-extension X-rays showed no motion. Dr. Bernstein recommended a functional capacity evaluation, "considering that [Petitioner] also had a shoulder problem." PX 27, p. 25.

On August 24, 2016, Respondent's human resources manager wrote to Petitioner. She indicated that Petitioner had been off work since August 24, 2015 due to a medical condition and that his twelve weeks of FMLA entitlement ended on September 4, 2015. She also indicated that Petitioner had been approved for long-term disability benefits with payments beginning February 22, 2016, and that Respondent was extending his medical leave through September 30, 2016. She notified Petitioner that, he was unable to return to work on October 3, 2016, Respondent would proceed with a "medical separation of employment" on that date. She indicated that Petitioner would need to obtain clearance from his doctor to return to work. RX 19.

On September 8, 2016, Petitioner underwent a functional capacity evaluation at ATI. Tom Warner, LAT, CSCS, CWcHP, conducted the evaluation. Warner rated the evaluation as valid. He noted that Petitioner complained of neck pain, left shoulder pain and bilateral knee pain during the evaluation. He also noted that Petitioner had not undergone any physical therapy after his fusion. He found Petitioner to be capable of functioning at a light physical demand level. PX 28.

On September 11, 2016, the Social Security Administration notified Petitioner of its finding that he became disabled pursuant to its rules on August 24, 2015. The Administration advised Petitioner he would begin receiving monthly disability benefits in February 2016. PX 38.

On September 12, 2016, Dr. Bernstein reviewed the functional capacity evaluation with Petitioner and imposed permanent restrictions of no lifting over 20 pounds and no overhead lifting. PX 27, pp. 25-26. He found Petitioner to be at maximum medical improvement. PX 27, p. 25.

On September 26, 2016, Respondent's human resources manager wrote to Petitioner and indicated Petitioner had been "off work since August 24, 2015 due to a non-work-related medical condition." The manager also indicated that Respondent was unable to provide Petitioner with work within the permanent restrictions imposed by Dr. Bernstein. She sent Petitioner a check for his accrued vacation and sick days and indicated he was "separated from" Respondent effective September 26, 2016 but would retain his long-term disability benefits. PX 29.

At the request of his attorney, Petitioner underwent a vocational rehabilitation evaluation by Susan Entenberg, MA, a certified rehabilitation counselor, on October 19, 2016. In her report of November 1, 2016 (Entenberg Dep Exh 2), Entenberg indicated that Petitioner speaks English "very well" and is able to "read without difficulty." She noted that Petitioner was receiving both long-term and Social Security disability benefits.

In her report, Entenberg reviewed Petitioner's educational and work history. She noted that, in addition to working at Respondent, Petitioner "worked part-time as a self-employed locksmith from 1995-2012, earning about $1500 per year." Entenberg Dep Exh 2, p. 2. She also noted that Petitioner was able to use a computer to browse the Internet and check his bank statement but that Petitioner denied being able to type or use any programs.

Entenberg found Petitioner not capable of resuming his former work as a maintenance employee, based on his permanent restrictions. She also found him to be an appropriate candidate for vocational rehabilitation, indicating that his restrictions would not preclude him from performing a variety of light occupations, including electronic assembler, counter clerk and light delivery driver. She noted that Petitioner had transferable skills relative to "mechanical/electrical knowledge" but no such skills relating to occupations within his restrictions. She recommended that Petitioner be offered the chance to obtain his GED, indicating this would increase his marketability.

At Respondent's request, Dr. Graf conducted a third Section 12 examination of Petitioner on November 10, 2016. In his report of that date (RX 4), Dr. Graf noted that Petitioner had undergone a discogram and three-level cervical fusion since the last examination. He also noted that Petitioner reported feeling "much better" since the surgery but still rated his neck and shoulder pain at 6/10. He further noted that Petitioner reported having been terminated by Respondent as of September 26, 2016 and that Petitioner did not feel as if he could resume his previous job.

Dr. Graf described Petitioner's gait as normal. On cervical spine examination, he noted a well-healed, right-sided incision and negative Spurling's sign bilaterally. He noted no upper extremity strength deficits and a full range of motion in both shoulders. He indicated that Petitioner scored 93 on a Pain Disability Questionnaire, meaning that Petitioner viewed himself as "moderately disabled."

Dr. Graf indicated he reviewed a Form 45 dated October 11, 2014 along with various physical therapy notes and records from Cadence, Dr. Florentino, Advocate Sherman Hospital, Dr. Cannestra, Dr. Stanley, Dr. Lichtenberg, Dr. Ansari-Ali, Dr. Bernstein and Dr. Bresch. He also referenced the discogram note. Dr. Graf also noted that he reviewed the repeat cervical spine MRI images, the lumbar spine MRI images, the post-discogram CT scan, a cervical discogram image and various post-fusion X-rays.

Dr. Graf expressed criticism of the cervical discogram, noting it was performed only at two levels, with no control level, and that no pressure readings were recorded. He also expressed criticism of Dr. Bernstein, indicating that the doctor recommended and performed a three-level cervical fusion "despite having a two-level invalid discogram."

Dr. Graf indicated that his previous causation opinions remained unchanged. He further opined that the cervical fusion "was neither reasonable nor medically necessary." He saw no

reason why Petitioner could not resume his former job. He attributed the restrictions imposed per the functional capacity evaluation to Petitioner's "pre-existing and unrelated medical condition and not the claimed work injury in question."

Dr. Graf noted that, while Petitioner had previously voiced low back complaints, he was now complaining solely of his neck and left shoulder following the fusion. He found it likely that Petitioner had "an initial cervical strain" and "vague complaints of cervical radiculopathy which resolved." He noted the contrast between Dr. Stanley, who had released Petitioner from care, and Dr. Bernstein, who went on to perform a three-level fusion. He characterized the occupational health care and physical therapy through 2014 as reasonable and necessary and indicated that any care beyond February 25, 2015 was "not reasonable, medically necessary nor causally related to the claimed injury in question." RX 4.

Petitioner returned to Dr. Bernstein on February 13, 2017, approximately one year after the three-level fusion. Dr. Bernstein noted some persistent neck stiffness. He indicated that Petitioner denied any radicular complaints. He described Petitioner as doing "reasonably well." He discharged Petitioner from care. PX 27, p. 27.

Dr. Bernstein testified by way of evidence deposition on April 26, 2017. PX 27. Dr. Bernstein testified he is a board certified orthopedic surgeon who specializes in spine surgery. He obtained board certification in 1993. He is on staff at Lutheran General Hospital. PX 27, pp. 5-7. He practices at The Spine Center. He conducts between 100 and 200 litigation-related examinations annually. About 80% of these are in workers' compensation claims. Of those examinations, about 85% are for the defense. PX 27, p. 8. He has conducted examinations at the request of Respondent's counsel. PX 27, p. 8.

Dr. Bernstein testified he has some recollection of Petitioner but needs his notes to testify. He first saw Petitioner on May 26, 2015. Petitioner told him that, on October 7, 2014, he was operating a forklift and turning his body severely because of an unusually tall load behind him. Petitioner said it was typical for him to have to turn his body but, on this date, the height of the load required "markedly extreme positions of his neck and low back." PX 27, p. 9. Petitioner indicated he developed neck pain that worsened over time, prompting him to go to a clinic. He engaged in therapy for his neck and also took medication. Petitioner also told him he fell on April 2nd, injuring his right ankle, and had been off work since that time. Petitioner complained of lateral neck pain to the tops of his trapezial muscles bilaterally without radicular symptoms. PX 27, p. 10.

Dr. Bernstein testified that Petitioner's initial examinations were "fairly normal." Petitioner had some slight guarding of range of motion of the cervical spine and some mild tenderness to palpation. Petitioner was neurologically intact. There were no long tract signs, meaning that there was no evidence of spinal cord compression. PX 27, pp. 10-11.

Dr. Bernstein testified he reviewed the MRI scan of December 22, 2014 and interpreted it as showing a left-sided herniation at C5-C6 and degenerative disc changes from C4 to C7. He

also reviewed a thoracic spine MRI, which was negative, and neck X-rays, which showed a degenerative pattern. PX 27, p. 12. On the basis of his examination and review of the images, he concluded that Petitioner had chronic neck pain following a work injury and that Petitioner's symptoms were "manageable and under control." He recommended symptomatic care, including adjustment of activities and over the counter anti-inflammatories. He felt that Petitioner had aggravated an underlying degenerative condition of his cervical spine and that it was possible the accident caused a herniated disc. PX 27, p. 12.

Dr. Bernstein opined that the accident of October 7, 2014 aggravated Petitioner's pre-existing degenerative condition. PX 27, p. 13.

Dr. Bernstein testified he saw Petitioner again on August 13, 2015. Petitioner indicated he had continued working, or resumed working, and was experiencing severe neck pain in a "cape like fashion" over the back of his neck and the tops of his shoulders and into the scapula. Petitioner also complained of some less severe low back pain. Petitioner denied radicular symptoms. Dr. Bernstein testified he considered Petitioner's symptoms to have worsened since the initial examination. On cervical spine re-examination, he noted stiffness and a decreased range of motion. He also re-reviewed the MRI. He concluded that Petitioner was suffering from discogenic neck pain. He recommended a repeat MRI "of the highest quality." PX 27, p. 15. He cannot recall whether he made any recommendations with respect to work status. PX 27, p. 15. After the repeat MRI, Petitioner returned to him on October 5, 2015. The repeat MRI showed degenerative changes in the cervical spine, most severe at C5-C6. He recommended a multi-level cervical discogram. A discogram "is an effort to identify or confirm a pain generator." He recommended a multi-level discogram because Petitioner had three degenerative levels in his neck, from C4 to C7. PX 27, p. 17. If Petitioner had one painful level, he would have offered him a single-level operation. If Petitioner had two or more painful levels, he would need a three-level fusion. PX 27, p. 17.

Dr. Bernstein testified that Petitioner returned to him on December 10, 2015, following the discogram. The radiologist who performed the study was only able to evaluate C4-C5 and C5-C6. The radiologist "couldn't get a needle into C6-C7." Petitioner had "severe concordant pain" at the two levels that were tested. It was a "judgment call" on the radiologist's part. Needle positioning can be difficult because you are trying to put a needle into a disc "and you're going near the carotid artery and some important structures in the neck." The radiologist might have been concerned about causing an injury. The fact that the study was concordant at C4-C5 and C5-C6 meant that either one level or both were contributing to Petitioner's pain complaints. Optimally, there would have been a control level to compare with the abnormal levels. If he himself had performed the discogram and had been unable to access C6-C7, he would have used C3-C4 as a control level. Regardless, he felt that the discogram was consistent with Petitioner's complaints. He did not believe Petitioner was exaggerating. He certainly was not going to subject Petitioner to another discogram because "it's a painful procedure" and "can cause infection." He recommended a three-level fusion as Petitioner's only real option versus living with pain. PX 27, pp. 19-20.

Dr. Bernstein testified he next saw Petitioner on February 11th. On that date, he discussed the risks and benefits of the proposed surgery with Petitioner. They also talked about the fact that Petitioner was trying to get approval from the workers' compensation carrier. PX 27, p. 21.

Dr. Bernstein testified that, when he operated on Petitioner, he found central disc herniations at all three levels. His operative findings were consistent with the MRI, the discogram and Petitioner's complaints. He removed the discs from C4 to C7, put in a bone implant and protein to help the fusion take and then put a metal plate on the front of the spine. In his opinion, the fusion was reasonable and necessary to alleviate Petitioner's symptoms. Petitioner had severe and incapacitating pain preoperatively, radiographic evidence of disc abnormalities, a discogram that further confirmed those abnormalities and intraoperative findings that also confirmed those abnormalities. The fact that Petitioner improved after the surgery further supports the need for the surgery. PX 27, p. 22. The October 7, 2014 work injury brought about the need for the fusion. Petitioner had no pre-accident history of neck pain and chronic, severe pain after the accident. PX 27, pp. 22-23.

Dr. Bernstein testified he saw Petitioner postoperatively on March 14, 2016. On that date, he obtained X-rays, evaluated the incision and talked with Petitioner, who indicated he was pleased with the results. Petitioner had some mild swallowing difficulty which is expected early on after such a fusion. PX 27, p. 23. As of the next visit, on April 11, 2016, Petitioner's X-rays looked good and his range of motion was gradually improving. At the following visit, on May 23, 2016, he noted that Petitioner was seeing his colleague, Dr. Bresch, for a right shoulder problem. Petitioner told him that his pre-operative neck pain was gone. His X-rays looked good. He released Petitioner to light duty with no lifting over 15 pounds and avoidance of overhead work activity. PX 27, p. 24. This is a common time frame for someone with a physical job. PX 27, p. 25. On August 15, 2016, Petitioner's X-rays showed a healed fusion and no motion on flexion-extension views. At that point, he recommended a functional capacity evaluation considering that Petitioner also had a shoulder problem. On September 12, 2016, he reviewed the evaluation results with Petitioner. The evaluation was valid. He found Petitioner to be at maximum medical improvement. He imposed permanent restrictions of no lifting over 20 pounds and no overhead lifting. He imposed these restrictions to prevent future injury. Petitioner has "adjacent segment risk," meaning that the disc above or below the fusion could become a problem, especially if he performed heavy work or work that required repetitive turning of the head and neck. In his September 12, 2016 note he indicated that Petitioner was not capable of returning to work at the DOT. The reference to "DOT" must be a typo. PX 27, p. 26. He saw Petitioner again on February 13, 2017, one year after the fusion. Petitioner was stable and "doing reasonably well." Petitioner told him he had increasing neck pain with physical activity but overall felt pleased with his results. Petitioner denied radiculopathy. Petitioner exhibited typical post-operative neck stiffness. He discharged Petitioner from care. He has not seen Petitioner since February 13, 2017. PX 27, p. 27.

Under cross-examination, Dr. Bernstein testified he is limiting his opinions to Petitioner's neck condition. PX 27, p. 28. On the initial intake form, Petitioner did not list a

referral source but he assumes that Petitioner's brother and sister-in-law referred him. He treated Petitioner's brother and sister-in-law in the past. PX 27, p. 29. He did not review any treatment records before Petitioner's initial visit. He knows he received some records because they are in his file but he is not sure whether he actually looked at them. He relied on Petitioner's history. On the intake form, Petitioner listed arthritis and "emotional upset" as pre-existing issues. If he were told that some of Petitioner's records showed his neck pain had improved a lot or had no neck complaints, that could affect his opinion if Petitioner's improvement was of long standing. Neck pain can wax and wane so he would be looking for relative consistency. PX 27, p. 32. He reviewed the MRI images, not just the report. PX 27, p. 32. Petitioner told him he felt better at rest and experienced neck pain when active. PX 27, p. 33. The only thing that changed between Petitioner's first and second visits was that Petitioner's complaints increased. On examination, Petitioner exhibited more neck stiffness at the second visit. He imposed a 15-pound restriction after the functional capacity evaluation to reduce the risk of reinjury and because Petitioner was still undergoing shoulder care. He had no opinion concerning Petitioner's shoulder functionality. He views the fusion as successful. PX 27, p. 34. If there were no risk of reinjury, he would probably not impose restrictions. PX 27, p. 35. Petitioner did not explain specifically what caused his symptoms to worsen between June and August. Although the discogram did not include a control level, he found Petitioner to be believable. In a perfect world, there would have been a control level but Petitioner had pain at levels that were abnormal on his scan. If the discogram had come back normal at C4-C5 and C5-C6, he would not have offered Petitioner any surgery whatsoever. PX 27, p. 37. If he had performed the discogram himself, he would have tried to make sure there was a control level but, in Petitioner's case, he believed he had "adequate confirmation with the discogram." PX 27, p. 37. Discography is "somewhat controversial" and there is a paper that suggests that, if you perform discography at a control level, you could damage that level for the long term. PX 27, pp. 37-38. He met with Petitioner's counsel prior to the deposition. They reviewed his records and that refreshed his memory as to the sequence of care and Petitioner's complaints. PX 27, p. 38.

On redirect, Dr. Bernstein testified that it is always his practice to rely on the histories his patients provide. Even if Petitioner returned to work after the October 7, 2014 accident, that would not affect his causation opinion. He imposes restrictions on all of his patients who undergo three-level cervical fusions but "it depends on the circumstances." Some of his patients have jobs that are not physically demanding in terms of head movement so he is not really required to impose restrictions. He just cautions those patients about the types of activity that could cause an injury. PX 27, pp. 38-39. He did not decide to perform a three-level fusion solely on the basis of the discogram. He based that decision on Petitioner's symptoms, radiographic findings and the consistency of the complaints, in addition to the discogram. PX 27, p. 40.

Dr. Graf testified by way of evidence deposition on June 30, 2017. RX 1. Dr. Graf testified he initially became board certified in orthopedic surgery in 2008. He was recertified in 2016. After his initial training, he did some general orthopedics but now does spine surgery

exclusively. RX 1, pp. 5-6. He is on staff at Alexian Brothers, St. Alexius and three hospitals owned by Centegra Health. He identified Graf Dep Exh 1 as his current CV. RX 1, pp. 6-7.

Dr. Graf testified he first examined Petitioner on February 25, 2015. ExamWorks arranged for this examination. He does not independently recall Petitioner and needs to rely on his notes to testify. RX 1, p. 8. He examined Petitioner three times and issued three reports. One of his assistants and an interpreter were present at the initial examination. Petitioner told him he worked for a steel distributor and was injured on October 7, 2014, while operating a forklift in reverse and twisting his upper back and neck to see around an oversized load. Petitioner indicated he felt neck pain while doing this and the pain increased over time. He also experienced some chest pain and shortness of breath. He was admitted to a hospital through an Emergency Room and later saw Dr. Norek. Petitioner denied any pre-accident neck conditions or treatment. He indicated he had experienced gout and a hernia repair in the past. He reported taking Allopurinol for gout as well as medication for hypertension and Naproxen, which is essentially Aleve. RX 1, p. 10. He described his complaints as right-sided. RX 1, p. 10.

Dr. Graf testified that he noted no abnormalities when he first examined Petitioner. Petitioner's cervical spine range of motion was full and Spurling's testing was negative. Petitioner exhibited no inconsistencies or non-organic pain signs. RX 1, p. 11. Spurling's is done to test for compression. RX 1, p. 12.

Dr. Graf testified he reviewed records in connection with his examination. Those records covered the period October 11, 2014 through January 15, 2015. He also reviewed cervical spine X-rays and MRIs of the cervical and thoracic spine. The X-rays showed multi-level disc osteophytes, or bone spurs, and degeneration from C4 to C7. The thoracic spine MRI showed some degenerative changes but no herniations. The cervical spine MRI showed a herniation at C5-C6 with an osteophyte complex in the right foramen. The herniation was on the left with bulging of C3-C4, C4-C5 and C6-C7. It was significant to him that the herniation was on the left because Petitioner's complaints were on the right side of his neck. The MRI "did not clinically correlate." RX 1, p. 14. In his opinion, the work accident resulted in cervical and thoracic strains. He based this opinion on the mechanism of injury, his examination and the imaging studies. RX 1, p. 14. He found Petitioner to be at maximum medical improvement as of this examination. RX 1, p. 15. The treatment to date was reasonable, appropriate and related to the accident. RX 1, p. 16. He felt that any additional care would not be related to the work accident. RX 1, p. 15. As for Petitioner's complaints of back and leg pain, the records did not reflect any back complaints for a number of months following the accident. RX 1, p. 15. He therefore concluded that the back and leg complaints were not related to the accident. RX 1, p. 16. Petitioner did not mention any low back pain at the February 25, 2015 examination. RX 1, p. 16. He (Dr. Graf) saw no reason why Petitioner could not resume full duty. RX 1, p. 16.

Dr. Graf testified he re-examined Petitioner on April 20, 2015. A Spanish-speaking interpreter was again available at that time. RX 1, p. 17. Petitioner indicated he had been working full-time and complained of some back pain. Petitioner also indicated he had fallen on stairs at work, slipping on the third step from the bottom and landing on his left knee. He

reported developing pain in his back and right leg as well as his left knee following this accident. He was off work due to his right leg pain. He did not mention any defects in the stairs or carrying anything. RX 1, p. 19. Dr. Graf testified that, on April 20, 2015, Petitioner exhibited an "extremely antalgic" gait and was using a cane. He refused to attempt to squat or stand on his toes or heels. He denied any neck complaints. He exhibited full 5/5 strength in his left leg and 5/5 strength in his right hip flexors. With respect to his right leg he was otherwise unable to break the strength of the doctor's single index finger. Seated straight leg raising in the distracted scenario was negative but he reported 8/10 pain on the right in the informed scenario. In the "informed scenario," Petitioner was told that the doctor would be stretching the nerve down his legs. RX 1, p. 21. He demonstrated "multiple inconsistencies." RX 1, pp. 20-21. Petitioner reported pain with simulated axial rotation and to light, one-finger touch. He also reported pain from the low back to the neck with forward flexion and low back pain with thoracic spine palpation. While Petitioner had motor strength loss, he regained it while walking in and out of the room. RX 1, p. 22.

Dr. Graf testified that Petitioner completed a pain questionnaire and scored a 91, meaning he rated himself as moderately disabled. The rating was inconsistent with the fact he was taking no pain medication. RX 1, p. 23.

Dr. Graf testified he reviewed additional records in connection with the re-examination. He also reviewed lumbar spine MRI images of April 8, 2015. The MRI showed degenerative changes with facet hypertrophy but no fractures or herniations. RX 1, p. 24. Dr. Graf again found no causal relationship between Petitioner's back symptoms and the October 7, 2014 accident. He again found Petitioner to be capable of full duty. RX 1, p. 25.

Dr. Graf testified he examined Petitioner a third and final time on November 10, 2016. He identified Dep Exh 4 as the report he generated in connection with this third examination. Petitioner reported having seen Dr. Bernstein and having undergone surgery on March 8, 2016. He rated his neck and left shoulder pain at 6/10 but felt that his pain had improved after the surgery. RX 1, pp. 26-27. Petitioner also told him he had been terminated and did not feel as if he could resume his former job. Petitioner indicated he was taking Metformin, a diabetes medication, and Losartan, a hypertension medication. Petitioner also mentioned he was taking "Hydroquin" but Dr. Graf was unfamiliar with this medication. RX 1, pp. 27-28. On re-examination, he noted a well-healed incision, negative Spurling's and 5/5 bilateral upper extremity strength. The findings were "essentially normal." RX 1, p. 28. Petitioner completed another disability questionnaire and scored a 93. This score was higher than the last one. RX 1, p. 28.

Dr. Graf testified he reviewed records from December 3, 2014 through August 15, 2016 in connection with his re-examination. Those records included Dr. Bernstein's operative report. He also reviewed various X-rays and MRIs, including the repeat cervical spine MRI images of September 25, 2015. That MRI showed multi-level degenerative changes but "no considerable nerve root compression." RX 1, p. 30.

Dr. Graf testified that a discogram is designed to try and determine whether an individual's pain is "discogenic or from the disc." A discogram can be invalid "because you can take really any disc and overpressurize it and it will cause pain." Standard protocol requires that there be "at least one control level, meaning one level where you inject and there's no pain." Technique is "important for sure." In his opinion, Petitioner's discogram was invalid by definition, for several reasons. Dr. Bernstein ordered a three-level discogram "but only two levels were actually done." Dr. Strimling, who performed the discogram, read both tested levels as positive but failed to record pressures or volumes. These days, it is "very rare to see that." RX 1, p. 32. He knows Dr. Strimling personally. He believes Dr. Strimling to be a "great radiologist and a good technician" but, unfortunately, the discogram was not valid by the accepted criteria. RX 1, p. 32.

Dr. Graf testified that, although Petitioner indicated he felt better after the surgery, his pain rating was 6/10 whereas he had reported "zero" cervical pain at the previous examination, on April 20, 2015. Regardless of causation, the surgery was a "pretty big step to take" for someone who had minimal complaints of pain and an invalid discogram. It makes no sense for Dr. Bernstein to have performed a three-level fusion because only two levels were tested and found positive at the time of the discogram. RX 1, pp. 33-34.

Dr. Graf testified it is still his opinion that the October 7, 2014 accident caused only a strain and that there is no relationship between the accident and Petitioner's current, post-operative condition. He also believes there is no relationship between the second claimed accident and Petitioner's current condition. RX 1, p. 35. When Dr. Stanley saw Petitioner, on May 8, 2015, he attributed Petitioner's persistent neck pain to chronic degenerative arthritis and not any work injury. RX 1, pp. 35-36. He agrees with Dr. Stanley on this point. It remains his opinion that Petitioner requires no work restrictions relative to either accident. RX 1, p. 36. It is also his opinion that, after February 25, 2015, the date of his first examination, none of Petitioner's lost time was related to either accident. RX 1, pp. 36-37.

Dr. Graf testified he finds Petitioner's entire situation confusing. When he examined Petitioner a second time, on April 20, 2015, Petitioner had no neck complaints and thus he did not examine Petitioner's neck. Petitioner then went on to have a three-level cervical fusion. RX 1, p. 37.

Under cross-examination, Dr. Graf testified he met with Respondent's counsel prior to his deposition and reviewed the opinions he expressed in his reports. RX 1, p. 38. He responded to Petitioner's counsel's subpoena by producing his reports and a disability questionnaire. He did not produce the medical records he reviewed because he did not generate those records. He gave Petitioner's counsel the option of producing his entire chart, at an additional cost. RX 1, p. 39. He is aware that he examined Petitioner for litigation purposes and not for treatment. RX 1, p. 40. It was ExamWorks that requested the initial examination. He addressed his first report to Kevin Bak, care of ExamWorks, but he does not know who Kevin Bak is. He is sure he has previously performed examinations on behalf of ESIS. He does not know how many. RX 1, p. 41. He received a cover letter but, as a physician, he

does not need to know an adjuster's opinions concerning a claim. RX 1, p. 42. The statements Petitioner made to him were "pretty consistent" with the histories in the medical records he reviewed. RX 1, p. 42. Petitioner denied any pre-existing conditions. He is not aware of Petitioner having undergone any cervical spine treatment before October 2014. RX 1, p. 43.

Dr. Graf testified that, when he first examined Petitioner, on February 25, 2015, he noted a full range of cervical spine motion and negative Spurling's bilaterally. Petitioner rated his pain at 5/10. RX 1, p. 43. Dr. Graf testified he summarized the pertinent records in his report. The records he reviews are a significant element of his examination. He reviewed physical therapy records from Accelerated Rehabilitation and an initial therapy note from CDH Occupational Health. He apparently did not review Dr. Florentino's notes since he did not mention them. He also apparently did not review any physical therapy notes from Cadence prior to the first examination. RX 1, p. 47. When Petitioner saw Dr. Baksinski at Cadence, she noted pain with cervical spine range of motion testing and, on December 1, 2014, pain in the right paraspinal musculature. RX 1, p. 49. Dr. Baksinski also noted pain with Spurling's on October 13, 2014, but "you can have neck pain with a Spurling maneuver which would be a negative result." Positive Spurling's means there is radiating arm pain with rotation of the head. Petitioner's complaint of radiating pain on November 14, 2014 appears to be new, although he had previously mentioned pain radiating to his shoulder. RX 1, p. 50. Petitioner's X-rays showed moderate, multi-level spondylitic changes at C4 through C7. Dr. Graf acknowledged he reviewed only a "partial" cervical spine MRI when he first examined Petitioner. The disc contained only "spot images." He reviewed all of the images at a later time. RX 1, p. 52. The MRI showed a left disc herniation at C5-C6. The herniation was on the left, not the right. RX 1, p. 53. In his opinion, the work accident caused cervical and thoracic strains. Dr. Baksinski also diagnosed strains, as well as degenerative disc disease. He agrees with these diagnoses. RX 1, p. 54. Anything is possible but, in his view, the accident did not aggravate Petitioner's degenerative disc disease. RX 1, p. 55. Petitioner told him that, on October 7, 2014, the load was "too high" for him to see over and he thus had to back the load up while twisting his upper back and neck. RX 1, p. 55.

Dr. Graf testified he found Petitioner to be at maximum medical improvement as of February 25, 2015. None of the treating physicians found this but he does not believe the question was posed to them. RX 1, p. 56. Dr. Norek prescribed additional therapy and a follow-up visit when she saw Petitioner on January 15, 2015. RX 1, p. 56.

Dr. Graf testified he does not believe he received a cover letter in connection with his second examination, on April 20, 2015. He reviewed additional records in connection with that examination. He did not find inconsistencies in those records. RX 1, p. 58. Petitioner told him he had fallen on stairs at work about a month earlier. Petitioner indicated he slipped from the third step down and was "trying not to fall when he began to have low back and right leg and left knee pain." RX 1, p. 58. He did not review any accident report on April 20, 2015. He finds such reports "marginally helpful." RX 1, p. 59. He deferred a cervical spine examination as Petitioner had no neck complaints. RX 1, p. 59. He rendered opinions relative to the low back,

not the neck or ankle. The records from Cadence and Dr. Florentino documented continuing neck complaints. RX 1, p. 61.

Dr. Graf testified he examined Petitioner a third time on November 10, 2016. He received a cover letter, which summarized the medical records and set forth fourteen questions. RX 1, p. 62. It was at this time that he received the report concerning the October 7, 2014 accident and Dr. Florentino's note of February 19, 2015. That note shows that Petitioner asked Dr. Florentino to release him to full duty despite ongoing neck symptoms. RX 1, p. 63. He also received records from Petitioner's April 2015 admission to Sherman Hospital. It would have been "somewhat" more helpful had he received those records before his April 20, 2015 examination of Petitioner. Petitioner was discharged from Sherman Hospital only four days before that examination. Petitioner underwent back care at the hospital. You would have to ask Petitioner if that was why he did not complain of neck pain on April 20, 2015. RX 1, p. 64. He cannot say whether Petitioner was injured when he stumbled on the stairs or when he attempted to avoid the table because "it's actually demonstrated that [Petitioner] had complaints of low back and leg pain prior to" the accident of April 2, 2015. RX 1, p. 66. He felt that Dr. Stanley's note was pertinent because Dr. Stanley attributed Petitioner's complaints to degenerative disc disease, not the work accident, based on the imaging and his evaluation. RX 1, p. 66. He does not know what records Dr. Stanley reviewed. RX 1, p. 66.

Dr. Graf reiterated his opinion that Petitioner does not require work restrictions relative to the October 7, 2014 accident. He acknowledged he did not review the functional capacity evaluation of September 8, 2016. Such evaluations can "possibly" be helpful in determining whether a patient needs restrictions. RX 1, p. 67.

When asked whether Dr. Bernstein performed unnecessary surgery on Petitioner, Dr. Graf responded that he would not have operated had Petitioner been his patient. RX 1, p. 67. It is "possible" that reasonable physicians would disagree on treatment modalities. RX 1, p. 68. In response to a question asking whether Dr. Bernstein breached his duty of care by operating, Dr. Graf responded by saying that it is Dr. Bernstein who should be asked this question. To him it did not make a lot of sense for Dr. Bernstein to perform a three-level fusion since the discogram was performed at only three levels. He reviewed Dr. Bernstein's operative report. In his opinion, the surgery did not provide Petitioner with improvement, based on Petitioner's post-operative pain rating, which was worse than the previous one. RX 1, p. 70.

Dr. Graf testified that medico-legal work, including Section 12 examinations, comprises 10 to 15 percent of his practice. RX 1, p. 70. Of the examinations he performs, about 85 percent are for respondents. RX 1, p. 71. He charged $950 for the first two reports he generated in Petitioner's case. He is charging $1500 for an hour and a half of deposition time. RX 1, p. 71. He operates once or twice per week, performing multiple surgeries on each operative day. RX 1, pp. 71-72. About 40% of the surgeries he performs involve the cervical spine. He is board certified in orthopedic surgery. He recertified last year and passed a specialty examination solely for spine surgery. RX 1, p. 72. He orders discograms in lumbar spine cases but only "very occasionally" orders discograms in cases involving the cervical spine.

RX 1, pp. 72-73. In cervical spine cases, a discogram is considered a "pretty dangerous procedure" because there is "a lot of stuff in the way." RX 1, p. 73.

On redirect, Dr. Graf testified it is pretty rare for him to receive a cover letter that contains suggestions as to how he should view a particular case. RX 1, pp. 73-74. If Petitioner had complained of his neck on April 20, 2015, he would have examined the neck and addressed it in his report. RX 1, p. 74. In his view, based Petitioner's pain ratings, Petitioner did not improve following the cervical fusion. RX 1, p. 76. Discograms in cervical spine cases are not common because "there's a lot of important stuff in the neck in a very small space." That "stuff" includes the carotid and vertebral arteries. RX 1, p. 76.

Under re-cross, Dr. Graf testified that the letter he received in connection with the April 20, 2015 re-examination indicated that Petitioner was claiming a back reinjury. He viewed the re-examination as relating to the lower back or simply as a re-evaluation. RX 1, pp. 77-78.

On November 28, 2017, Dr. Lami examined Petitioner in connection with his claim for long-term disability benefits. Dr. Lami noted a complaint of 6/10 pain in the base of the neck. On cervical spine examination, he noted slightly reduced flexion and extension but no neurological deficits. He saw no need for lifting restrictions but recommended that Petitioner avoid overhead activities on a routine basis. RX 5.

Susan Entenberg testified by way of evidence deposition on February 22, 2018. PX 31. Entenberg testified she is a certified rehabilitation counselor. PX 31, p. 4. She obtained certification in 1978 and is currently certified through 2022. PX 31, p. 5. She identified Entenberg Dep Exh 1 as her current CV. She works with individuals who have been injured at work and is also a consultant to the Social Security Administration. She testifies in disability hearings at the federal level. PX 31, p. 6. In the workers' compensation setting, she is typically hired by claimants' attorneys. PX 31, p. 7.

Entenberg testified she interviewed Petitioner on October 19, 2016. She reviewed the operative report, the functional capacity evaluation, records from Dr. Bernstein and a job description from Respondent in connection with the interview. PX 31, pp. 11-12, She issued a report on November 1, 2016. PX 31, p. 9. Entenberg Dep Exh 2.

Entenberg testified that Petitioner was 56 years old as of the October 19, 2016 interview. Petitioner was born in Mexico, where he attended school through the eighth grade. Petitioner took ESL classes after coming to the United States and took a correspondence locksmith course in 1995. She had "no problem" communicating with Petitioner in English. PX 31, p. 10. Petitioner indicated he could read English without difficulty but found spelling difficult. Petitioner took his driver's license examination in English. Petitioner became a U.S. citizen in 2008. He reported that he had received workers' compensation benefits for a while but was currently receiving long-term and Social Security disability benefits. PX 31, p. 11.

Entenberg testified that Petitioner denied undergoing any additional treatment following his September 12, 2016 visit to Dr. Bernstein. Petitioner also denied taking any medication, although he complained of intermittent pain in both shoulders when lifting his arms overhead. He also complained of occasional arm weakness, worse on the left. He indicated he could walk, drive for one to two hours and sleep without difficulty. He also reported being able to go to the store with his wife and carrying light bags. He described visiting his six-month-old grandson but denied lifting him. He also described performing light household tasks and occasionally mowing his daughter's lawn "in spurts." PX 31, p. 14. He had not begun a job search.

Entenberg described Petitioner's job at Respondent as a heavy physical demand level occupation, based on the job description she reviewed. In her opinion, Petitioner is not capable of resuming this job but has "enough residual functional capacity to do other light jobs" within his permanent restrictions. PX 31, p. 17. The "negatives," in terms of Petitioner's employability, are his age, his lack of education beyond the fourth grade and his very limited computer skills. Petitioner worked part-time as a locksmith in the past but, in her view, that work is beyond his restrictions as it involves overhead tasks and frequent reaching. PX 31, p. 17. Petitioner has a "long work history doing one type of job for a very long time" and would need the help of a rehabilitation counselor to submit employment applications. She also believes Petitioner would benefit from obtaining his GED. That would "definitely help increase" his marketability. PX 31, p. 19. Petitioner could find work as an electrical/electronic assembler, counter clerk or light delivery driver. PX 31, p. 19. Such positions pay about $10 per hour, on average. PX 31, p. 20.

Entenberg testified she had no further contact with Petitioner following the 2016 interview. In February 2018, she reviewed a log of the employment contacts Petitioner made on his own. PX 31, p. 20. Entenberg Dep Exh 3. On February 19, 2018, she issued a supplemental report. Entenberg Dep Exh 4. Based on the log she reviewed, Petitioner made 215 contacts between July 3, 2017 and February 14, 2018. Most of the jobs that Petitioner targeted were jobs he had previously performed, including maintenance technician and forklift operator. Many of the jobs required a GED. Petitioner was "putting in applications but was not being successful." PX 31, p. 21. She felt that the number of contacts, i.e., 215 over a seven-month period, was good but that Petitioner would have difficulty finding work without vocational assistance. PX 31, p. 22. If Petitioner obtained such assistance at the current time, it would be difficult for him to find work, since he is now 58 years old. Even if Petitioner obtained that assistance, as well as his GED, she believes it is more likely than not that he would not find alternative employment. PX 31, p. 23. It would probably take Petitioner about six months to obtain his GED, especially since the math requirements have changed. If Petitioner found employment, he would likely still be limited to about $10 per hour. PX 31, p. 23.

Under cross-examination, Entenberg testified she is a licensed professional counselor in Illinois. PX 31, p. 25. She performs about five to eight vocational rehabilitation evaluations per month. Petitioner's attorney retained her in this case. She charged a flat rate of $789 for "everything." PX 31, p. 26. She performed job analyses in the past and continues to perform

labor market surveys, about twice a month. She has an employee who does the job placement "leg work" for her. PX 31, p. 27. She charges $195 per hour for deposition time. She met with Petitioner for an hour or an hour and a half. PX 31, p. 29. She received correspondence from Petitioner's attorney indicating he wanted her opinion as to whether a stable labor market exists for Petitioner's services and what vocational rehabilitation plan, if any, would be appropriate. PX 31, p. 30. She did not review any of Dr. Graf's reports. PX 31, p. 30. Petitioner's functional capacity evaluation took place at ATI. She cannot say whether an athletic trainer conducted this evaluation. Such evaluations are not necessarily conducted by physical therapists. PX 31, p. 32. What matters to her is whether the person performing the evaluation was trained in the protocol. ATI is very reputable and uses the key functional assessment method. PX 31, p. 33. Petitioner had no problem conversing with her and is at a "pretty high level of English." PX 31, p. 34. Petitioner can read in English but reported having difficulty spelling. PX 31, p. 34. She would not place Petitioner in a heavily clerical position that required a lot of writing. PX 31, p. 35. In her opinion, Petitioner is precluded from working as a locksmith because that job involves overhead lifting, outside of his restrictions. PX 31, pp. 36-37. Most locksmiths now are working in security systems equipped with cameras and placing locks in different areas. PX 31, p. 37. Respondent classified Petitioner's job as very heavy. Petitioner had to move heavy drums, motors and machinery. PX 31, p. 38. She is currently putting in a lot of time testifying at Social Security disability hearings. She could testify every day if she wanted to. PX 31, p. 40. She receives a fee for a cancelled hearing unless the hearing is cancelled 24 hours in advance. PX 31, p. 41. She assumes that Petitioner completed the job log himself. It is not unusual for people looking for work to revert to what they know. Petitioner applied for some jobs outside his restrictions. PX 31, p. 43. She did not provide Petitioner with any job search assistance. PX 31, p. 44. She does not know how Petitioner found the jobs he applied for. PX 31, p. 44. She did not verify any of the prospective employers. PX 31, p. 44. It does not surprise her that Petitioner qualified for Social Security disability, given his age, lack of education and lack of transferable skills. Petitioner is "grid" under the federal system and would be found disabled at age 55 even at a light work level. PX 31, p. 45. The earliest job contact she saw in the log was made in July 2017. PX 31, p. 48.

On redirect, Entenberg testified that Petitioner was not able to pursue a GED in the 1980s because he was working and had a family. Petitioner worked as a locksmith very sporadically, averaging about $1500 per year. PX 31, p. 49. In her practice, she does not routinely review the Social Security determinations when deciding whether an individual is a candidate for vocational rehabilitation services. An individual receiving Social Security disability benefits can continue looking for work without jeopardizing those benefits. PX 31, p. 51.

Under re-cross, Entenberg testified that locksmith jobs are "very part time" and "just not out there anymore." Petitioner could probably change a lock on a door. PX 31, p. 51.

Petitioner testified he began looking for work on his own after he met with Susan Entenberg on October 19, 2016. Respondent did not offer him any assistance with job search efforts, interviewing skills or resume preparation. T. 97. He looked for work by logging onto a computer and checking openings for forklift operators. T. 97. He kept a record of the contacts

he made. T. 98. PX 32. He looked for work between May 16, 2017 and August 9, 2019. T. 99. He received no job offers during this time. He stopped looking for work as of August 2019 because he was not receiving any responses. T. 101. He lives off of his Social Security disability benefits. T. 101. Respondent did not pay him any weekly benefits during the period he looked for work. T. 102. He received non-occupational disability benefits between August 31, 2015 and February 21, 2018. His neck felt "much better" after Dr. Bernstein operated on him. He experiences increased symptoms with activities such as mowing his lawn. If he spends an hour mowing his lawn, he is "out" and has to take Aleve or Naprosyn. His symptoms vary, week to week. In some weeks, he takes Aleve or Naprosyn once or twice. In other weeks, he does not take any medication. He watches what he does and avoids carrying much when grocery shopping. T. 104. His low back, leg and ankle are "okay." T. 104.

In addition to the exhibits previously discussed, Petitioner offered into evidence a July 2013 six-page description of his job at Respondent (PX 30) and a collection of job search records running from May 16, 2017 through August 9, 2019 (PX 32). Petitioner also offered a letter dated February 13, 2021 from a subrogation analyst at Meridian indicating that Petitioner's group health plan paid $25,286.62 in medical benefits relative to Petitioner's work injury and expected reimbursement of that amount in the event of a favorable decision or settlement. PX 33. Petitioner further offered a February 26, 2021 letter from a subrogation specialist at Hartford indicating that Petitioner received short-term and long-term disability benefits from August 31, 2015 through February 21, 2018 in the amount of $35,516.91. PX 36.

Kathleen Mueller, a certified rehabilitation counselor, testified on behalf of Respondent. Mueller testified she has worked at her current firm for almost eleven years. T. 177. She primarily works in the workers' compensation arena, evaluating injured workers for employability. She has testified in twenty to twenty-five cases. T. 180. In terms of referrals, her caseload is fairly evenly balanced, in terms of claimant versus defense. She prepared a vocational assessment of Petitioner at the request of Respondent's counsel. T. 181. She identified RX 12 as her initial report. T. 182. She reviewed several independent medical examination reports along with a functional capacity evaluation before issuing this report. T. 183-184. She also reviewed the depositions of Drs. Graf and Bernstein, Susan Entenberg's report and deposition, two employment analysis reports from The Hartford and a description of the job Petitioner performed for Respondent. Petitioner was a maintenance worker whose job falls into the heavy physical demand level category. T. 185-186.

Mueller testified it was her understanding that Petitioner performed a self-directed job search. She reviewed the job logs Petitioner created between May 2017 and August 2019. The logs do not reflect how Petitioner completed his applications or which individuals he communicated with. T. 187-188.

Mueller testified she performed a transferable skills analysis, using a computer software program called OASYS. This program has "four different levels of matching" with the "best match" being direct or close and the worst being potential. She also utilized the Illinois Department of Employment Security wage information database.

Mueller testified that, if Petitioner were able to perform his old job, he would currently be earning $28.31 per hour. The median hourly wages for the positions she identified were $16 to $22 for the Chicago, Naperville and Arlington Heights area and $14.50 to $22 for the Elgin area. T. 191. Her company recommends that claimants make a minimum of twenty employer contacts per week. Petitioner's logs reflect he contacted between four and nine employers per week. T. 192. An online application typically takes between five minutes and one hour. Petitioner would have increased his chances of finding work had he increased his daily contacts. T. 192-193. She disagrees with Susan Entenberg's opinion that a diligent job search consists of one employer contact per day. In her own opinion, Petitioner did not put forth full effort in looking for work. His logs do not indicate whether he actually completed applications or with whom he spoke about prospective employment. T. 194. She tells her clients that their full-time job is to find full-time work. Petitioner sometimes indicated that a GED was required but she does not know how he obtained that information. T. 195-196. In her opinion, Petitioner's lack of a GED does not hinder his access to employment within his restrictions. She agrees with the opinions Susan Entenberg originally expressed, i.e., that Petitioner is employable in certain entry level jobs. T. 196. According to the Dictionary of Occupational Titles, eleven percent of all jobs are considered sedentary and 49 percent are considered light. Therefore, Petitioner had access to sixty percent of the jobs in the labor market. T. 197. A locksmith job is categorized as light. T. 197.

Under cross-examination, Mueller testified she was asked to address two different scenarios: one based on a full duty release and the other based on the results of the functional capacity evaluation. She has testified on behalf of Respondent or its law firm on about five occasions. Overall, members of her firm have testified in this capacity on ten to twenty occasions. T. 198. After the initial contact, there was a delay due to the need for clarification of some of the physical demands of the job. T. 199. She does not recall having a conversation as to whether Petitioner was employable. T. 200. She understood that her report would be used for litigation purposes. T. 201. Petitioner's trial was continued a couple of times. T. 201. She did not interview Petitioner. T. 203. When she interviews someone, she tends to glean additional information. Her opinions in this case could have been the same or different had she interviewed Petitioner. T. 204. She interviews claimants about seventy-five percent of the time. T. 204. She sometimes administers aptitude tests but in Petitioner's case there was enough information to go on. Petitioner had a "solid work history" and she performed a transferable skills analysis. T. 205. Based on the functional capacity evaluation alone, Petitioner would not have been able to resume his job at Respondent. T. 208. She did not list specific prospective jobs in her report. T. 208. Petitioner has experience in electrical, based on the DOT job title. Those skills would transfer into new positions. Both she and Susan Entenberg felt that Petitioner could perform assembly work. Petitioner has operated machines. T. 209. If Petitioner had had assistance with resume preparation, interviewing skills, etc., that could have helped him identify jobs. She is not aware of Petitioner having received such assistance. T. 212. She is also not aware of Petitioner having been denied such assistance. T. 212. Petitioner has a fourth grade education, which he obtained in Mexico. She has no understanding of Mexico's education system. T. 213. Petitioner worked without a GED for over

thirty years and Susan Entenberg testified that employment opportunities are available to him even though he lacks a GED. T. 214. Petitioner would probably increase his opportunities should he have a GED. T. 214-215. Some applications contain questions about whether an applicant has a GED. T. 215. Based on Petitioner's documentation, some of the employers he contacted required a GED. She did not see the actual postings for the underlying jobs. T. 216. The labor market now is different than it was before the pandemic. T. 216. In some industries, it is now easier to find work. Many available jobs are "shifting towards the service industry." Petitioner would certainly be capable of "host work" in this industry. He could perhaps be a delivery driver. The fact that Petitioner has been out of the work force for more than five years can make it more difficult for him to find work. T. 218.

On redirect, Mueller testified that Petitioner could perhaps work as a packer or machine operator. Amazon is a huge employer and "a lot of packaging is coming up." T. 220.

Under re-cross, Mueller testified that her niece earns $20 per hour as a packager at Amazon. She has worked at Amazon for six months. T. 221.

In addition to the exhibits previously discussed, Respondent offered into evidence an affidavit from Dr. Cannestra dated January 21, 2020 indicating that he treated Petitioner for a right ankle sprain in 2015 and discharged him from care on June 26, 2015. Dr. Cannestra attested that, as of the date of discharge, Petitioner was at maximum medical improvement with respect to his right ankle and performing full duty. RX 13. Respondent also offered into evidence a one-page report from Dr. Bernstein dated December 12, 2019 indicating he had not seen Petitioner since February 13, 2017, at which point Petitioner was doing "reasonably well" following the three level cervical fusion performed on March 8, 2016. Dr. Bernstein indicated he imposed permanent restrictions of no overhead lifting and no lifting over 15 pounds. He also indicated Petitioner, like all patients with multi-level fusions, was at risk for adjacent segment degeneration that might require additional surgery. He further indicated he did not treat Petitioner's thoracic spine and felt that any thoracic spine condition had resolved. RX 14.

Arbitrator's Credibility Assessment

Petitioner worked for Respondent for over thirty years, a factor that weighs in his favor, credibility-wise. Petitioner's accident-related testimony was detailed and believable, as was his testimony that his neck complaints persisted after he resumed full duty in 2015, after Respondent's examiner, Dr. Graf, found him to be at maximum medical improvement.

Where the Arbitrator had some problems with Petitioner was with respect to his testimony concerning his activities as a locksmith. That testimony was inconsistent. At one point, Petitioner denied working as a locksmith but, at another, he indicated he never earned much money performing such work. Susan Entenberg testified that Petitioner told her he was self-employed as a locksmith for seventeen years but only averaged about $1500 from this work on an annual basis.

Dr. Bernstein, who operated on Petitioner's neck, testified that Petitioner was "sincere about his condition." He did not view Petitioner as exaggerating or malingering. PX 27, p. 19.

Dr. Graf noted no non-organic pain signs when he first examined Petitioner, on February 25, 2015, but noted inconsistencies at the two subsequent examinations.

Overall, the Arbitrator found Dr. Bernstein's causation opinion more persuasive than Dr. Graf's. Dr. Graf conceded that the cervical spine MRI showed a disc herniation but he viewed that finding as insignificant because the herniation was on the left while Petitioner's symptoms were primarily right-sided. Dr. Stanley, a physician of Petitioner's selection, agreed with this, but he saw Petitioner months before the concordant discogram, which he never reviewed. Unlike Drs. Graf and Stanley, Dr. Bernstein actually operated on Petitioner's cervical spine and testified he found central disc herniations at all three operated levels, C4 to C7. PX 27, p. 21. Dr. Graf placed reliance on Petitioner's purported denial of neck pain at the April 20, 2015 re-examination but near contemporaneous records reflect that Petitioner still had such pain. Dr. Graf failed to place Petitioner's presentation on April 20, 2015 in context. He did not seem to appreciate that Petitioner had recently been discharged from a hospital where the treatment was focused on the back, knee and ankle.

The Arbitrator also found Dr. Bernstein more persuasive than Dr. Graf on the issue of the necessity and propriety of the three-level fusion. Dr. Graf asserted that the fusion was inappropriate because Dr. Bernstein relied on an incomplete discogram in performing it. Dr. Bernstein agreed that the discogram was sub-optimal, in that it did not include a control level, but he found it consistent with Petitioner's symptoms. He also maintained that the physician who performed the discogram acted appropriately in not probing further due to the vital adjacent structures in the neck. He did not recommend that the discogram be repeated for this reason. At his deposition, Dr. Graf ultimately agreed, indicating that a cervical discogram can be risky for a patient due to the proximity of vital structures, including the carotid artery. He also characterized Dr. Strimling (the physician who he believed performed the discogram) as a good technician. While it would certainly have been ideal for Dr. Bernstein to have had a complete discogram prior to operating, there was a valid argument against repeating the procedure and the surgery was ultimately a success. Petitioner is not symptom-free but is well enough to perform various household activities.

Arbitrator's Conclusions of Law Relative to Both Cases

Did Petitioner sustain accidents on October 7, 2014 and April 2, 2015 arising out of and in the course of his employment?

In 15 WC 2631, the Arbitrator finds that Petitioner sustained a compensable work accident on October 7, 2014. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony concerning the symptoms he developed after intermittently operating a forklift in reverse for an hour or more on October 7, 2014. No one contradicted Petitioner's account of having to twist his upper body to the right and look behind himself while driving in

reverse due to the unusual load that blocked his view. The accident report (PX 1), Form 45 and histories in Petitioner's initial medical records (especially the Emergency Room records of October 11, 2014, which Respondent offered into evidence, RX 18) are consistent with this account. The fact that Petitioner did not sustain a distinct trauma at a specific time does not defeat his claim. The Arbitrator views his injury as cumulative in nature and occurring over the hour or so that Petitioner intermittently operated a forklift in reverse "with his right arm stretched out behind him and his trunk twisted to the right so he could look backwards." RX 18. The demands of Petitioner's employment, combined with the circumstance of an unusually high load, caused Petitioner to have to assume awkward positioning to operate the forklift safely.

In 15 WC 27124, the Arbitrator finds that the accident of April 2, 2015 occurred "in the course of" Petitioner's employment but that Petitioner failed to establish the accident "arose out of" his employment. The term "in the course of" relates to the time, place and circumstances of the accident. Petitioner credibly testified the accident occurred at the workplace during his regular shift, while he was descending stairs to an area where he intended to perform repairs. No one contradicted this testimony. As for the "arising out of" component, however, Petitioner failed to establish that his fall was connected in some way to his employment. He readily admitted that he was not carrying anything and that there was nothing unusual about the stairs. He merely "stumbled" when he reached the third step from the bottom. As Dr. Baksinski noted after the accident, Petitioner did not know what had caused him to fall. There was a large steel table close to the stairs but there is no evidence suggesting the table blocked the stairs or otherwise caused Petitioner to fall. Nor is there evidence that Petitioner came into contact with the stairs. His records reflect he landed on his left knee on the floor.

The Arbitrator, having found that Petitioner failed to prove a compensable work accident of April 2, 2015, awards no benefits in 15 WC 27124.

<u>Did Petitioner establish a causal connection between the accident of October 7, 2014 and his current condition of ill-being?</u>

In 15 WC 2631, the Arbitrator has found that Petitioner sustained a compensable work accident on October 7, 2014. Petitioner maintains that this accident aggravated an underlying degenerative condition and contributed to the need for the three-level cervical fusion that Dr. Bernstein performed in March 2016. Respondent, in reliance on Dr. Graf, its examiner, contends that the accident caused only cervical and thoracic strains that resolved as of February 25, 2015.

The Arbitrator initially finds that the accident of October 7, 2014 aggravated an underlying degenerative cervical spine condition of ill-being and contributed to the need for the surgery that Dr. Bernstein performed. In so finding, the Arbitrator relies in part on Petitioner's credible denial of pre-accident neck problems or treatment and the fact that Petitioner was able to perform his physically demanding job for Respondent for many years before the

accident. T. 28-29. The Arbitrator also relies on Petitioner's credible testimony that his neck symptoms persisted after Dr. Graf found him to be at maximum medical improvement on February 25, 2015. The Arbitrator further relies on Dr. Norek, a referral from a medical facility selected by Respondent. When Dr. Norek saw Petitioner in mid-January 2015, only five or six weeks before Dr. Graf's examination, she diagnosed cervical radiculitis and recommended work restrictions and additional treatment. The Arbitrator also notes that, on February 16 and 19, 2015, nine and six days before Dr. Graf's examination, Petitioner's primary care physician noted neck pain and radicular complaints and recommended that Petitioner see Dr. Cascino, a neurosurgeon. Petitioner testified he was willing to see Dr. Cascino but never had the opportunity to do so. The Arbitrator recognizes that Respondent's examiner, Dr. Graf, described Petitioner as voicing no neck complaints at the April 20, 2015 re-examination. However, under cross-examination, Dr. Graf conceded that the letter he received concerning the need for the re-examination referenced an injury to the back, not the neck. Moreover, the re-examination took place only a few days after Petitioner was discharged from a hospital where he underwent care for "intractable back pain" as well as ankle and knee complaints. The Arbitrator concludes that, as of April 20, 2015, Petitioner was focused on his back, leg and ankle as opposed to his neck and Dr. Graf understood that his purpose in seeing Petitioner was to evaluate his claim of a back injury.

The Arbitrator also relies on controlling case law in finding causation in this case. Petitioner had a degenerative neck condition before the accident of October 7, 2014 but that condition did not prevent him from performing his job. The fact that Petitioner was not in pristine health does not defeat his claim. In Schroeder v. IWCC, 2017 IL App (4th) 160192WC, the First District emphasized that the "chain of events" principle applies to workers such as Petitioner: "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." The Court also cited Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003) for the propositions that "an employer takes its employees as it finds them" and that a work accident need only be a cause of a condition of ill-being for an injured worker to recover under the Act. That Petitioner's return to full duty in February 2015, along with his claimed fall of April 2, 2015, might have also contributed to the deterioration of his neck condition is not material.

The Arbitrator also finds that the accident of October 7, 2014 caused a thoracic spine strain that ultimately resolved. The Arbitrator further finds that Petitioner failed to establish a causal connection between the October 7, 2014 accident and the lumbar spine and radicular complaints that Dr. Baksinski documented on December 29, 2014. Aside from an initial mention of some back discomfort, the note of December 29, 2014 is the first documentation of lumbar spine complaints.

Is Petitioner entitled to reasonable and necessary medical expenses?

In 15 WC 2631, the Arbitrator has found that Petitioner established a compensable work accident of October 7, 2014 and causation as to his current post-operative cervical spine condition of ill-being. In this case, Petitioner claims the following unpaid medical expenses: 1)

Spine Center (Dr. Bernstein), $110,175.00 (PX 21); Lutheran General Hospital, $1,276.98 and 3) Integrated Imaging, $1,666.00 (discogram, 12/4/15, PX 37). Respondent disputes this claim based on its accident and causation defenses.

The Arbitrator has previously found that Petitioner established a compensable accident and causation as to the need for the three-level fusion Dr. Bernstein performed in 2016.

Before considering the claimed bills, the Arbitrator addresses the threshold issue of whether Petitioner exceeded the choices of physicians afforded by Section 8(a) of the Act. The Arbitrator finds that Petitioner did not exceed those choices in 15 WC 2631. After the accident of October 7, 2014, Petitioner initially underwent care at CDH on October 11, 2014. Petitioner testified his supervisor sent him to this facility. T. 37. The doctor at this facility arranged for Petitioner to be transferred to Advocate Sherman Hospital's Emergency Room for evaluation of chest pain. Petitioner later saw Dr. Baksinski at Cadence, an occupational medicine facility. Dr. Baksinski subsequently referred Petitioner to Dr. Norek. After seeing Dr. Norek, Petitioner saw his own primary care physician, Dr. Florentino. Dr. Florentino referred Petitioner to Dr. Cascino but there is no evidence suggesting Petitioner ever saw this physician. Following the claimed accident of April 2, 2015, Petitioner saw Drs. Cannestra and Stanley. He saw Dr. Cannestra for treatment of various body parts, including his neck, and Dr. Stanley for his neck. The records of both physicians document referrals from Dr. Florentino. Petitioner later began a course of care with Dr. Bernstein. He testified a relative referred him to this physician. Dr. Bernstein endorsed this testimony. The Arbitrator concludes that Dr. Florentino was the first physician of Petitioner's choice and that Drs. Cannestra and Stanley were referrals emanating from that choice. The Arbitrator views Dr. Bernstein as Petitioner's second choice.

The Arbitrator finds that it was reasonable for Dr. Bernstein to order a multi-level discogram and then recommend and perform a three-level fusion. Petitioner's neck pain worsened after the initial office visit in May 2015, without evidence of any intervening injury. Dr. Bernstein testified it is not unusual for neck symptoms to wax and wane. The discogram was not "perfect" in the sense that the physician who performed the procedure was unable to access one of the three designated levels, due to safety concerns, but he documented concordant pain at two of those levels. Petitioner improved significantly following the fusion, a result that speaks for itself.

The Arbitrator awards the claimed medical expenses, subject to the fee schedule, and with Respondent receiving Section 8(j) credit for the $25,286.62 in medical expenses paid by its group carrier. Arb Exh 1. PX 33.

Is Petitioner entitled to temporary total disability and maintenance benefits?

In 15 WC 2631, Petitioner claims temporary total disability benefits from August 20, 2015 (the date Dr. Bernstein first took Petitioner off work, PX 22) through September 12, 2016 (the day Dr. Bernstein imposed permanent restrictions) and maintenance benefits from September 13, 2016 through August 9, 2019 (the last day of Petitioner's self-directed job

search). Respondent disputes this claim, based on its accident and causation defenses. The parties agree that Respondent paid no weekly benefits under the Act and is entitled to Section 8(j) credit for its payment of $35,529.75 in non-occupational disability benefits. Arb Exh 1. [The payments actually totaled $35,516.91 (PX 36) but the parties stipulated to a figure of $35,529.75.]

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. The Arbitrator awards Petitioner temporary total disability benefits from August 20, 2015 through September 12, 2016, a period of 55 5/7 weeks. In making this award, the Arbitrator relies on Dr. Bernstein's records and "off work" notes. The Arbitrator views Petitioner's causally related cervical spine condition of ill-being as stabilizing as of September 12, 2016, the date Dr. Bernstein imposed permanent restrictions. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator also awards Petitioner maintenance benefits from September 13, 2016 through August 9, 2019, a period of 151 4/7 weeks. As to the latter, the Arbitrator relies on the job description, the valid functional capacity evaluation and the permanent restrictions in concluding that Petitioner was physically unable to resume his former job at Respondent following the three-level cervical fusion. That job falls into either the heavy or very heavy physical demand category while the restrictions result in a light physical demand level categorization. There is no evidence suggesting that Respondent ever offered Petitioner work within his restrictions. The Arbitrator recognizes that Petitioner's self-directed job search was imperfect, from the perspective of Respondent's vocational expert, in the sense that he did not write down the names of the people he contacted and made far fewer than twenty contacts per week. However, Respondent could have remedied these deficiencies had it conducted vocational assessments, in accordance with the applicable rules [see 9110.10(a)] and case law [see Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 203 (2009)], and offered Petitioner vocational services. The Arbitrator views Petitioner as making a good faith effort, over an extended period of time, to find alternative employment despite the fact Respondent was not paying weekly benefits under the Act.

What is the nature and extent of Petitioner's disability?

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 disability. That section sets forth five factors to be considered in determining permanency. The Arbitrator assigns no weight to the first factor, any AMA Guides impairment rating, since neither party offered such a rating into evidence. The Arbitrator assigns significant weight to the second and third factors, Petitioner's age at the time of the accident and occupation. Petitioner was a 54-year-old maintenance worker as of the October 7, 2014 accident. The Arbitrator views him as an older individual who, from a statistical perspective, would likely have remained in the workforce for another eleven years had the accident not taken place. The Arbitrator also assigns weight to the fourth factor, future earning capacity. The permanent restrictions that Dr. Bernstein imposed prevented Petitioner from resuming his longtime job with Respondent. [Dr. Lami, who examined Petitioner in connection with his long-term disability claim, saw no need for lifting restrictions but conceded that Petitioner should avoid overhead activities. The

description of Petitioner's maintenance job reflects he was required to reach overhead shelves and extend his neck to perform overhead repairs and check overhead cranes. RX 30, pp. 3-4 of 6.] The alternative jobs that Entenberg and Mueller identified involved lower wages than the wages Petitioner earned at Respondent. The Arbitrator also assigns weight to the fifth and final factor, evidence of disability documented in the treatment records. When Dr. Bernstein gave his evidence deposition, he described Petitioner as doing "reasonably well" following the three-level fusion but indicated that Petitioner was at risk for adjacent segment problems that could require more surgery.

Petitioner seeks an award of permanent total disability benefits under an "odd lot" theory. While some of the evidence, particularly Petitioner's age and lack of formal education, weighs in favor of such an award, other evidence does not. Petitioner did not come to the United States until he was a teenager but, to his credit, he studied English on arrival and clearly learned quite a bit. He testified in English and exhibited a fairly broad vocabulary. Susan Entenberg described him as speaking English very well and being able to read without any problem. She also noted that he was self-employed as a part-time locksmith for seventeen years, until 2012, and earned $1500 per year from this. To the Arbitrator, this implies a certain level of successful customer communication and service. The valid functional capacity evaluation of September 8, 2016 put Petitioner at a light physical demand level. Both Entenberg and Mueller were able to identify certain light duty jobs that Petitioner qualifies for. Petitioner's self-directed job search was unsuccessful but it appears he targeted a number of jobs that were beyond his restrictions.

The Arbitrator, having considered the foregoing, finds (in 15 WC 2631) that Petitioner established permanent partial disability equivalent to 40% loss of use of the person as a whole, representing 200 weeks of benefits, under Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC027124
Case Name	Jose Quintino v. Earle M Jorgensen Steel Co
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0299
Number of Pages of Decision	6
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Michael Wojtas
Respondent Attorney	Tina DiBenedetto

DATE FILED: 8/11/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Quintino,

Petitioner,

vs. No. 15 WC 027124

Earle M. Jorgensen Steel 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 the issues of accident, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, as stated below.

Petitioner testified that while working on April 2, 2015, he was assigned to repair some equipment in a room located down a flight of stairs. As he was walking down, he stumbled and quickly moved his body to the left to avoid hitting a table at the bottom of the stairs. He was not carrying anything, and landed on the floor on his left knee. Petitioner acknowledged he did not know what caused him to stumble, and that there was nothing on, or unusual about, the stairs. Petitioner injured his legs, back, and neck in the fall.

On April 6, 2015, Petitioner sought treatment at Cadence Occupational Clinic. There, he complained of a headache and pain to his neck, back, right hip, and right leg. Dr. Baksinski diagnosing him with sprains of his right ankle and spine, neuralgia, and radiculitis. Physical therapy was ordered. An MRI taken April 8, 2015 revealed no acute fracture, dislocation, disc protrusion or central canal stenosis in Petitioner's lumbosacral spine.

On April 13, 2015, Petitioner was admitted to Sherman Hospital with complaints of intractable back and leg pain. During his admission, he was treated with narcotic pain medication and fitted with a brace for his right ankle. His April 16, 2015 discharge diagnoses included a right ankle sprain, pseudogout, lower back pain, and new onset diabetes.

Petitioner saw Dr. Cannestra on April 24, 2015 for lower extremity pain, though Petitioner admitted then that his back pain had completely resolved. Dr. Cannestra ordered further physical therapy for Petitioner's right ankle and kept him off work.

On May 8, 2015, Petitioner saw Dr. Stanley for neck pain. Dr. Stanley believed Petitioner's recent cervical MRI findings were more consistent with a chronic degenerative condition, and he informed Petitioner that his persistent neck pain was the result of his chronic degenerative arthritis, and not secondary to his work injury. Dr. Stanley agreed that Petitioner could work full duty without restrictions.

Petitioner received a cortisone injection to his left knee on May 22, 2015. He was released to work and returned to his regular job without restrictions on June 8, 2015. At Petitioner's June 26, 2015 visit, Dr. Cannestra discharged him from further treatment after finding his left knee was 95% improved, his right ankle was 90% improved, and that overall, Petitioner had done extremely well with minimal pain and no functional limitations. At arbitration, Petitioner testified that his lower back, right leg and ankle were doing okay, and he admitted that all of his right ankle issues were related to his gout.

The Arbitrator denied Petitioner proved an accident on April 2, 2015, finding that although it occurred in the course of his employment, it did not arise out of his employment. The Arbitrator found Petitioner failed to establish that his fall was in some way connected to his employment because he admitted he had not been carrying anything, and merely stumbled when he was 3 steps from the bottom of the stairs. There was no evidence that anything was on the stairs, or that the table blocked the stairs or otherwise caused Petitioner to fall. The Arbitrator also found it significant that Petitioner told Dr. Baksinski he did not know what had caused him to fall.

The Commission agrees with the Arbitrator that Petitioner's fall occurred in the course of his employment. No evidence contradicts that. However, contrary to the Arbitrator, the Commission finds Petitioner's accident did also arise out of his employment.

In *McAllister v. Ill. Workers' Comp. Comm'n,* 2020 IL 124848, 2020 Ill. LEXIS 561, 450 Ill. Dec. 309 (2020), the Supreme Court held that the "arising out of" component of a claim is primarily concerned with causation, and to satisfy that requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. The Court held that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing acts which the employee: (1) was instructed to perform by the employer, (2) had a

common-law or statutory duty to perform, or (3) might reasonably be expected to perform incident to his or her assigned duties. In *McAllister,* the Court found that claimant's knee injury arose out of an employment-related risk, because the acts which caused his injuries – kneeling down to look for a pan of carrots and then standing up – were acts his employee might reasonably expect him to perform in his assigned duties as a sous-chef.

The Commission finds similarities between the present case and *McAllister.* Petitioner testified his job duties included repairing equipment, a task performed in a downstairs room where a large, 5' x 10' steel repair table was located. He testified he would usually go down these stairs five or six times each shift, and that there was no other way to access this repair area. No evidence was offered to rebut Petitioner's testimony that going down the stairs to perform repairs was one of his job duties.

The Commission finds that Petitioner's act of descending stairs to an employer designated downstairs room where the steel repair table was located in order to repair a piece of equipment was an act which his employer might reasonably expect him to perform incident to his assigned duties. As such, it was a risk distinctly associated with his employment.

The *McAllister* court also reaffirmed that common bodily movements and everyday activities can be compensable and employment-related when their origin was in a risk connected with, or incidental to, employment. The Court, citing *Caterpillar Tractor*,[1] held that once a claimant has presented proof that he was involved in an employment-related accident, he is not required to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public. The Commission finds it unnecessary under the facts of the instant matter to conduct a neutral risk analysis in order to conclude that Petitioner proved his accident arose out of his employment.[2]

Having found Petitioner proved accident, the Commission also finds a causal relationship between Petitioner's April 2, 2015 accident and his injuries to his right ankle, left knee and back. In so finding, the Commission relies upon Petitioner's credible testimony, as well as his treating records between April 2, 2015 and June 26, 2015. Dr. Baksinski diagnosed Petitioner on April 6, 2015 with sprains of his right ankle and spine, neuralgia, and radiculitis. Petitioner's hospitalization at Sherman Hospital, a week later, was for intractable back and leg pain. Although at that hospitalization it was discovered that some of Petitioner's pain was caused by unrelated pseudogout, his admission and much of his treatment there were necessitated at least in part by his injuries from his April 2, 2015 accident.

Dr. Stanley found Petitioner able to work full duty without restrictions on May 8, 2015, and that Petitioner's neck pain was caused by his chronic degenerative arthritis, not his work

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[1] *Caterpillar Tractor Co. v Industrial Comm'n,* 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989).

[2] However, even under a neutral risk analysis, the Commission would find Petitioner's act of descending stairs five to six times per shift, presented a risk quantitatively greater than faced by the general public. See *Village of Villa Park v. Ill. Workers' Comp. Comm'n,* 2013 IL App. (2nd) 130038WC.

injury.[3] Dr. Cannestra released Petitioner from care on June 26, 2015, finding that his right ankle and left knee had no functional limitations and only little pain. The Commission finds Petitioner proved the treatment he received between April 2, 2015 and June 26, 2015, at ATI Physical Therapy, Sherman Hospital and Midwest Bone and Joint, was causally related to his work accident.

With regard to temporary total disability, the evidence shows Petitioner stopped working on April 13, 2015, when he was admitted to Sherman Hospital with intractable pain. Upon his discharge, Petitioner continued receiving treatment for his right ankle and left knee from Dr. Cannestra, who kept him off work. Petitioner testified he did return to his regular job on June 8, 2015. The Commission finds Petitioner proved he was temporarily totally disabled as a result of his accident for 8 weeks, from April 13, 2015 through June 7, 2015.

Finally, in determining the level of Petitioner's permanent disability, the Commission consider the five factors enumerated in §8.1b(b) of the Act, and assigns the following weights to them:

(i) **Disability impairment rating:** *no weight,* because no AMA Impairment Rating was offered into evidence;

(ii) **Employee's occupation:** *some weight,* because Petitioner was able to resume his usual job as a maintenance worker on June 8, 2015;

(iii) **Employee's age:** *moderate weight,* because at 54 years of age on his date of accident, Petitioner would have likely remained in the workforce for another eleven years, had his accident not taken place;

(iv) **Future earning capacity:** *little weight,* because Petitioner returned to his usual job approximately two months following his work accident, and presented no evidence that this accident caused any reduction in his future earning capacity, and

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because as a result of his work accident, Petitioner sustained a sprain to his right ankle; an aggravation of his prior cervical spine condition; and other generalized pain in his lower extremities, left knee and low back. On April 15, 2015, Dr. Barclay reported he did not believe Petitioner's MRI findings explained his right leg symptoms. On April 16, 2015, Dr. Everhart found that Petitioner's right ankle, in addition to being sprained, showed evidence of pseudogout. On April 24, 2015, Dr. Cannestra reported Petitioner had probable gout of the left knee and right ankle. Petitioner admitted that all of his right ankle issues were related to his gout. He also told Dr. Cannestra on that date that his back pain had completely resolved.

[3] Although after this date Petitioner continued to received treatment for his cervical spine, including a cervical fusion after this date, those injuries and treatment were addressed by the Commission in Petitioner's companion claim, 15 WC 002631.

Taking all of the above into consideration, the Commission finds Petitioner established permanent partial disability equivalent to 2% loss of use of person as a whole, representing 10 weeks of benefits, under §8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2022, is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $720.67 per week for 8 weeks, for the period of April 13, 2015 through June 7, 2015, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred at Midwest Bone and Joint, Sherman Hospital and ATI Physical Therapy, for his treatment received between April 2, 2015 and June 26, 2015, as provided by §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $648.60 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that Petitioner's injuries from his April 2, 2015 accident caused the 2% disability to the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $38,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 11, 2022

MP/mcp
o-07/21/22
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015648
Case Name	INSURANCE COMPLIANCE v. B DUNN CONSTRUCTION
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0300
Number of Pages of Decision	7
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Joseph L. Moore
Respondent Attorney	

DATE FILED: 8/12/2022

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS	)	BEFORE THE ILLINOIS WORKERS'
	) SS	COMPENSATION COMMISSION
COUNTY OF PEORIA	)	

STATE OF ILLINOIS DEPARTMENT OF INSURANCE, WORKERS' COMPENSATION INSURANCE COMPLIANCE DIVISION,

Petitioner,

vs.

20 WC 015648
18 INC 00248

BRIAN DUNN, Individually and as President of B. DUNN CONSTRUCTION COMPANY,

DECISION AND OPINION RE: INSURANCE COMPLIANCE

Petitioner, Illinois Workers' Compensation Commission, Insurance Compliance Division (the Commission) brings this action, by and through the Office of the Attorney General, against the above-captioned Respondent, alleging violations of Section 4 of the Illinois Workers' Compensation Act (the Act) and Section 9100.90 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission for failure to procure mandatory workers' compensation insurance. Proper and timely notice was given to all parties.

An Insurance Compliance Hearing on the Merits was conducted before Commissioner Stephen J. Mathis on May 9, 2022, in Peoria, Illinois. Respondent was not present at the hearing despite being personally served with notice of said hearing on March 16, 2022 (Px 2).

Petitioner has requested penalties for a period of 357 days of non-compliance with the Act commencing: February 10, 2018, to October 8, 2018; January 5, 2019, to February 7, 2019; and October 9, 2019, through December 29, 2019. The Commission, after considering the record in its entirety and being advised in the applicable law, finds that Respondent, Brian Dunn, individually, and doing business as B. DUNN CONSTRUCTION COMPANY, knowingly and willfully violated Section 4(a) of the Act and Section 9100.90 of the Rules during the aforementioned time periods.

As a result, Respondent shall be held liable for his non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the Act and Section 9100.90 (b) of the Rules. The Commission hereby assesses total penalties in the amount of $190,216.74, against the above-named Respondent for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1) On October 7, 2016, Articles of Incorporation were filed on behalf of B. Dunn Construction Company. Respondent Brian Dunn was listed president of the corporation, and as the Registered Agent for the business. (PX5).

2) The Articles of Incorporation state the business of B. Dunn Construction Company is "To supply labor to install sheeting on buildings and related construction."

3) At all times relevant statute 820 ILCS305/3 was in effect and states:

Sec.3. The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure.
2. Construction, excavating or electrical work.
3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor vehicle where the employer employs more than 2 employees in the enterprise or business.

[Section 4,5,6, and 7 omitted for relevance].

8. Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery.
9. Any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection or safeguarding of the

employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous.
[Section 10, 11, 12, 13 and 14 omitted for relevance].
15. Any business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof.

4) At all times relevant statute ILCS 305/4 was also in effect.

5) Respondent Brian Dunn was not present at the May 9, 2022, hearing although he was personally served with notice on March 16, 2022. (PX2).

6) Megan Drew, an Investigator for Insurance Compliance for the Illinois Workers' Compensation Commission testified at the hearing that she became aware of Mr. Dunn and his business' non-compliance when a tip was received from the Ironworkers Union. (T8-9)

7) Investigator Drew testified that Respondent Brain Dunn individually, and doing business as B. Dunn Construction Company, required workers' compensation insurance for two reasons; 1) the nature of the business i.e. construction which is categorized as ultra-hazardous under the Act, and 2) tax filings reflect that Respondent had 2 or more employees.
(T 13-14, PX5, PX6, PX7).

8) Ms. Drew testified that she began investigating Respondent in November 2018 when she took over the case from her predecessor, Eric Cooper. At the time she took over the investigation Respondent did not have workers' compensation insurance. The purpose of her investigation was to determine if Respondent Brian Dunn, individually and doing business as B. Dunn Construction Company was in compliance with the Act.

9) Documents received into evidence from the Illinois Department of Employment Security reflect that Respondent reported having employees from the time of his incorporation on October 6, 2016, through July 2019. (PX6,7 T 10.).

10) Investigator Drew requested information from the National Council on Compensation Insurance (NCCI), The Illinois Secretary of State, the Department of Employment Services, and the Self-Insurance unit of the Commission.

11) On July 23, 2020, Nancy Hale, Proof of Coverage Analyst for NCCI Holdings, Inc., conducted a thorough search of the NCCI database. The search revealed that Respondent, Brian Dunn, individually and doing business as B. Dunn Construction Company had no proof of workers' compensation insurance from February 10, 2018 to October 8, 2018; January 5, 2019 to February 7, 2019; and October 9, 2019, through December 29, 2019 (PX3).

12) On July 13, 2020, Maria Sarli-Dehlin, from the Office of Self-Insurance, certified that no certificate of approval to self-insure was issued by the Commission to B. Dunn Construction Company in Fairbury, Illinois. (PX4).

13) As part of her investigation Investigator Drew testified that she had telephone contact with Mr. Dunn. On December 3, 2020, she hand delivered a notice of hearing to Respondent and he contacted her by telephone on the following day. Some settlement discussions followed thereafter that were not successful. Respondent then began ignoring efforts at further contact. (T14-15. PX2).

14) Ms. Drew testified that Respondent did not have workers' compensation insurance at the time of hearing and that B. Dunn Construction Company was involuntarily dissolved as a corporation per the Secretary of State. She further testified that the nature of the work performed by Respondent was hazardous under the statutory definition. (T 15-17).

15) Investigator Drew testified that Respondent Dunn knew that he was required to have workers' compensation insurance. She testified that the Department of Insurance's calculation of fines (PX 9) correctly represents her findings. The total penalties owed by Respondent is $190, 216.74. The total is comprised of $178,500 (357 days x $500) and $11,716 (daily rate of unpaid premiums $32.82 x 357).

The Commission's authority and jurisdiction over insurance non-compliance cases is authorized by Section 4(d) the Act, as well as the Rules. Under Section 4 of the Act, all employers who come within the auspices of the Act are required to provide workers' compensation insurance, whether this is done through being self-insured, through security, indemnity, or bond or through a purchased policy.

Section 9100.90 of the Rules codifies the language of the Act, and additionally describes the notice of non-compliance required, as well as the procedures of the Insurance Compliance Division, and how hearings are to be

conducted. Reasonable and proper notice, as noted above, was provided to Respondent. Section 91000.90(d)(3)(D) of the Rules specifies that " A certification from an employee of the National Council on Compensation Insurance stating that no policy information page has been filed in accordance with Section 9100.20 shall be deemed prima facie evidence of that fact." Petitioner's Exhibit 3 contains the certification from NCCI Holdings, Inc., indicating that Respondent did not have workers' compensation insurance from February 10, 2018, to October 8, 2018; January 5, 2019, to February 7, 2019; and October 9, 2019, through December 29, 2019 (PX3).

> In *State of Illinois v. Murphy Container Service, et al*. 2007 Ill. Wrk. Comp.LEXIS1216, the Commission considered the following factors in assessing penalties against an uninsured employer: 1) the length of time the employer had been violating the Act; 2) the number of workers' compensation claims brought against the employer; 3) whether the employer has been made aware of his conduct in the past; 4) the number of employees working for the employer; 5) the employer's ability to secure and pay for workers' compensation coverage; 6) whether the employer had alleged mitigating circumstances; and, 7) the employer's ability to pay the assessed amount.

In the instant case, the Commission finds that the length of time in which Respondent had been violating the Act in failing to obtain workers' compensation insurance was significant. Respondent failed to have insurance for 357 days. The number of employees fluctuated from 5 to 8. The corporation was dissolved involuntarily on March 12, 2021. Respondent was repeatedly notified of his non-compliance beginning in July 2018.

Having reviewed the record, the Commission finds no evidence as to the inability to secure and pay for workers' compensation coverage and no evidence of mitigating circumstances.

The Commission finds Respondent knowingly and willfully failed to comply with the Act. Based upon the significant period of time that Respondent failed to comply with the Act, the Commission assesses a penalty of $190, 216.74 against Respondent, BRIAN DUNN, individually, and doing business as B. DUNN CONSTRUCTION COMPANY.

IT IS THERFORE ORDERED BY THE COMMISSION that Respondent, BRIAN DUNN, individually, and doing business as B.DUNN CONSTRUCTION COMPANY, is found to be an employer who was in non-compliance with the insurance

provisions Section 4(a) of the Act and Section 9100.90 of the Commission Rules,and is hereby ordered to pay the Commission a fine of $190,216.74. This amount represents 357 day of non-compliance with the Act at $500.00 per day, as well as unpaid premiums at a daily rate of $32.82 per day.

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

Illinois Worker's Compensation Commission
Insurance Compliance Division
69 West Washington Street Suite 900
Chicago, Illinois 60601

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.

August 12, 2022

SJM/msb
d-08/10/2022
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC008478
Case Name	Wileta Brown-Martin v. State of Illinois – Illinois Department of Public Health
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0301
Number of Pages of Decision	15
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Michael Miles
Respondent Attorney	Kenton Owens

DATE FILED: 8/12/2022

/s/ Thomas Tyrrell, Commissioner

Signature

22IWCC0301

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

Wileta Brown-Martin,

Petitioner,

vs. NO: 17 WC 8478

State of Illinois–Illinois Department of Public Health,

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, causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator, and corrects certain scrivener's errors. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct clerical errors in the Arbitration Decision. On page two (2) of the Decision, the Arbitrator mistakenly wrote that Ms. Heatherton described Petitioner's injury as **carpel** tunnel syndrome. The Commission modifies the above-referenced sentence to read as follows:

> Ms. Heatherton described the Petitioner's injury as **carpal** tunnel syndrome and cubital tunnel syndrome—right and left forearms and wrists.

On page three (3) of the Decision, the Arbitrator mistakenly wrote that Dr. Dye noted a prior diagnosis of **capholunate** advanced collapse (SLAC). Finally, on that same page, the Arbitrator wrote that Dr. Sudekum reported bilateral **carpel** tunnel releases and a revision of the right **carpel** tunnel release. The Commission modifies the above-referenced sentences to read as follows:

> Dr. Dye noted a prior diagnosis of **scapholunate** advanced collapse (SLAC) in her wrist as well.

For the Petitioner's past surgical history, Dr. Sudekum reported bilateral **carpal** tunnel releases 24 years prior, revision of the right **carpal** tunnel release in 2013, and bilateral LRTI basilar joint arthroplasty in 2014.

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 October 8, 2021, is modified as stated herein.

August 12, 2022

o: 7/12/22
TJT/jds
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC008478
Case Name	BROWN-MARTIN, WILETA v. STATE OF ILLINOIS/ILLINOIS DEPARTMENT OF PUBLIC HEALTH
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Michael Miles
Respondent Attorney	Kenton Owens

DATE FILED: 10/8/2021

/s/Jeanne AuBuchon,Arbitrator
Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

October 8, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WLIETA BROWN-MARTIN
Employee/Petitioner

v.

SOI/ILLINOIS DEPARTMENT OF PUBLIC HEALTH
Employer/Respondent

Case #**17** WC **8478**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 14, 2021**. 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 **2/7/17** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**88,759.66**; the average weekly wage was $**1706.92**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** dependent children.

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

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

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

Respondent is entitled to a credit of $**any benefits paid through group** under Section 8(j) of the Act.

ORDER

No benefits 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.

Jeanne L. AuBuchon

Signature of Arbitrator

October 8, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on June 14, 2021, on all issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of her employment; 2) the causal connection between the accident and the Petitioner's cubital tunnel syndrome; 3) payment of medical bills incurred; 4) entitlement to TTD benefits from February 7, 2017 through March 10, 2017; and 6) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

As of the injury manifestation date of February 7, 2017, the Petitioner was employed with Respondent as a health facility investigator, traveling to various sites and observing facilities operating under the regulations of the Illinois Department of Public Health – ranging from small group homes to large adult developmentally disabled facilities. (T. 11-12, 15) She claimed that repetitive motions in writing, holding a clipboard, driving and typing were causes of possible cubital tunnel surgery. (AX2, T. 12) She explained that her job entailed observation, constant standing, looking at people and writing. (T. 15) She said that a lot of times, there wasn't a table to write on, so she used a clipboard, holding it in the crook of her left arm and writing narratives on it with her right hand. (T. 15, 18-19) The Petitioner, who is right-hand dominant, testified that she was experiencing loss of sensation, numbing of the hands, dropping things and pain. (T. 14) On cross-examination, the Petitioner testified that she had arthritis in her wrist, and her hobbies included gardening and sewing. (T. 17-18)

The Petitioner testified that she had treated for several years before 2017 with Dr. Daniel Osei, a hand surgeon formerly with Washington University Physicians, and then treated with Dr. Christopher Dy, another surgeon with Washington University Physicians, in 2017 after Dr. Osei retired. (T. 13-14) The Petitioner retired in December 2018. (T. 16)

On January 9, 2017, the Petitioner saw Dr. Dy and complained of loss of dexterity and ability to position objects, with the right side being worse than the left. (PX2) A physical examination resulted in positive Spurling's test and a positive Tinel's sign. (Id.) Dr. Dy reported that the clinical examination suggested that the Petitioner would benefit greatly from a submuscular ulnar nerve transposition. (Id.) Dr. Dy performed the transposition and a flexor pronator lengthening on February 7, 2017. (Id.)

The Petitioner reported her injury to the Respondent on February 10, 2017, using the same description of her injuries as was claimed in AX1. (RX1) Her supervisor, Monica Heatherton, wrote a report on February 22, 2017, stating that the Petitioner's condition progressively deteriorated over the previous five years, that the Petitioner complained of pain and weakness and that she periodically observed the Petitioner wearing braces. (Id.) Ms. Heatherton described the Petitioner's injury as carpel tunnel syndrome and cubital tunnel syndrome – right and left forearms and wrists. (Id.) In the Employee's Notice of Injury, the Petitioner's description of her job duties again was consistent with her prior reports but did not contain details as to the duration, frequency or intensity of her activities. (Id.)

On March 10, 2017, after follow-up visits, Dr. Dy released the Petitioner to work and noted that the Petitioner wanted to discuss her desire for a left ulnar transposition. (Id.) The Petitioner underwent occupational therapy at Athletico Physical therapy from February 13, 2017, through April 3, 2017. (PX5) On April 7, 2017, the Petitioner reported good strength and improved sensation but had continuing issues with dexterity, although that was improving as well. (PX2) Dr. Dy found no need for continued therapy at that time. (Id.) At a visit to Dr. Dy on May 26, 2017, the Petitioner began complaining of right hand and wrist pain, which appeared to be connected to an arthritic condition for which she underwent previous ligament reconstruction and

tendon interposition (LRTI). (Id.) Dr. Dye noted a prior diagnosis of capholunate advanced collapse (SLAC) in her wrist as well. (Id.) He gave the Petitioner a steroid injection in her thumb at that visit. (Id.) On February 26, 2018, the Petitioner told Dr. Dy that her ulnar symptoms had improved and are not bothersome, although she occasionally experienced numbness and tingling. (Id.)

On October 10, 2017, the Petitioner underwent a Section 12 examination with Dr. Anthony Sudekum, a hand surgeon at the Missouri Hand Center. (RX5) Dr. Sudekum reviewed nerve conduction and EMG study reports from March 7, 2014, and July 6, 2016, and noted that the 2014 study showed ulnar neuropathy at the right elbow consistent with cubital tunnel syndrome, while the 2016 report did not state evidence of right ulnar neuropathy or right cubital tunnel syndrome. (Id.) Dr. Sudekum also reviewed records from Dr. Dye, the Employee Notice of injury and Ms. Heatherton's report. (Id.) For the Petitioner's past surgical history, Dr. Sudekum reported bilateral carpel tunnel releases 24 years prior, revision of the right carpel tunnel release in 2013 and bilateral LRTI basilar joint arthroplasty in 2014. (Id.) At the time of the examination, the Petitioner had a body mass index in the obese range, arthritis and hypertension. (Id.)

Dr. Sudekum wrote in his report that he did not receive any information that would indicate the Petitioner's job included "sustained or forceful manual activities, which would have served to cause or aggravate carpal tunnel syndrome or any pathologic process affecting her upper extremities." (Id.) He further stated that it was possible that the Petitioner may have experienced some symptoms associated with her various conditions while performing her normal, benign job duties, but this should not be misunderstood to implicate that activity as a cause or aggravating factor of the underlying pathology. (Id.) His opinion was that the Petitioner's work did not cause or aggravate her conditions. "…I feel those conditions would have developed at the same rate and

required the same treatment regardless and irrespective of her employment activities…," he wrote. (Id.) Dr. Sudekum did not testify. He died in an avalanche in the Himalayan Mountains in May 2019.

In a letter to the Petitioner's attorney on July 19, 2018, Dr. Dy reported his opinions that the Petitioner's bilateral cubital tunnel syndrome, right carpal tunnel syndrome, bilateral thumb basal joint arthritis and right SLAC were aggravated by her work activities. (Id.) He also said that attempts at conservative treatment were no longer beneficial, and the right cubital tunnel surgery was causally related to the Petitioner's work activities. (Id.) He stated in the letter that in addition to reviewing his own records, he reviewed Dr. Osei's records from November 2, 2012, to October 5, 2016. (Id.) Until this letter, Dr. Dy's records did not mention the Petitioner's work activities nor any connection between the Petitioner's condition and her work.

At a deposition on January 23, 2019, Dr. Dy testified consistently with his reports. (PX6) He stated that the Petitioner had prior surgeries with Dr. Osei for thumb arthritis. (Id.) For the cubital tunnel syndrome, the Petitioner had tried conservative treatment of night splinting and Gabapentin, but that did not help. (Id.) Dr. Dye explained that when he examined the Petitioner, she had some notable irritation of the ulnar nerve at a point just above her elbow and around, as well as some weakness in some of the muscles of her hand. (Id.) He stated that nerve conduction studies were taken in 2016 that corroborated his diagnosis of cubital tunnel syndrome. (Id.) Dr. Dye said he reviewed the nerve conduction studies prior to surgery but not before his deposition. (Id.) Neither the nerve conduction studies nor Dr. Osei's records were entered into evidence.

During the deposition, Petitioner's counsel read to Dr. Dy the description of the Petitioner's work activities from Dr. Sudekum's report, which was a recitation of the Petitioner's Employee's Notice of Injury. (Id.) Dr. Dy testified that description was similar to his understanding of the

Petitioner's work activities from the records he reviewed and that the attorney's recitation did not change the opinions he expressed in his opinion letter. (Id.) In support of his opinion that the Petitioner's cubital tunnel syndrome was aggravated by her work, Dr. Dy said repetitive activities – specifically leaning on the inside of the elbow or flexing or bending the elbow – can cause irritation to the ulnar nerve, constantly pressing the nerve against the bone. (Id.) He stated that, over time, that can cause numbness and tingling initially and subsequently can leave to permanent damage to the nerve, including loss of sensation in the fingers, loss of muscle strength and loss of dexterity in the hand. (Id.) He said that depending on the Petitioner's posture, typing could result in prolonged elbow flexion and pressure on the medial aspect of the elbow. (Id.)

On cross examination, Dr. Dy testified that the Petitioner verbally told him what her job duties were, but he did not record them in his notes. (Id.) His recollection was that the Petitioner drove to multiple locations, carried a bag containing a laptop, printer and office accessories weighing 10-15 pounds and spent substantial time writing reports. (Id.) He could not speak with certainty as to whether the Petitioner did one repetitive activity constantly over the workday, how many hours per day she had to type or what her typing posture was. (Id.) Dr. Dy also could not state what the Petitioner's hobbies were or whether her hobbies could lead to the development of cubital tunnel syndrome. (Id.)

On October 5, 2020, the Petitioner underwent a Section 12 examination with Dr. Patrick Stewart, an orthopedic hand surgeon at the Southern Illinois Hand Center. (RX3) Dr. Stewart reviewed nerve conduction studies and EMG studies from 2014 and 2016, Dr. Dy's records, the injury reports from February 2017 and records from the cubital tunnel surgery. (Id.) Dr. Stewart made the same observations of the nerve conduction studies as Dr. Sudekum. (Id.)

Dr. Stewart reported that the anesthesia assessment from February 2, 2017, for the Petitioner's surgery, noted that the Petitioner underwent carpal tunnel releases and ligament reconstruction and tendon interposition in 2013, a left carpel tunnel release in 1994, a total hip arthroplasty in 2011 and a total knee arthroplasty in 2012. (Id.) The Petitioner's past medical history included fibromyalgia, osteoarthritis, hypertension, depression, migraines and reflux. (Id.) The records submitted and testimony elicited at arbitration did not indicate that workers' compensation claims were filed for any of these prior conditions.

At Dr. Stewart's examination, the Petitioner's description of her job duties was consistent with her prior reports. (Id.) In addition, the Petitioner reported to Dr. Stewart that she lived in Carbondale and drove to various group homes in the southern portion of the state – from Effingham to Metropolis and occasionally to Chicago. (Id.) She would be at one site one or two days, depending on the size of the group home. (Id.) For a very large facility, she could be at that site for up to two weeks. (Id.) At those sites, she observed residents and the workers' interactions with them, take notes and complete a report. (Id.) She carried her laptop and printer in a roller bag. (Id.) The Petitioner reported hobbies of sewing, resurfacing furniture, doing upholstery work and gardening. (Id.) She was a one-pack-per-day smoker and a light occasional drinker. (Id.) The Petitioner made an unsolicited statement to Dr. Stewart that the only reason she filed her workers' compensation claim was because she did not have enough personal time off (PTO) accrued to be off work for her surgery. (Id.)

Dr. Stewart's physical examination of the Petitioner's right arm resulted in normal findings, with negative tests for carpal and cubital tunnel issues. (Id.) In his report, he stated that the Petitioner had several other risk factors for cubital tunnel syndrome – elevated body mass index, hypertension, smoking and age. (Id.) On February 23, 2021, Dr. Stewart testified

consistently with his reports. (RX4) He opined that the Petitioner's right cubital tunnel complaints and surgery were not related to her job duties. (Id.)

CONCLUSIONS OF LAW

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

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

The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of employment, and that involves as an element a causal connection between the accident and the condition of claimant. *Cassens Transp. Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 199 Ill. Dec. 353 (2nd Dist. 1994). An injury is considered "accidental" even though it develops gradually over a period of time as a result of repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Id*.

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, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). Even if the claimant had a preexisting degenerative condition which made her more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id*. A claimant may establish a causal connection in such cases if she can show that a work-related injury played a role in aggravating or accelerating her preexisting condition. *Id*. at 204-05.

An employee who alleges injury based on repetitive trauma must "show that the injury is work related and not the result of a normal degenerative aging process." Peoria County Belwood

Nursing Home, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, 106 Ill.Dec. 235 (1987). In these cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." Nunn v. Industrial Comm'n, 157 Ill. App. 3d 470, 477, 510 N.E.2d 502, 109 Ill. Dec. 634 (1987).

In this case, Dr. Dy said the Petitioner's work activities aggravated her bilateral cubital tunnel syndrome, right carpal tunnel syndrome, bilateral thumb basal joint arthritis and right SLAC. It is important to note that the Petitioner has not pursued claims for any injuries other than the right cubital tunnel syndrome. Dr. Stewart said the Petitioner's condition was not related to the work activities as described to him.

In a repetitive trauma case, a Petitioner's job duties need not be repetitive in the sense that the same task is done over and over again as on an assembly line to result in a compensable injury. *City of Springfield v. Illinois Workers' Comp. Comm'n,* 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009). Intensive use of hands and arms can result in cumulative injuries that are compensable. *Id*. However, the Commission has determined a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel v. Mulay Plastics*, 97 IIC 238.

In this case, the record is bereft of any details regarding the frequency, duration or intensity of the Petitioner's work activities that would lead to the conclusion that they aggravated her cubital tunnel syndrome. Although Dr. Dy said he reviewed Dr. Osei's records before performing surgery, he did not provide any information from those records to support his conclusions. The pre-2017 records were not submitted into evidence. In addition, Dr. Dy's records make no mention of a connection between the Petitioner's condition and her work activities until his letter of July 19,

2018, to the Petitioner's attorney. For these reasons, the Arbitrator gives little, if any, weight to Dr. Dye's opinions. On the other hand, the opinions of Drs. Sudekum and Stewart were sufficiently based on the facts at hand (or lack thereof), and their opinions deserve greater weight.

The Arbitrator finds particularly probative the Petitioner's unsolicited comment to Dr. Stewart that the only reason she filed her claim was because she did not have sufficient PTO to cover her time off for her cubital tunnel surgery. The Petitioner did not address or explain this comment in her testimony. This – along with the fact that the Petitioner did not pursue claims for her other injuries – create a strong inference that the Petitioner's injury was not work related.

The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24, 30, 368 N.E.2d 1292, 11 Ill. Dec. 546 (1977). In order to find that the Petitioner's injury to be work-related, the Arbitrator would have to speculate or conject that her work activities were sufficient to aggravate her cubital tunnel syndrome. Without specific details as to the duration, frequency and intensity of the Petitioner's activities, the Arbitrator does not find that it is more likely than not that the activities aggravated her pre-existing condition.

Therefore, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that her cubital tunnel syndrome or an aggravation thereto arose out of and in the course of her employment.

Because of the findings above, the Arbitrator does not reach the remaining disputed issues.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC035575
Case Name	Maricela Thorne v. Card Dynamix LLC
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	22IWCC0302
Number of Pages of Decision	9
Decision Issued By	Maria Portela, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Kenneth Smith

DATE FILED: 8/12/2022

/s/Maria Portela, Commissioner
Signature

DISSENT: /s/Kathryn Doerries, Commissioner
Signature

22IWCC0302

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

MARICELA THORNE,

Petitioner,

vs. NO: 13 WC 35575

CARD DYNAMIX,

Respondent.

ORDER AND OPINION ON PETITION PURSUANT TO SECTION 8(a) OF THE ACT

This matter comes before the Commission on Petitioner's Petition pursuant to Section 8(a) seeking authorization for treatment with Dr. Jared Kalina, pain management specialist, payment of medical expenses incurred and alleged to be causally related to Petitioner's accidental injury of March 27, 2013 and Section 19(k) penalties and Section 16 attorney's fees for the alleged failure to pay for medical treatment. The Commission grants Petitioner's Petition pursuant to Section 8(a) in part and denies said Petition in part, as stated below.

The Arbitration Decision issued on November 14, 2017. The Arbitrator found Petitioner's condition of ill-being in the lower back and legs at the time of the hearing was causally related to the March 27, 2013 work accident.

Regarding prospective medical care, the Arbitrator specifically found that Petitioner "needs further medical care and treatment, in the form of prescription or OTC medications, future office visits and a potential MRI." The decision further stated "The Arbitrator adopts the future plan and recommendations of Dr. Sokolowski on this issue…" and "Petitioner now has open medical rights under Section 8(a)." (Arb. Dec. p. 12) The Respondent did not file a Petition for Review of the Arbitration Decision and it became final on December 14, 2017.

Subsequent to the issuance of the Arbitration Decision on November 14, 2017, Petitioner next saw Dr. Mark Sokolowski on December 8, 2017. At the time of this visit, Dr. Sokolowski

continued to order a new MRI of the lumbar spine and noted Petitioner had been waiting for it to be approved since December, 2016. Dr. Sokolowski also ordered Hydrocodone for break-through pain when needed.

On August 10, 2018 Petitioner followed up with Dr. Sokolowski. During this visit, Dr. Sokolowski again stated that Petitioner required a new MRI for which she had been seeking approval since December 2016 and that she remained symptomatic with lumbar pain and radiculopathy. Dr. Sokolowski also opined "because she is anticipated to require long-term pain management, I referred her to an independent pain management specialist for ongoing prescribing and interventions as needed."

On August 20, 2018 Petitioner was initially seen by Dr. Kalina, a pain management specialist with whom she has continued to receive treatment at least through June of 2021. Hearings on Petitioner's Petition pursuant to Section 8(a) occurred on October 7, 2020, July 28, 2021, and March 2, 2022. Both parties were represented, and a record made at each hearing. The parties submitted depositions and other documentary evidence.

Petitioner's Section 8(a) Petition focuses on the fact that pursuant to the Arbitration Decision, Petitioner is entitled to open medical rights and therefore, Respondent is foreclosed from requiring that Petitioner undergo a medical evaluation pursuant to Section 12 to determine if pain management is reasonable, necessary and causally related to treat injuries sustained in the work accident. Petitioner further asserts that Section 12 examinations are limited to situations where employees are seeking payment of disability benefits. Additionally, Petitioner argues that pursuant to the Arbitration Decision, Respondent is liable for payment of the outstanding bills of Dr. Sokolowski, Persistent Med, Persistent Toxicology, CM Healthcare Solutions, Specialty Pharmaceutical, Prescription Partners, Vital Medical Network, Anci-Bill, Advanced Ambulatory, Kalina Pain Institute, Rush Copley and Bright Light Medical Imaging (unpaid repeat MRI bill).

Respondent argues that treatment for pain management was not included in the prospective medical award pursuant to the Arbitration Decision as the referral for pain management by Dr. Sokolowski was made on August 10, 2018, nearly 9 months after the Arbitration Decision issued. Moreover, Respondent asserts that for that reason, it is entitled to have Petitioner submit to a medical evaluation to determine whether pain management is reasonable, necessary and causally related to treat injuries Petitioner sustained in the work accident of March 27, 2013.

Referring to page 12 of the Arbitration Decision regarding Issue (O), "Whether the Petitioner is Entitled to Prospective Medical," the Arbitrator found and concluded:

> Petitioner has proven that she needs further future medical care and treatment, in the form of prescription or OTC medications, future office visits and a potential MRI. The evidence weighs in favor of Petitioner and she has proven entitlement to prospective medical care and treatment. As outlined above, an MRI recommendation from Dr. Sokolowski has been pending since 2016 to evaluate the fusion site. The Arbitrator adopts the future plan and recommendations of Dr. Sokolowski on this issue and discounts the opinions of Dr. Lami. Petitioner now

has open medical rights under Section 8(a).

In interpreting the fourth sentence of the above-referenced paragraph which states, in part, "the Arbitrator adopts the future plan and recommendations of Dr. Sokolowski," the Commission finds this sentence is to be read in conjunction with the first sentence of the paragraph which specifies that Petitioner's future care and medical treatment shall consist of prescription or OTC medications, future office visits and a potential MRI. Moreover, paragraph 3 of the Order Section of the Arbitration Decision finds "Respondent is liable for prospective medical treatment and expenses, *specifically*, continuing follow-up visits with Dr. Sokolowski, a new lumbar MRI, (but only if Dr. Sokolowski continues to order one) and continuing prescription medication as required." (Emphasis added.)

Therefore, the Commission finds that the prospective medical award in the Arbitration Decision did not include future treatment provided by a pain management physician to whom Petitioner was referred after the arbitration hearing. The referral for pain management was made by Dr. Sokolowski 9 months after the Decision issued. Accordingly, the Commission denies that part of Petitioner's Section 8(a) Petition that alleges Respondent is not entitled to a Section 12 exam and finds that Respondent is entitled to schedule an examination of the Petitioner pursuant to Section 12 of the Act to specifically determine whether treatment provided by a pain management physician is causally related to the March 27, 2013 work accident, and whether said pain management is reasonable and necessary to treat the injuries Petitioner sustained in the work accident.

Additionally, the Commission does not find Petitioner's argument that Section 12 examinations are limited to situations where employees are "entitled to receive disability benefits" to be persuasive. Section 12 of the Illinois Workers' Compensation Act states, in pertinent part:

> An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act. An employee may also be required to submit himself for examination by medical experts under subsection (c) of Section 19.
>
> An employer requesting such an examination, of an employee residing within the State of Illinois, shall deliver to the employee with the notice of the time and place of examination sufficient money to defray the necessary expense of travel by the most convenient means to and from the place of examination, and the cost of meals necessary during the trip, and if the examination or travel to and from the place of examination causes any loss of working time on the part of the employee, the employer shall reimburse him for such loss of wages upon the basis of his

> average daily wage. Such examination shall be made in the presence of a duly qualified medical practitioner or surgeon provided and paid for by the employee, if such employee so desires.
>
> …
>
> If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period.

Section 12 does not contain any language stating that an employee who is not seeking disability benefits is exempt from submitting to an examination at the employer's request.

Regarding that part of Petitioner's Section 8(a) Petition seeking payment of unpaid medical bills and pursuant to the Arbitrator's award of prospective medical care consisting of treatment in the form of prescription or OTC medications, future office visits with Dr. Sokolowski and a new lumbar MRI ordered by Dr. Sokolowski, the Commission finds Respondent liable and awards payment pursuant to the fee schedule of the following bills:

a. Prescription Partners (Outstanding bills for medications dispensed by Dr. Sokolowski for DOS 6/23/14, 4/9/18, 5/9/18, 6/11/18, 7/12/18, and 8/10/18 of $5,776.37) (Px10)
b. Bright Light Medical Imaging (Outstanding balance of $2,700 for 1/19/21 MRI) (Px14)
c. Mark Sokolowski, M.D. (outstanding/unpaid medical bills as of 6/28/21 for $1,690 for visits of 8/10/18, 5/10/19, 3/6/20 and 2/5/21) (Px2)

In regard to that Section of Petitioner's Petition pursuant to Section 8(a) seeking penalties under Section 19(k), the Commission finds penalties shall be imposed on the full amount of the following bills:

1) Prescription Partners (Outstanding bills for medications dispensed by Dr. Sokolowski for DOS 6/23/14, 4/9/18, 5/9/18, 6/11/18, 7/12/18, and 8/10/18 of $5,776.37) (Px10)
2) Bright Light Medical Imaging (Outstanding balance of $2,700 for 1/19/21 MRI) (Px14)
3) Mark Sokolowski, M.D. (outstanding/unpaid medical bills as of 6/28/21 for $1,690 for visits of 8/10/18, 5/10/19, 3/6/20 and 2/5/21) (Px2)

Total amount of bills awarded equals $10,166.37.

Section 19(k), states in part:

> In case where there has been any *unreasonable or vexatious delay* of payment or *intentional underpayment* of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of

this Act, shall be considered unreasonable delay. (Emphasis added.)

The Commission finds that more than several years after the Arbitration Decision issued, the Respondent has still not paid the afore-referenced medical bills corresponding to treatment awarded pursuant to the Decision. Unilateral suspension of payments in contravention of a final decision by the Commission is unreasonable and vexatious. (*Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 331 Ill.App.3d 405, 413 (2002) (*citing Keystone Steel and Wire Co. v. Industrial Comm'n*, 85 Ill.2d 178 (1981).)

Accordingly, the Commission awards penalties pursuant to Section 19(k) based on the full amount of the afore-listed unpaid medical bills ($10,166.37 x 50%) of $5,083.19.

Section 19(k) provides for additional compensation "equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k). However, the Commission does not believe it is restricted from imposing penalties on the full amount of the bills rather than the fee schedule amount.

The Court in *Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 331 Ill.App.3d 405 (2002) did not directly address the issue of whether Section 19(k) penalties are to be calculated based on the full amount of the unpaid medical bills versus the fee schedule amount of the bills, that being "the amount payable at the time of such award." However, the *Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 331 Ill.App.3d 405, 415 (2002) Court held "To clarify, Section 19(k) penalties and attorney fees pursuant to section 16 may be based on the entire amount of the award that has accrued or only the unpaid portion thereof, as the Commission in its discretion sees fit. The Commission cannot impose penalties and fees on that portion of an award that has not accrued, however. *See Zitzka v. Industrial Comm'n,* 328 Ill. App. 3d 844, 851 (2002).

Consistent with the Court's reasoning in *Navistar*, the Commission finds it is within its discretion to calculate 19(k) penalties on the full amount of the unpaid medical bills rather than on the fee schedule amount of the bills.

With respect to attorney's fees pursuant to Section 16, the Commission awards attorney's fees in the amount of $3,049.91 ($10,166.37 – full amount of medical bill award + $5,083.19 – Section 19(k) penalties x 20%). Section 16 of the Act does not contain a formula to be used by the Commission in assessing attorney's fees against an employer who unreasonably, vexatiously or intentionally delays the payment of compensation benefits. The amount of fees to be assessed is a matter committed to the discretion of the Commission. *Williams v. Industrial Comm'n*, 336 Ill.App.3d 513, 516 (2003). Due to the Respondent's egregious disregard in failing to pay bills corresponding to treatment specifically awarded in the Arbitration Decision, the Commission awards attorney's fees pursuant to Section 16 in the amount of 20% of the full amount of the outstanding medical expenses, as well as 20% of the penalties awarded pursuant to Section 19(k).

At this time, the Commission makes no determination as to whether the medical bills of Dr. Kalina or any of the bills from providers to whom Dr. Kalina referred Petitioner should be awarded as the Commission has found Respondent is entitled to schedule an examination of the Petitioner pursuant to Section 12 of the Act.

Accordingly, the Commission denies that part of Petitioner's Section 8(a) Petition arguing that Respondent is not entitled to have Petitioner submit to a Section 12 exam for the reasons stated herein and grants that part of said Petition seeking payment of the medical bills specified herein along with Section 19(k) penalties and attorney's fees pursuant to Section 16.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Respondent pay Petitioner $10,166.37 for the outstanding medical bills of Prescription Partners, Bright Light Medical Imaging and Mark Sokolowski, M.D pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay Petitioner $5,083.19 pursuant to Section 19(k).

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay Petitioner's attorney $3,049.91 pursuant to Section 16.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,267.00. 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.

August 12, 2022

MEP/dmm
O: 061422
49

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Deborah J. Baker*
Deborah J. Baker

DISSENT

I concur with the Majority's award of Section19(k) penalties and Section 16 attorney's fees based on the facts of this case. However, I disagree as to the calculation of the penalties and fees and therefore dissent, in part, with the Majority's decision.

Section 19(k) states:

> "In case (sic) where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay compensation, which do not present a real controversy but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of *the amount payable* (emphasis added) at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this

Act, shall be considered unreasonable delay." *820 ILCS 305/19*

Under section 19(k), the imposition of penalties is discretionary and "intended to address situations where there is not only a delay [in payment], but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. Industrial Comm'n,* 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553, 234 Ill. Dec. 205 (1998). Section 16, regarding the imposition of attorney fees, uses identical language to section 19(k) and was intended to apply in the same circumstances. *McMahan,* 183 Ill. 2d at 515, 702 N.E.2d at 553; 820 ILCS 305/16 (West 2010). *Air Freight Express v. Ill. Workers' Comp. Comm'n,* 2013 IL App (1st) 122219WC-U, 2013 Ill. App. Unpub. LEXIS 1237, 2013 WL 2643714.

Here, the "amount payable" to satisfy the award is calculated pursuant to Section 8(a) and the fee schedule provisions of Section 8.2 of the Act. The Majority calculated the Section19(k) penalties on the amount of the outstanding balance ($10,166.37) despite knowing the fee schedule amount ($5,250.89) that will satisfy payment of the bills per PX6 admitted into evidence. Although claimed discretionary, by calculating the penalty on an amount that is neither awarded nor payable, the Majority, in effect, imposes a penalty on an inflated amount not contemplated or supported by the Act. By using this inflated amount as a starting point, the penalties and attorney's fees are likewise inflated.

Awarding penalties in the amount of $5,083.19 where the total "amount payable" is $5,250.89 per Petitioner's own exhibit, results in a 96% penalty that far exceeds the 50% of the "amount payable" as stated in the Act.

The following chart illustrates the unreasonable effect of using such values:

Penalties and Fees	Using Balance of Unpaid Medical Bills $10,166.37	Using Fee Schedule-Amount Payable (PX6) $5,250.89
19(k) Penalties	$5,083.19 (96% penalty on the fee schedule amount actually owed)	$2,625.45 (50% penalty on the fee schedule amount actually owed)
Attorney's Fees on Bills	$2,033.27	$1,050.18
Attorney's Fees on Penalties	$1,016.64	$ 525.09
Total: Penalties and Fees	$8,133.10	$4,200.72

Discretionary authority should be exercised with reasonableness, fairness and a sense of equity. The *Jacobo* court noted the standard for abuse of discretion as follows:

> "In addition, even when the facts support an award of penalties and attorney fees under sections 19(k) and 16, the decision to award penalties and fees is left to the discretion of the Commission. An abuse of discretion occurs when the Commission's ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the [Commission]."" *Jacobo v. Ill. Workers' Comp. Comm'n*, 2011 Ill. App. LEXIS 1186, *22, 355 Ill. Dec. 358, 368, 959 N.E.2d 772, 782, 2011 IL App (3d) 100807WC.

I believe that awarding penalties on the full amount of unpaid medical bills when the amount that will satisfy the bills by law under the fee schedule is in evidence, then the Majority's penalty award is unreasonable and an abuse of discretion.

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC036722
Case Name	Roslyn Bond (FKA Moore) v. Peoria School District 150
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0303
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Michael Brandow

DATE FILED: 8/15/2022

/s/ Deborah Simpson, Commissioner

Signature

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

ROSLYN MOORE,

Petitioner,

vs. NO: 17 WC 36722

PEORIA SCHOOL DIST. 150,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent 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, with the following changes made as stated by the Commission herein. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission acknowledges and corrects two typographical errors contained in the Decision of the Arbitrator, the first of which concerns an inconsistency with the accident date. In the body of the Decision, the Arbitrator found that Petitioner sustained accidental injuries to her right hand/wrist, arm, and shoulder arising out of and in the course of her employment on October 2, 2017. However, in the Findings section, the accident date is misstated as October 10, 2017. The Request for Hearing form, Amended Application for Adjustment of Claim, and Petitioner's testimony all establish that the correct accident date is October 2, 2017. Therefore, the Commission corrects the Findings section of the Decision of the Arbitrator to reflect the accident date of October 2, 2017.

The second typographical error that the Commission corrects in the Decision of the Arbitrator concerns the amount of awarded medical expenses. In the Findings section, the Arbitrator awarded reasonable and necessary medical expenses in the amount of $27,606.59; however, in the body of the Decision, the Arbitrator awarded the amount of $27,666.59. On the Request for Hearing form, Petitioner claimed entitlement to unpaid medical bills totaling $27,666.59. The Commission finds that the record establishes this amount of $27,666.59 to be the correct total of unpaid medical expenses and changes the award of medical expenses in the Findings section of the Decision of the Arbitrator to reflect this amount.

The Commission incorporates the changes as stated herein into the Decision of the Arbitrator, and in all other respects, affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Findings section of the Decision of the Arbitrator is changed to reflect the accident date of October 2, 2017 and the award of reasonable and necessary medical expenses in the amount of $27,666.59, pursuant to the medical fee schedule, as provided by §8(a) and §8.2 of the Illinois Workers' Compensation Act. These changes to the Findings section conform with the findings otherwise made in the body of the Decision of the Arbitrator. In all other respects not specifically stated herein, the Commission affirms and adopts the Decision of the Arbitrator filed on January 19, 2022.

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

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

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

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.

August 15, 2022

DLS/met
O- 7/27/22
46

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC036722
Case Name	ROSLYN MOORE v. PEORIA SCHOOL DISTRICT 150
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Michael Brandow

DATE FILED: 1/19/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 19, 2022 0.37%

/s/Bradley Gillespie, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ROSLYN MOORE Case # 17 WC 036722
Employee/Petitioner
v.
PEORIA SCHOOL DISTRICT 150
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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **December 22, 2021**. 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, **October 10, 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 $**11,832.08**; the average weekly wage was $**227.54**.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services of $**27,606.59** according to Section 8(a) and Section 8.2 of the Act. Respondent shall receive a credit for any payments already made by it.

Respondent shall approve prospective medical treatment as recommended by **Dr. Lawrence Li** in accordance with Section 8(a).

Respondent shall pay TTD from November 9, 2017 to December 30, 2017, or 7 weeks at the rate of $227.54.

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.

Bradley D. Gillespie **JANUARY 19, 2022**

Signature of Arbitrator

BEFRORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
BLOOMINGTON, ILLINOIS

ROSLYN MOORE,	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 17 WC 036722**
	)	
PEORIA SCHOOL DISTRICT 150,	)	
Respondent.	)	

19(b) DECISION OF THE ARBITRATOR

This matter proceeded to hearing on December 22, 2021 in Bloomington, Illinois (Arb. 1). The following issues were in dispute:

- Accident
- Causation
- Medical Bills
- TTD
- Prospective Medical Treatment

FINDINGS OF FACT

Roslyn Moore, [hereinafter "Petitioner"] testified she worked for Peoria School District 150 [hereinafter "Respondent"] in October 2017. (Tr. p. 9) Petitioner worked in the school cafeteria preparing school lunches. (Tr. pp. 9-10) On October 2, 2017, Petitioner stated she was opening large cans with a can opener. (Tr. p. 10) The can opener used was a large industrial/commercial type can opener. The can opener was illustrated in Petitioner's Exhibit #2. Petitioner described the can opener as "old and rusty." (Tr. p. 12) Petitioner stated the opener's condition made it difficult to turn. *Id.* Petitioner explained that when she would turn the crank to open the cans, it would get stuck, and she would have to force the can opener, and this caused pain in her right hand. (Tr. pp. 12-13) Initially, she noticed pain in the palm of her right hand. (Tr. p. 13) Petitioner developed pain in her right elbow and shoulder when using the can opener. *Id.* When testifying, Petitioner was somewhat uncertain about when she developed pain in her elbow and shoulder. Petitioner testified that she sought treatment with Dr. Bruns on October 16, 2017. (Tr. p. 18) Petitioner gave a history of injuring her shoulder, elbow, and hand on October 2, 2017, while using a can opener at work. (Tr. p. 18 & PX #5). Dr. Bruns provided chiropractic

care for her. On November 13, 2017, Dr. Bruns wrote a letter to Cheryl Stenstrom at Peoria School District 150, stating Petitioner had suffered work-related injuries on October 2, 2017, to her neck, right shoulder, and right elbow. Petitioner stated she injured herself while manually opening large cans. Dr. Bruns placed her on restrictions. (PX #5).

After not improving, Petitioner had a Form 45 prepared on November 6, 2017. The report stated the employee was lifting cans repetitively and now has pain in her right wrist, right shoulder, and neck strain/sprains. (RX #1).

Petitioner was referred to IWIRC at the request of Respondent on October 23, 2017. (PX #6 p. 1) Petitioner gave a history of injuring herself on October 2, 2017, while opening really large cans in the kitchen. *Id.* Petitioner described numbness and tingling radiating to her right elbow and her right shoulder joint off and on. *Id.* The initial evaluation suggested a diagnosis or a right shoulder strain or cervical strain. (PX #6 p. 2) IWIRC provided a Therma|Soft Gel Cold/Hot Pack, provided home exercises for her shoulder and neck and dispensed a roll-on bottle of Fast Freeze. *Id.* Petitioner was returned to regular duty. *Id.* On November 2, 2017, Petitioner returned to IWIRC in follow-up. She described her symptoms as wrist popping, a "catch feeling" along with numbness and tingling in her right wrist. (PX #6 p. 4) Petitioner complained of numbness and tingling in her 2nd, 3rd and 4th fingers as well as pain in her right shoulder, elbow and wrist which started at work while opening 7-8 large cans. *Id.* She stated that the numbness and tingling was awaking her in the night. *Id.* Her interim history noted that Petitioner had been seen by her primary care provide, her chiropractor, who had referred her to Great Plains for right carpal tunnel syndrome and that she had bee scheduled for an EMG. *Id.* After determining her carpal tunnel was non-work related, Petitioner was released from IWIRC's care to return to her primary care provider. (PX #6 p. 5)

Petitioner testified she was referred to Dr. Li at the Orthopedic & Shoulder Center by Dr. Bruns. (Tr. p. 20 & PX 4) On November 7, 2017, Petitioner sought treatment from Dr. Li and gave a history of injuring her right shoulder, elbow, wrist, and hand at work on October 10, 2017. (PX #4 p. 8) Petitioner reported that she was opening cans and she encountered a particular difficult can and felt pain in her right shoulder, elbow, wrist and hand. *Id.* Petitioner subsequently developed numbness and tingling in her hand as well. *Id.* Following her physical exam, Dr. Li recommended an MRI of the right shoulder and elbow and to observe the wrist for

the time being. (PX #4 p. 9) The shoulder and elbow MRIs were completed on December 14, 2017. (PX #4 pp. 10-11 and 12-13 respectively) The right shoulder MRI demonstrated moderate supraspinatus tendinosis without tear and a possible superior labral tear. (PX #4 p. 10) The right elbow MRI demonstrated moderate tendinosis with moderate grade partial thickness tear of the common extensor tendon. (PX #4 p. 12) After reviewing the MRIs, Dr. Li diagnosed Petitioner with a right shoulder rotator cuff strain, right epicondylitis partial thickness tear of the common extensor tendon and right wrist strain aggravating carpal tunnel syndrome. (PX #4 p. 17) After conservative care including corticosteroid injections and physical therapy, Dr. Li recommended surgery on her right elbow. (PX #4 p. 27)

Dr. Li's evidence deposition was competed on June 15, 2020. (PX #3). Dr. Li testified he is a board-certified orthopedic surgeon. Dr. Li's practice specializes in shoulders, elbows, and knee surgeries. (PX #3 pp. 4-5). Dr. Li testified Petitioner gave him a history she was injured on October 10, 2017, and she worked about four hours a day in the school cafeteria, and the most strenuous thing she did was open cans. Petitioner was opening a particularly difficult can and felt pain in her right shoulder, elbow, and wrist, as well as her hand. Subsequently, she felt some numbness and tingling her hand as well. Dr. Li described the can opener as a big crank type can opener affixed to a table. In Dr. Li's causation opinion, he was asked to assume that the can opener defective which made it difficult to open the cans. (PX #3, p. 6) Dr. Li was then able to review photographs of the can opener. Dr. Li was able to review the MRI films from December 14, 2017. Based on these films, Dr. Li opined Petitioner had no tears in her rotator cuff and felt she had a partial thickness tearing of the common extensor tendon in the right elbow. (PX #3 pp. 7-8). Dr. Li testified to a reasonable degree of medical certainty the partial thickness tear of the common extensor tendon was related to the work accident. Dr. Li stated the stress of using the can opener caused the tear. (PX #3 pp. 7-8).

Dr. Li stated he felt most of the shoulder issues were preexisting but using the can opener aggravated her shoulder condition. (PX #3, pp. 8-9) Dr. Li opined he felt Petitioner's right hand carpal tunnel was aggravated, but he had no treatment plan for the carpal tunnel. (PX #3, pp. 9-10) Dr. Li testified that after Petitioner failed conservative care which included cortisone injections, he recommended right elbow surgery and causally connected it to the work injury. (PX #3, pp. 11-13).

At the behest of Respondent, Petitioner was examined by Dr. Williams at Midwest Orthopaedics in Peoria, Illinois on February 19, 2018. Dr. Williams' evidence deposition was taken on October 15, 2020. (RX #2) Dr. Williams testified he was a board-certified orthopedic surgeon who is licensed to practice in the State of Illinois. (RX #2, p. 5) Dr. Williams stated Petitioner gave a history of being 58-years old, right-handed, and working for Peoria School District 150 as a food server. (RX #2 p. 9) Petitioner worked there for approximately two years. *Id.* Petitioner explained part of her job duties was using a manual can opener to open large restaurant style cans. (RX #2 pp. 9-10) Around October 16, 2017, Petitioner started to have problems with her right hand and had a bruise in her palm. (RX #2 p. 10). Petitioner stated she followed up with Dr. Bruns and then was seen by Dr. Li. *Id.* After the MRIs and x-rays were completed, Petitioner had a cortisone shot in her right elbow, which she said initially helped but it started to wear off. *Id.* Petitioner complained of numbness and tingling around the index and middle fingers which she said was constant. (RX #2 p.11) She had weakness and was dropping things. *Id.* Petitioner stated while there was no particular job duties that caused her symptoms, she felt on October 16, 2017, it was preceded by her using the can opener with her right hand. (RX #2 pp. 11-12). After reviewing the medical records and doing a physical exam, Dr. Williams diagnosed Petitioner with right carpal tunnel syndrome and lateral epicondylitis of the right elbow. (RX #2 p. 19). Dr. Williams did not feel Petitioner's work activities were forceful, vibratory, repetitive and/or of a magnitude to either aggravate and/or accelerate and/or cause Petitioner's lateral epicondylitis and/or carpal tunnel syndrome. (RX #2 p. 20). Dr. Williams did feel it would be reasonable to have her on restrictions for her conditions. (RX #2 p. 22).

On cross examination, Dr. Williams stated he did not have medical records from Dr. Li or Dr. Bruns. (RX #2 p.23) The only record he had from Dr. Li was the MRI report. *Id*. Dr. Williams admitted he did not have the films of the MRI, but just the report. (RX #2 p. 24) Dr. Williams did not make any opinions regarding Petitioner's shoulder. *Id.* Dr. Williams stated he thought he did receive a history of Petitioner having a bruise on her right hand while using the can opener and it was his understanding it was an industrial size can opener. (RX #2 pp. 25-26) Dr. Williams also stated he had never used that type of can opener and did not know the amount of force it took to use the industrial can opener. (RX #2, pp. 25-27).

Respondent called Gabriel Kline to testify. (Tr. p. 40) Ms. Kline testified she was employed with District 150 as Assistant Director of Food Service Operations for all schools in the district. (Tr. p. 41) Ms. Kline testified she knew of new blades being sent to the school in questions but had no first-hand knowledge if or when those blades were installed in the can opener. (Tr. p. 42) On cross examination, Ms. Kline did not have first-hand knowledge of the operation or the blade conditions of the can opener on October 2, 2017. (Tr. p. 43) Ms. Kline stated when she first informed of the accident, Petitioner told her she was injured on October 2, 2017. (Tr. p. 44)

CONCLUSIONS OF LAW

Regarding Issue (C): Did the accident arise out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds and concludes as follows:

Petitioner testified she was injured on October 2, 2017, as a result of using a can opener was in a defective condition. (Tr. p. 12) Petitioner testified it was difficult to turn and caused immediate pain in her right hand. (Tr. pp. 12-13)The Arbitrator notes that Petitioner was less clear when her shoulder and elbow symptoms began and testified at trial she was confused as to the dates and had poor memory of the specific dates. According to Petitioner's first medical report from Dr. Bruns of October 23, 2017, Petitioner gave an accident date of October 2, 2017, that states an injury to her right wrist, elbow, and shoulder. (PX #5) When Petitioner filled out her Form 45 on November 6, 2017, Petitioner stated an accident date of October 2, 2017, complaining of right wrist, elbow, and shoulder pain. (RX #1) The Arbitrator further notes that Petitioner followed up with IWIRC on October 23, 2017, complaining of right wrist, elbow, and shoulder pain from an accident that happened on October 2, 2017. (PX #6 p. 1) Respondent's witness, Gabriel Kline, verified when Petitioner notified the employer of the work accident, she used a date of October 2, 2017. (Tr. p. 44)

Wherefore, based on the preponderance of the evidence, the Arbitrator finds and concludes that Petitioner sustained accidental injuries to her right hand/wrist, right arm and right shoulder arising out of and in the course of her employment with Respondent on October 2, 2017.

Regarding Issue (F): Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner's treating physician, Dr. Li, testified to a reasonable degree of medical certainty Petitioner's right wrist, elbow, and shoulder conditions were related to the accident. (PX #3 pp. 8-10) and right elbow surgery was recommended after failed conservative care. Dr. Li was able to review photos of the can opener in question and made aware the can opener was operating properly. (PX #3 pp. 5-6) Dr. Li made an honest assessment that if the can opener was in good working order, it would not require enough force to cause an extensor tendon tear, but since it was in a defective state and harder to turn, it would in fact cause the extensor tendon tear in the elbow. (PX #3 pp. 8-9)

Respondent retained Dr. Williams for an independent medical exam. In Dr. Williams' deposition testimony, he opined, to a reasonable degree of medical certainty, Petitioner's right elbow and wrist condition was not related to the accident in questions. (RX #2 p. 20) Dr. Williams testified he did not make any opinions regarding Petitioner's right shoulder injury. (RX #2 p. 24) Dr. Williams based his opinion on his understanding of Petitioner's job duties. Dr. Williams was not supplied all the medical treatment records of Dr. Bruns and Dr. Li. (RX #2 p.23) The only record he had from Dr. Li was the MRI report. *Id*. Dr. Williams admitted he did not have the films of the MRI, but just the report. (RX #2 p. 24) Moreover, Dr. Williams was not aware of the defective condition of the can opener.

Based on the evidence depositions, the Arbitrator finds Dr. Li's opinions more persuasive, as Dr. Williams was not given all the treatment records, nor was he able to review photos or know of the working order of the can opener in question. Thus, Petitioner has proven her right wrist, elbow, and shoulder injuries are causally related to the October 2, 2017 work accident.

Regarding Issue (J): Where the medical services provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds and concludes as follows:

Incorporating the above, the Arbitrator finds Petitioner's medical treatment was reasonable and necessary and awards medical bills of:

Provider	**Charges**
Bruns Chiropractic	$19,016.00
Orthopedic & Shoulder Center	$ 6,783.00
IWIRC	$ 533.56
Prescription Partners	$ 1,334.03
TOTAL:	**$27,666.59**

Respondent shall pay the reasonable and necessary medical services of $27,666.59, as provided in Section 8(a) and 8.2 of the Act. Respondent shall be given an 8(j) credit for any payments made.

Issue (K): In support of the Arbitrator's Decision relating to (K) What temporary benefits are in dispute? The Arbitrator finds and concludes as follows:

The records demonstrate Petitioner was off work from November 9, 2017, through December 30, 2017, or seven weeks. Based on Dr. Li's persuasive testimony that Petitioner's injuries are related to the work duties, the Arbitrator finds and awards the seven weeks of TTD benefits.

The Arbitrator incorporates the findings on accident, causation and the reasonableness and necessity of the medical bills above. Dr. Li testified that after Petitioner failed conservative care which included cortisone injections, he recommended right elbow surgery and causally connected it to the work injury. (PX #3, pp. 11-13). Wherefore, the Arbitrator awards the right elbow surgery recommended by Dr. Li to treat Petitioner's right lateral epicondylitis.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015527
Case Name	Jose Silva v. Nehring Electrical Works
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0304
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Jim Magiera

DATE FILED: 8/15/2022

/s/ Deborah Simpson, Commissioner

Signature

22IWCC0304

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: medical expenses TTD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE SILVA,

Petitioner,

vs. NO: 20 WC 15527

NEHRING ELECTRICAL WORKS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission first modifies the Decision of the Arbitrator to add the award of reasonable and necessary medical expenses from Midwest Anesthesia in the amount of $2,400.00 as depicted in Petitioner's Exhibit 7. The Midwest Anesthesia bills cover services provided to Petitioner during his right shoulder surgery performed on October 1, 2020 and his cervical injection performed on June 30, 2020. The record supports the award of all reasonable and necessary medical treatment rendered for Petitioner's cervical injury through the hearing date and right shoulder injury through March 30, 2021, which is the date Dr. Ankur Chhadia released Petitioner from his care for his right shoulder at MMI. This would encompass the bills from Midwest Anesthesia included in Petitioner's Exhibit 7. After adding the Midwest Anesthesia expenses, the Commission otherwise agrees with the Arbitrator's award of reasonable and necessary medical expenses.

The Commission next modifies the award of TTD benefits to May 5, 2020 through February 14, 2021, February 17, 2021 through March 4, 2021, and March 12, 2021 through

October 21, 2021, in order to account for the light duty dates that Petitioner worked. At Petitioner's first treatment visit at Physicians Immediate Care on May 5, 2020, PA Arthur Silwa placed him on 50-pound lifting restrictions. Petitioner's treating doctors thereafter kept him either on light duty restrictions or off work completely until March 30, 2021, at which time Dr. Chhadia placed Petitioner at MMI for his right shoulder and opined that Petitioner could return to work without restrictions for his right shoulder only. Nevertheless, Dr. Chhadia noted that Petitioner was still under work restrictions for his cervical condition that was being addressed by his other medical providers. Petitioner remained on medical work restrictions for his cervical spine through the hearing date of October 21, 2021.

Although Petitioner remained on work restrictions per his treating doctors for his right shoulder and/or cervical conditions from May 5, 2020 through the hearing date, there was a period of time in which Respondent accommodated Petitioner's light duty restrictions. Specifically, Petitioner testified that he came back to work with restrictions on February 15, 2021 and February 16, 2021. However, Petitioner testified that he had difficulty performing the light duty work and was taken back off work by his doctor after those two days. Petitioner's testimony is supported by Dr. Thomas McNally's treatment note dated February 16, 2021, in which Petitioner reported experiencing soreness after trying to work light duty the day prior and Dr. McNally placed Petitioner off work in response. Brian Starr, Respondent's production manager and one of Petitioner's supervisors, also testified that in addition to February 15, 2021 and February 16, 2021, Petitioner worked light duty on March 5, 2021, March 9, 2021, March 10, 2021, and March 11, 2021. When asked if he attempted to return back to work another time from March 5, 2021 to March 11, 2021, Petitioner could not recall doing so. Nevertheless, Petitioner testified that if Respondent's records indicated that he had, they would be correct.

Based on the restrictions from Petitioner's treating doctors, which the Commission finds to be persuasive, the record supports the award of TTD benefits from May 5, 2020 through the hearing date with the exception of those dates in which Petitioner worked with light duty accommodations. Although the Arbitrator awarded TTD benefits from May 5, 2020 through October 21, 2021, Petitioner only claimed entitlement to TTD benefits on the Request for Hearing form from May 5, 2020 through February 14, 2021, February 17, 2021 through March 4, 2021, and March 12, 2021 through October 21, 21. These date ranges on the Request for Hearing form appear to account for the light duty days that Petitioner worked on February 15, 2021 and February 16, 2021, as well as from March 5, 2021 through March 11, 2021. As such, the Commission modifies the TTD award to May 5, 2020 through February 14, 2021, February 17, 2021 through March 4, 2021, and March 12, 2021 through October 21, 2021 in order to properly reflect the light duty days in which Respondent accommodated Petitioner at work.

In all other respects not specifically stated herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated December 8, 2021 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED that Respondent is liable for the reasonable and necessary

medical expenses of Midwest Anesthesia in Petitioner's Exhibit 7 in the amount of $2,400.00, pursuant to the medical fee schedule, as provided by §8(a) and §8.2 of the Illinois Workers' Compensation Act. The award of other medical expenses as outlined in the Decision of the Arbitrator is otherwise affirmed.

IT IS FURTHER ORDERED that Respondent shall pay TTD benefits of $470.85 per week for 75 1/7 weeks, commencing May 5, 2020 through February 14, 2021, February 17, 2021 through March 4, 2021, and March 12, 2021 through October 21, 2021, as provided in §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 §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 $14,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 15, 2022

DLS/met
O- 6/29/22
46

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015527
Case Name	SILVA, JOSE v. NEHRING ELECTRICAL WORKS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Jim Magiera

DATE FILED: 12/8/2021

THE INTEREST RATE FOR THE WEEK OF DECEMBER 7, 2021 0.10%

/s/Gerald Granada, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jose Silva
Employee/Petitioner

v.

Nehring Electrical Works,
Employer/Respondent

Case # **20** WC **015527**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva, Illinois**, on **10/21/2021**. 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, **5/4/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,726.30**; the average weekly wage was $**706.28**.

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

Respondent shall be given a credit of **$22,318.26** for TTD, and $**0** in PPD, **$54,282.63** for medical, for a total credit of **$76,600.89**.

Respondent is entitled to a credit for any benefits it may have paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $470.85/week for 76-3/7ths weeks, commencing 5/5/20 through 10/21/21, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any TTD it has already paid.

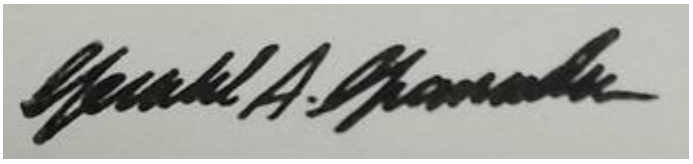
Respondent shall pay reasonable and necessary medical services of Persistent Labs, $3,905; RNS Physical Therapy, $3,035.36; Ashton Sugery Center, $20,849.40; and Suburban Orthopedics, $24,952.00, subject to the Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay pursuant to the Fee Schedule for the prospective medical care recommended by Petitioner's treating physicians, including the proposed surgery by Dr. McNally and Dr. Pelinkovic involving a C3-4 anterior cervical discectomy and fusion with local autograft, allograft, and instrumentation, and possible cage insertion.

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.



DECEMBER 8, 2021

Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Jose Silva, who alleges to have sustained injuries on May 4, 2020 while working for Respondent Nehring Electrical Works. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) notice; 3) causation; 4) medical expenses; 5) prospective medical care; and 6) TTD. Petitioner testified at the hearing via a Spanish translator.

On May 4, 2020, Petitioner worked for Respondent as a "twister operator" – a job that required him to load steel bobbins into a machine with a crane. Once the bobbins were rolled near the machine, Petitioner testified that he would lift the bobbins up, using one hand to guide the bobbin while using the other to control. The controlling portion required above shoulder height for his arm. He performed this job duty seven times per day, with six bobbins going inside the machine and one in the back. He estimated the bobbins weighed a ton. Petitioner testified he had no issues performing this job prior to May 4, 2020. In order to run the machine, Petitioner would have to take out a reel with his hands at chest level. He described the reel as being very heavy and requiring much physical force to pull and maneuver the reel. While taking out the reel with his hands, he had to use his whole body because there was no grip due to the reel being made of wood. Petitioner testified that after grabbing the reel, he sat down to perform the next part of the process when his right arm and neck started to hurt. He notified his second shift supervisor, Cody Lynch, who sent Petitioner home and told him to go to the clinic the next day. Petitioner continued to work and testified that the pain in his right shoulder worsened. Petitioner reported to work the following day and informed the morning supervisor Brian Starr of what happened. Starr sent Petitioner to the company clinic.

On May 5, 2020, Petitioner presented to Physicians Immediate Care for pain in his upper back, right and left shoulders, and his right arm with pain radiating to the right upper arm and forearm. Px1. The history indicates the injury occurred a couple of weeks prior due Petitioner's work as a machine operator which required lifting and twisting when he started to have bilateral shoulder pain. Id. On physical examination, tenderness to the bilateral shoulder, bilateral trapezius muscles, and bilateral rotator cuffs. Id. X-rays taken of Petitioner's right and left shoulders were normal. Id. Petitioner was diagnosed with right and left shoulder sprains and placed on work restrictions. Petitioner testified that Respondent did not offer Petitioner a light-duty job. Petitioner also testified that the history contained in the medical reports from this medical provider of when the accident occurred was incorrect.

On May 12, 2020, Petitioner followed up at Physicians Immediate Care with pain in the cervical spine and the right shoulder with the pain localized along the right scapular border and along the right trapezius. Px1. On physical examination, it was noted right sided neck pain with rotation and flexion and tenderness along the right medial scapular border. X-rays taken of Petitioner's cervical spine were fairly normal. Petitioner was diagnosed with strains of the right shoulder, left shoulder, and neck. Petitioner was recommended to start physical therapy and continue with work restrictions.

On May 12, 2020, Petitioner presented to Dr. Rivera at RNS Physical Therapy. Dr. Rivera diagnosed Petitioner with a cervical sprain, right shoulder sprain, recommended physical therapy for his neck and right shoulder, and placed Petitioner off work. Additionally, Dr. Rivera noted that he believed Petitioner's condition was causally related to the work accident.

On June 1, 2020, Petitioner underwent MRIs of his right shoulder and cervical spine at Fox Valley Imaging. The right shoulder MRI revealed irregular tearing of the superior labrum with suspected tiny anterior paralabral cyst versus capsular cyst and moderate to severe supraspinatus and infraspinatus

tendinopathy with fraying but no focal tear. The cervical MRI revealed a left paracentral disc extrusion at C3-C4 resulting in mild to moderate spinal canal stenosis with mild flattening of the cord; no cord signal abnormality in the cervical region and at C5-C6, annular disc fissure and disc bulge with minimal spinal canal stenosis.

On June 4, 2020, Petitioner saw Dr. Novoseletsky at Suburban Orthopaedics for pain management with complaints of constant pain and stiffness on the back of the neck that radiates down into his right shoulder and arm. Px3. Dr. Novoseletsky diagnosed Petitioner with radiculopathy, disc extrusion, and shoulder pain. Dr. Novoseletsky recommended Petitioner undergo a cervical epidural steroid injection, continue physical therapy, and continued his off-work restrictions.

On June 8, 2020, Petitioner saw Dr. Chhadia at Suburban Orthopaedics for his right shoulder pain. Dr. Chhadia diagnosed Petitioner with a partial-thickness right rotator cuff tear and right shoulder tendonitis. Dr. Chhadia recommended Petitioner continue physical therapy, remain off work, and undergo injections to the right shoulder. Dr. Chhadia administered a Triamcinolone injection into the right shoulder subacromial space at this visit and at Petitioner's follow up visit. Petitioner testified that the injections did not help. Dr. Chhadia ultimately recommended a right shoulder arthroscopic rotator cuff debridement.

On July 16, 2020, Dr. Novoseletsky referred Petitioner to Dr. Thomas McNally for a spine surgery consultation and continued Petitioner's off work restrictions. On August 4, 2020, Petitioner initially saw Dr. McNally at Suburban Orthopaedics complaining of bilateral pain starting from top of his head to his mid back and pain to the right shoulder. Dr. McNally diagnosed Petitioner with cervical radiculopathy, right shoulder pain, and cervical disc displacement. Dr. McNally recommended a noncontrast CT scan of the cervical spine, an EMG of bilateral upper extremities, and to continue following up with Dr. Chhadia, Dr. Novoseletsky, and Dr. Rivera. The August 17, 2020 CT scan revelaed a lesion at C7. Petitioner underwent an EMG on August 26, 2020 that indicated mild left C4 cervical radiculopathy.

On September 15, 2020, Petitioner underwent an independent medical examination with Dr. Theodore Suchy at the request of Respondent. Rx5. Dr. Suchy diagnosed Petitioner with a right shoulder superior labral tear and resolved cervical myositis. He noted that Petitioner's right shoulder condition was causally related to the work accident and that Petitioner required an arthroscopic evaluation of the right shoulder with possible labral repair and biceps tenodesis, along with acromioplasty. Dr. Suchy indicated that Petitioner could return to light duty work eight to twelve weeks following the surgery and maximum medical improvement six months after surgery. Dr. Suchy opined that Petitioner's neck was at maximum medical improvement.

On October 2, 2020, Petitioner underwent the right shoulder surgery recommended by Dr. Chhadia. Petitioner continued to follow up with Dr. Chhadia post-surgery on October 6, 2020, November 3, 2020, December 1, 2020, December 29, 2020, February 2, 2021, March 2, 2021, and March 30, 2021. Throughout those visits, Petitioner's right shoulder symptoms were improving and Dr. Chhadia recommended Petitioner continue physical therapy. On February 2, 2021, Dr. Chhadia placed Petitioner on light duty restrictions related to the right shoulder and continued those restrictions until March 30, 2021 when he placed Petitioner with no restrictions related to the right shoulder. At trial, Petitioner testified that his right shoulder started to feel better following the shoulder surgery, but his neck continued to remain the same. Petitioner testified that on the date of trial, he had no pain to his right shoulder and that he was about 90 percent recovered. Petitioner testified that he does not use his right shoulder at full strength due to fear of hurting his neck and that he was happy with the outcome of his

right shoulder surgery.

Regarding the cervical spine, Petitioner continued to treat with Dr. McNally on October 8, 2020, December 3, 2020, and December 22, 2020, and January 19, 2021 with similar neck complaints of radiating pain and physical examination findings. Dr. McNally continued his previous recommendations of physical therapy and off work restrictions. On December 22, 2020, Dr. McNally recommended Petitioner undergo an updated closed MRI of his cervical spine. The January 28, 2021 cervical MRI revealed multilevel cervical spondylosis, most advanced at C3-4 where there is mild stenosis and ventral cord flattening - similar to Petitioner's previous MRI. On February 16, 2021, Dr. McNally recommended a C3-4 anterior cervical discectomy and fusion with local autograft, allograft, and instrumentation, with possible cage insertion. Petitioner continued to follow up with Dr. McNally through June, 2021, who continued his recommendations for cervical surgery while maintaining Petitioner's off work restrictions. Petitioner testified that he tried to return to work for two days in Feburary, 2021, but tired quickly and was ultimately taken off work. Dr. McNally testified via evidence deposition on April 29, 2021, in which he confirmed his recommendation for a cervical fusion and noted that Petitioner's C3-4 disk herniation was consistent with a history of trauma – which was likely a causative factor in Petitioner's ongoing complaints of pain.

On April 9, 2021, Petitioner saw Dr. Harel Deutsch for an independent medical examination at the request of the Respondent for purposes of evaluating Petitioner's neck pain. Rx1. Dr. Deutsch diagnosed Petitioner with a cervical strain, opining that Petitioner did not initially complain of neck pain at during his first visit at Physicians Immediate Care. Dr. Deutsch opined that the January 28, 2021 cervical MRI was unremarkable and showed degenerative changes. He further opined that: Petitioner's condition of cervical radiculopathy was not causally related to the work accident; that eight to ten visits of physical therapy to be the only treatment reasonable and necessary; Petitioner was not malingering; and that Petitioner did not require the cervical fusion recommended by Dr. McNally. Dr. Deutsch noted that Petitioner was at maximum medical improvement for his cervical strain by July 4, 2020 and that Petitioner could work full duty without restrictions. Dr. Deutsch testified via evidence deposition on June 14, 2021. His testimony was consistent with the opinions he set forth following Petitioner's April 9, 2021 examination.

On July 13, 2021, Petitioner saw Dr. Dalip Pelinkovic for an initial spine surgery consultation as it was his understanding Dr. McNally left Suburban Orthopaedics. Dr. Pelinkovic diagnosed Petitioner with a C3-4 disc herniation and continued his off work restrictions. On August 24, 2021, Dr. Pelinkovic noted that Petitioner had maximized and failed non-operative care and recommended the same surgery as previously recommended by Dr. McNally. Dr. Pelinkovic continued Petitioner's off work restrictions.

At trial, Petitioner testified that he was paid workers compensation benefits until April, 2021 and that his benefits stopped after he saw Dr. Deutsch. Petitioner testified that he had no injuries or accidents involving his right shoulder or neck prior to the accident nor following the accident. Petitioner testified that his neck still hurt on the date of trial with a three or four out of ten pain, and that his pain localizes from the base of his skull down to his shoulders. He is taking Norco for the pain and wishes to stop taking the medication as he is afraid it may become an addiction. Due to his neck condition, he is unable to walk for a prolonged period of time, gets tired quickly from being in a position for a long time, he is unable to dance, laugh aloud, cut the yard, or perform mechanic work on his car. Petitioner testified that he wants the surgery recommended by his doctors. He is not currently working and takes pain medication

seven or eight times per week depending on how he feels.

Brian Starr, a Production Manager for Respondent was called to testify for the Respondent. Mr. Starr supervised Petitioner during his first shift and confirmed that Petitioner's job duties included removing a reel from a machine that required manually rolling the reel out of the machine. Starr confirmed that Petitioner informed Cody Lynch of the accident in which he described injuring his back while pulling the reel out of the machine.

CONCLUSIONS OF LAW

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

Regarding the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is supported by the Petitioner's unrebutted testimony and the preponderance of the medical evidence that show Petitioner developed pain in his right shoulder and later in his neck following the work activities he described. Respondent's witness Brian Starr also acknowledged Petitioner describing his pain following the removal of a reel out of a machine as reported to Petitioner's supervisor. There was no substantive evidence offered to rebut Petitioner on this issue. Accordingly, the Arbitrator concludes that the Petitioner sustained an accident arising out of and in the course of his employment with the Respondent on May 4, 2020.

WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Regarding the issue of notice, the Petitioner has met his burden of proof. Petitioner testified that he informed his supervisor of his accident on May 4, 2020 and was instructed to go to the company clinic the following day. Respondent's witness Brian Starr also corroborated the Petitioner's testimony on this issue. There was no evidence offered to rebut Petitioner on this issue. Therefore, the Arbitrator concludes that the Petitioner provided Respondent proper notice of his May 4, 2020 work accident.

IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence that shows Petitioner injured his right shoulder and neck following his May 4, 2020 work accident. Regarding the right shoulder, both Dr. Chhadia and Dr. Suchy agree that Petitioner's right shoulder condition was causally related to the work accident. Further, both doctors agree that Petitioner required the right shoulder surgery that was performed on October 8, 2020. Thus, the right shoulder condition is not at issue. The crux of the dispute in this issue is centered around Petitioner's neck condition – for which Respondent points to the fact that Petitioner did not have documented neck complaints until seven days after his work accident. The Arbitrator notes that Respondent's IME's, Dr. Deutsch and Dr. Suchy comment on Petitioner not mentioning his neck pain immediately after his accident; and that despite the various facts Dr. Suchy mentions against the finding

of causation, ultimately diagnoses Petitioner with a neck strain. However, the Arbitrator finds persuasive the opinions of Petitioner's treating physicians that it is common to have an overlap of symptoms between the shoulder and the neck. It is also very reasonable that immediately following his accident, the Petitioner's was more focused on the torn labrum in his shoulder that required surgical attention. The medical evidence shows that throughout his treatment with his various medical providers, the Petitioner consistently had complaints of pain in his right shoulder and his neck. The records are also devoid of any significant pre-existing neck complaints or intervening accidents to Petitioner's neck. Based on all these facts, the Arbitrator concludes that the Petitioner's right shoulder and neck conditions are causally related to his May 4, 2020 work accident.

WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?

Consistent with the Arbitrator's conclusions regarding the issues above, the Arbitrator further finds that the Petitioner's medical treatment for his right shoulder and neck was reasonable and necessary to address his work-related conditions stemming from his May 4, 2020 work accident. Therefore, Respondent shall pay pursuant to the medical fee schedule, and as provided in Sections 8(a) and 8. 2 of the Act the following medical expenses: $3,905.00 from Persistent Labs; $3,035.36 from RNS Physical Therapy; $20,849.40 from Ashton Surgery Center; and $24,952.00 from Suburban Orthopedics. Respondent is entitled to a credit for any benefits it may have already paid under Section 8(j) of the Act.

IS PETITIONER ENTITLED TO PROSPECTIVE MEDICAL CARE?

Consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner's request for prospective medical care is reasonable, necessary, and related to his May 4, 2020 work accident. The recommendation for surgical intervention is not unreasonable and clearly relates to his original work accident given the following facts: Petitioner has been compliant with the medical treatment of the treating physicians; he has consistently sought medical care since his work accident; Petitioner has not had any intervening accidents involving his neck; and despite his continued care, he now continues to experience pain originating from his work related neck conditions. Based on all these factors, the Arbitrator awards Petitioner his request for prospective medical care and the Respondent shall authorize and pay pursuant to the Fee Schedule for the prospective medical care recommended by Petitioner's treating physicians, including the proposed surgery by Dr. McNally and Dr. Pelinkovic involving a C3-4 anterior cervical discectomy and fusion with local autograft, allograft, and instrumentation, and possible cage insertion, and any ancillary reasonable and necessary services in connection with the surgery, including, but not limited to follow up medical visits, therapies, testing and pain management.

WHAT TEMPORARY BENEFITS ARE DUE?

Consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner was temporarily totally disabled from May 5, 2020 through October 21, 2021. Petitioner was placed off work from Dr. Rivera, Dr. Novoseletsky, Dr. Chhadia, Dr. McNally, and Dr. Pelinkovic during that timeframe. Accordingly, Respondent shall pay the Petitioner TTD for the time period in question and Respondent shall receive a credit for any TTD payments it may have made.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC015192
Case Name	Herbert Carriger v. Reynolds Consumer
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0305
Number of Pages of Decision	29
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Graham Ogilvy
Respondent Attorney	James Egan

DATE FILED: 8/15/2022

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HERBERT CARRIGER,

Petitioner,

vs. NO: 19 WC 15192

REYNOLDS CONSUMER PRODUCTS, LLC.,

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

The Arbitrator found Petitioner proved repetitive trauma accident and causation of current conditions of ill-being of bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and right shoulder impingement. He awarded Petitioner medical bills submitted into evidence and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Greatting including bilateral cubital tunnel surgeries, bilateral cubital tunnel syndrome surgeries, and arthroscopic right-shoulder surgery. The Commission agrees with the analysis and reasoning of the Arbitrator. Accordingly, the Commission affirms and adopts the substance of the Decision of the Arbitrator.

However, the Commission notes that there is a clerical error in the first line of the Findings Section of the Decision of the Arbitrator. The Arbitrator indicated the manifestation date of Petitioner's conditions of ill-being as May 8, 2010. The record establishes that the actual date of manifestation was May 8, 2019. Accordingly, the Commission changes the date in the Finding Section from May 8, 2010, to May 8, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 18, 2022, is corrected as noted above and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses presented in Petitioner's Exhibit 7 pursuant to §8(a), and subject to the applicable medical fee schedule in, §8.2 of the Act.

IT IS FURTHER ORDERE3D BY THE COMMISSION that Respondent authorize and pay for prospective treatment recommended by Dr. Greatting including bilateral carpal tunnel release surgeries, bilateral cubital tunnel release surgeries, and arthroscopic surgery for Petitioner's right shoulder impingement, as well as reasonable post-surgical treatment.

IT ISFURTHER ORDERED BY THE COMMISSION that this award in no instance shall be a bar to a further hearing and determination of an amount of temporary total compensation or of compensation for permanent disability.

IT IS FURTHER ORDERED BY THE COMMISSION that the Commission remands this case to the Arbitrator for further proceedings for a determination of an 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 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 $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 15, 2022

DLS/dw
O-7/27/22
46

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC015192
Case Name	CARRIGER, HERBERT v. REYNOLDS CONSUMER PRODUCTS, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	25
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Graham Ogilvy
Respondent Attorney	James Egan

DATE FILED: 1/18/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/ Dennis OBrien, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

HERBERT CARRINGER
Employee/Petitioner

v.

REYNOLDS CONSUMER PRODUCTS, LLC
Employer/Respondent

Case # **19** WC **015192**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 28, 2021**. 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 8, 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.

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

In the year preceding the injury, Petitioner earned $**72,800.00**; the average weekly wage was $**1,400.00**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **no** dependent children.

ORDER

Petitioner suffered a repetitive trauma accident which manifested itself on May 8, 2019, which arose out of and in the course of his employment by Respondent.

Petitioner's current conditions of ill-being, bilateral carpal and cubital tunnel syndromes and right shoulder impingement, are causally related to the repetitive trauma accident of May 8, 2019.

All of the bills introduced into evidence in Petitioner's Exhibit 7 are related to Petitioner's bilateral carpal and cubital tunnel and right shoulder impingement injuries, are reasonable, and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule.

Petitioner has not reached maximum medical improvement with respect to his bilateral carpal tunnel and bilateral cubital tunnel syndromes, and he is entitled to prospective medical treatment consisting of the bilateral carpal and cubital tunnel release procedures recommended by Dr. Greatting, as well as regular post-operative treatment as recommended by Greatting.

Petitioner has not reached maximum medical improvement with respect to his right shoulder, and he is entitled to prospective medical treatment consisting of the arthroscopic procedure recommended by Dr. Greatting, as well as regular post-operative treatment as recommended by Greatting.

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.

JANUARY 18, 2022

Signature of Arbitrator

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that as of the date of arbitration he was 68 years old. He said he had a high school education. In 1973 he began working for a food storage company which eventually became Respondent. He began as an Operator A, a training position, progressing to an Operator C within two years, running every line in the department, making everything from bread bags to body bags. After eight years as an Operator C he was transferred, becoming a parts room mechanic in the maintenance parts room where they inventoried maintenance parts and rebuilt reusable parts. He described that as being similar to an auto parts room. He worked that job until 1995, at which point he was promoted to a salaried clerk position, working more in an office. In 2002 that job was eliminated and he was fired, only to be promptly rehired as a track operator. That position operates the machine that makes the small piece that closes Ziplock bags. He worked that job until 2008 when he was moved to the actual maintenance department. He said he worked in that department from 2008 until the date of his injury.

Petitioner said he was a shift mechanic in the maintenance department, initially rotating shifts, and when a line went down he would immediately go out to it and try to get it going. He said there were 25 or 30 different machines in the plant, not just bag making machines, but machines which recycled plastic, and extrusion machines that made the plastic out of resin pellets. The only time they would really see outside contractors would be if they were installing new machinery. Petitioner said that he worked 12 hour shifts for about six months but was then able to move into the day shift as a mechanic, generally working from 7:30 a.m. to 3:30 p.m., five days per week. He said the work was similar to the shift mechanic position, but the shift mechanic was on a smaller crew.

Petitioner testified that as a maintenance mechanic he worked with many different tools, initially corded tools, but more recently cordless. In the three years prior to May of 2019 he said he worked with small hammers, 15-pound sledgehammers, wrenches from very little to three feet long, pipe wrenches from very small to four-foot long, a great number of tools. He said the machines they worked on also ranged from small to very large. He said basically his entire day was spent using hand tools, some of which required him to use a forceful grip. He said about a fourth of the bolts he had to loosen would be stuck, so when working on every machine he knew he would have trouble. There were safety rules on how much a person could do but the maintenance people were excluded from those rules so they could perform their job duties. There were times when two people would be on a wrench, and times they put an extra six-foot long pipe on a wrench to get extra leverage, and they would stand and jump up and down on them or hit them with a 15 pound sledge, they did whatever it took.

Petitioner said he worked with ratcheting tools such as a type of hoist called a come-a-long, which were in differing sizes, with the smallest to lift a half ton and the largest to lift three tons. Petitioner said he had to

reach over his head most of the time as things were hooked well above the head and he would have to pull downwards to lift things up. He said he would use come-a-longs often, perhaps 20 to 25 percent of the time. He said the amount of force required to use a come-a-long depended on what was being lifted, and sometimes two people would be needed to run the handle if the object was heavy enough. He said if you were using the three ton hoist and the object was being lifted up 30 feet, one person could not do that. He said lifting something like that would take 20 minutes of constant up and down ratcheting. He explained that the tool would have a gear reduction to handle that kind of a load, and if the handle moved a foot the load might move only three or four inches.

Petitioner testified that he used power tools, electric, battery powered and air powered, but with innovations most were now battery powered, while before 2019 they were mostly corded electric or air powered. In addition to regular drills for drilling holes, he said they had die grinders which were small and operated at high speed and, with an attachment, could cut steel, with a different attachment, a brush, could glean off the plastic which was used to make bags but had, due to a breakdown, accumulated and become a hard solid which needed to be cut off, just to get to the machine to make a repair. He said some of the drills had a high torque and, if you were not careful, you could get hurt. One three-quarter inch drill was quite big, about two feet from handle to chuck, weighed about 20 pounds and could have a foot and-a-half long bit. He said it had two handles as it took two people to run it, that with only one person it could probably break your wrist, as it was very powerful. All of these tools had triggers which had to be held or the tool would turn off. Previously some of the tools had buttons to keep them on, but those had been outlawed.

Petitioner said there would be days when he would not use a power tool as the job he was doing did not require one, while other jobs would require the use of power tools all day, but his estimation would be that he would be using power tools 10 percent of the time. He said he did not fix the same machine every day, and different machines required different tools. He said to work on some machines required the mechanics to go up, down, and sideways and do a lot of reaching in for 50 percent of the day. Machines were not brought to them for repair, they went to the machines. Every mechanic had their own tool box to carry tools as well as their own 36” X 18” X 4’ tall four wheel cart, which they would push to the machine. There was a handle on the cart for pushing, and he said fully loaded the cart weighed between 750 and 800 pounds. He said the cart was similar to a shopping cart as it had two straight wheels and two wheels which turned.

Petitioner identified Petitioner Exhibit 9 as photographs. Page one of the exhibit showed a variety of the larger wrenches he used. He said he was in the photo to show perspective. He said page two showed bolt cutters and a large pipe wrench. He said they were probably used about once per week and can require a great deal of force if the material being cut was hard steel, such as a lock. He said page three was showed a variety of lifting jacks as well as another three-quarter inch drill which was mounted on a magnet so it could be attached sideways and held in place. In the back were two machine jacks. He said page four showed one of their work areas and a yellow two-ton hoist. Page five showed their bolt room which they used for storage of steel, and housed a horizontal band saw and a vertical band saw and a variety of different ladders, as well a a grinder, a buffer wheel and a sander. On the left out of the photo was another two-ton hoist. They did steel fabrication in this area. He said that sometimes they were given jobs that required them to make parts they would then install. He said page six showed a variety of come-a-longs and straps that were used to pick up objects. On page seven were lifting rings. Pieces of machinery were manufactured with holes drilled in the so a lifting ring could be

attached to it so the object could be picked up. The rings were attached to the machines by hand. When it was available they would then use an electric hoist to lift it, if it was not available they would hoist it by hand. The photograph on page eight showed his tool box, the black box on a blue floor, being weighed with a bunch of tools. He said the blue floor was the scale, and that his tool box weighed 819 pounds. He said the photo was taken in late 2019. And no changes had been made between May 2019 and the taking of the photograph, it contained the same tools. It contained his hand bag, right above a yellow air hose. That hand bag was a shoulder bag also pictured in the photograph on page nine. A person could not take the tool cart up stairs, so common tools were contained in the bag which could be thrown over a shoulder and carried to where they needed to go. The photo on page nine showed it sitting on a scale, and showed it weighed a little more than 30 pounds. In his case the shoulder strap would be placed on his right shoulder most of the time. Page eleven was a photograph of him with the tool bag on his shoulder. Page twelve was a photo of one of their cabinets with a variety of pipe wrenches and a red chain wrench. He said the longest pipe wrench was three feet long. He said the pipe wrenches were limited on how big they could go but the chain on the chain wrench was considerably bigger and it could be wrapped around a larger item. It was used in the same manner as a pipe wrench, it required the same motions. If there was a large pipe that was stuck and needed to rotate they could take the chain around it, lock it, and move it. Page 13 showed a variety of gear pullers or bearing pullers, they are hand tools used to pull parts out. They were adjustable so that they could be wider open, go around a part, and be tightened down using a wrench so the part could be pulled of or out. The larger one probably weighed 15 to 20 pounds. Page 14 showed a cart used to pull screws, long fine threaded augers about six inches in diameter which were heated to melt resin pellets to create the material to make bags. He said they could be 16 to 20 feet long, with a few that were longer. They would get stuck, sometimes because somehow a bolt had gotten into a bag of resin pellets. They would use a come-a-long to pull the screw, while at the other end a hydraulic jack would push it. Sometimes they would try to bump it with a lift truck and at other times they would use a dead blow, 18 inches in circumference and 30 inches long, made of solid steel with two rings attached to the top, lift it with a forklift and then swing it back and forth striking it. He said he would not be surprised to find that the piece of steel weighed a ton. He said page sixteen was a photo of the nip tower, which had two big rollers in it, one steel, one rubber, and they have to be changed out, as the rubber one wears out quite frequently. He said this photo shows the conditions they had to work in, the things they had to get into, with low overhead and overextending.

Petitioner said he had previously seen Petitioner's Exhibit 1, saying it was basically his job description, but that it did not entirely reflect his job duties. He said the description of lifting 36 pounds from floor to waist was wrong, as they would lift 100 pounds. He said all of the lifting, pushing, and pulling on the document was inaccurate, too low. He said the company had safety requirements for individuals, but they did not apply to maintenance, who had to do jobs as required. The document said stair climbing was occasional, and he said he thought it was constant as they worked on five floors. He said ladder or scaffold climbing was a least frequent, as opposed to occasional, as was reaching over shoulder level. He said they were reaching somewhere at all times whether it be above their shoulders or sideways. Said the document showed wrist turning as frequent while he felt it was constant, he was always turning his wrist while performing his job, and the same was true for grasping, which he said was constant.

Petitioner said he was not claiming a single trauma accident. He said he was right hand dominant but on occasions his right hand could not reach where the job demanded and he would use his left hand. He said he began noticing problems with his hands and arm in the latter part of 2018, in December. He noticed numbness and weakness in his hands, and then in his right shoulder if he was reaching, and he would have to quit. He said he had previously had carpal tunnel surgery in both hands in 2004, and thought the surgery back then had been a success, with no residual numbness or tingling after his recovery. He said he as not diagnosed with cubital tunnel in 2004.

Petitioner testified that in January of 2019 he went to see his personal physician, Dr. Peterson, in Jacksonville, and he sent him to Dr. Trudeau for electrical studies. After those studies were performed he was referred to an orthopedic surgeon, Dr. Greatting, who he saw on May 8, 2019. At that time he was in pain and had numbness, his hands were always numb, they were numb as of the time of arbitration. He said he described his job duties to Dr. Greatting, the doctor diagnosed carpal tunnel in both hands, and cubital tunnel in both elbows. He could not remember what the doctor said about his shoulder, though he made some diagnosis in regard to it. He said Dr. Greatting recommended surgery on both wrists, both elbows, and the right shoulder. He said Dr. Greatting had him undergo a right shoulder MRI on May 21, 2019. Dr. Greatting then injected his shoulder on June 10, 2019, but that injection did not help. Dr. Greatting sent him to physical therapy for the shoulder, at Passavant Hospital in Jacksonville, for six weeks, but the physical therapy did not help the shoulder. He followed up with Dr. Greatting, who told him there was nothing more he could do, Petitioner needed surgery for the hands, elbows and right shoulder. Petitioner said he had not had any further treatment since that time.

Petitioner said that as of the date of arbitration he was still working his regular hours, with no restrictions. He said that as of the date of arbitration it hurts, though it was not extreme pain as he was testifying, but it would hurt if he had to reach or exert himself. He said his entire right hand was numb and as far as upper arm symptoms went, they affected his middle, ring, and small fingers. He said he had symptoms along the ulnar, pinky side of his forearm. He said the left hand was not as bad as the right, but they were the same symptoms in the same areas on the left, the entire left hand would go numb, though worse, again, in the middle, ring, and small fingers. He had the same type of tingling in his left forearm as he had on the right.

Petitioner said he would like to have the surgeries recommended by Dr. Greatting approved as he would like to get out of pain.

On cross examination Petitioner said his job title with Respondent was mechanic and he had been employed by Respondent for 48 years. He agreed that he underwent an EMG of his right and left upper extremities on February 25, 2019, prior to May of 2019. He said he did have a workers' compensation claim in 2004 for bilateral carpal tunnel syndrome which resulted in bilateral carpal tunnel surgery. He said he was examined by Dr. King, Respondent's IME physician, on October 7, 2019. He said he did not remember telling that doctor that his symptoms had not completely resolved after the 2004 carpal tunnel injury, and if Dr. King testified to that, it would be inaccurate. He said that when he saw Dr. Greatting on May 8, 2019 he was still working full duty. He said he did not recall Dr. Greatting at that visit telling him that he did not cause or contribute to his right shoulder issues, he could not say what Dr. Greatting thought.

Petitioner said his 750 to 800 pound cart included the weight of all of the tools on it, which included wrenches, half inch come-a-long, chains, a small gear puller, small pipe wrenches, small chain wrench, small drill, a lot of tools. He said he would push this cart all day to a job, when finished with that job it would be pushed to another, and if there was still time left in a day, to a third. He alone pushed the cart, he did not have any help. He said they almost always worked in teams performing repairs, but each person had their own cart to push.

Petitioner said that in 2019 he had some electric tools, perhaps up to 20 percent of the tools were electric. He said depending on the situation they were in using an electric tool was easier than using a manual tool. He said sometimes you could not get a power tool in to do the work, demonstrating when the tool would be going at a 90 degree angle away from the hand.

Petitioner agreed he had not lost any time from work since filing his application in this case, working full duty the entire time.

On redirect examination Petitioner was read a portion of Dr. King's IME report reflecting history given to him by Petitioner and Petitioner stated that was not what he recalled reporting to Dr. King. He said he told Dr. King what he testified to at this hearing, he noticed symptoms in the middle of December, and called his doctor.

Petitioner said he spoke to Dr. Greatting in depth about his job duties when he saw him on June 10, 2019. He said Dr. Greatting spoke to him about causation for his injuries at that time. His attorney then read a portion of Dr. Greatting's note of that day to him where the doctor said that based on his understanding of Petitioner's work duties he felt the work aggravated, or accelerated the symptoms relating to his right shoulder condition and the bilateral carpal and cubital tunnel syndromes.

Andrew Vitale

Mr. Vitale was called as a witness by Respondent. He said he was a licensed occupational therapist. After getting his bachelors degree in occupational therapy he received continuing education in injury prevention, ergonomics, functional capacity evaluations and employee safety. He said he had performed ergonomic analysis for the past 20 years, performing approximately 20 in 2021. He said the analyses were performed on-site at the job site, most of it involving watching the employee work doing their typical job activities. In addition he would take measurements, gauging repetition, force and the activities the worker was performing.

Mr. Vitale said that on October 3, 2019 he performed a job analysis on Petitioner at Respondent's facility. He said he did it as he normally would conduct an ergonomic study. In doing it he would look at the body positions, the repetitions and the activities the worker performed to assess if there was ergonomic risk associated with his activities.

Mr. Vitale identified Respondent Exhibit 2 as the ergonomic assessment he completed on October 3, 2019. He said that after observing Petitioner's work activities his overall assessment was that there was not an ergonomic risk associated with the tasks Petitioner performed. He said Petitioner was a day mechanic at Respondent's west plant. Mr. Vitale said one of the supervisors at the plant brought him to the work area,

identified Petitioner and his crew, and then Mr. Vitale observed them work. On October 3, 2019 they were using a grease gun to grease fittings on some of the equipment, performing maintenance on several machines and tensioning a chain on a gear box. He did not recall seeing Petitioner push an 800-pound cart. He said Petitioner was working in a group but performing tasks independently. He had been informed that Petitioner worked from 7:30 to 3:30 with 40 minutes of breaks during that period.

When asked his opinion of Petitioner's essential job functions, Mr. Vitale said in general he performed preventive maintenance on equipment within the plant. He said in performing his assessment he used a annual Tasks Risk Assessment, which looks at the time the worker is performing tasks and the duration of time he performed the tasks. If he were doing a tightening or wrenching task, the time between tasks, the force and the speed required to perform the tasks and whether there were any awkward to perform the tasks would be noted as would any awkward positions or vibrations associated with those tasks. For this test Petitioner's ergonomic assessment indicated that there was low musculoskeletal risk factors due to the low ergonomic risk.

Mr. Vitale said he also ran a Washington State Ergonomics Rule analysis, which looks at awkward positions of basically head to toe from the shoulders down to squatting or kneeling, looking at high hand force which could include gripping and pinching, to see if it was highly repetitive motions of the hands and wrists, or impacts, such as the base of the hand striking something, and whether there was any vibration associated with the task, as well as whether there was any heavy frequent or awkward lifting activities. Based on what he viewed the rule of ergonomic thresholds was not exceeded, as the assessment utilized a caution zone checklist that the different thresholds for force and posture and vibration were not exceeded, giving the indication that there was no ergonomic risk associated with that position.

Mr. Vitale said he also used OSHA Guidelines in doing his assessment. They look at repetition and duration of activities, postures performed by the worker doing the activities, force, vibration and if there is any exposure to those ergonomic factors. Using that assessment tool he concluded that Petitioner's activities did not exceed the threshold for repetition, duration, posture, force or vibration levels. He said this assessment was for the bilateral wrist and elbow as well as for the right shoulder. He said he also took video.

[The Arbitrator viewed the video included on Respondent Exhibit 3, which was contained in seven clips and ran a combined 41 minutes and 41 seconds. It showed Petitioner kneeling to tighten bolts with an electric drill, stand to get a grease gun and bend over to grease the back of a 2 ½ foot tall machine, pumping the grease gun five or six times with his right hand. The next clip showed him kneeling to look into a metal box on the floor with a flashlight, and walk around the machine with a co-worker, talking to another co-worker. He then unscrewed a switch and threw it, perhaps a safety switch as they were to work on the machine. He and a co-worker looked at the machine with a flashlight and the co-worker cleaned out the drum of the machine of small materials with his hand. Petitioner walked around machines to get to different places and the cameraman had to chase him and find him amongst all of the equipment. Petitioner was seen with his co-worker putting a cover back on a machine with bolts and an electric drill. Petitioner was again seen greasing various ball joints with the grease gun, again pumping it with his right hand. In doing this he at times had to climb a rolling stair ladder, and then move it to another location to ascend it again. Petitioner was then seen lubing a ball joints in an electrical area which already had its cover taken off of it. He then greased a ball joint outside of the electrical area and then reattached the cover over the electrical area, putting four screws through the metal plate cover and

the machine wall beneath while his co-worker held the plate in place. He then hand tightened the screws with his right hand and then tightening them further using a rachet with his right hand. He then climbed down approximately five feet from the elevated work area using a ladder attached to the machine. Petitioner was next seen kneeling, holding a flashlight while his co-worker was laying on his stomach working on the inside of a gear box approximately 36" X 18". The cover was off before the video began. They worked on a chain going from gear to gear for quite some time, with the co-worker doing most of the work on the two main gears while Petitioner did hand work and bench work a smaller "Run Rite" tensioning gear at the machine and at his cart. While Mr. Vitale said he did not see Petitioner having a cart, he videoed him working at it on several occasions, putting the small gear in a vise and tightening down a bolt on it using a wrench. He also caught the co-worker's cart in the video. Petitioner assisted in reattaching the chain after it was worked on by the co-worker to the gears and then in attaching the tension gear to the gear box. Oil was then sprayed on the chain and gears by the co-worker, and the co-worker was starting to reattach the gear box cover as the video ended.]

On cross examination Mr. Vitale said he probably observed Petitioner for about three hours at the beginning of his shift. He said that while he was not there for eight hours, in those areas of the report where the assessment tools on pages 4, 5 and 6 of Respondent Exhibit 2 indicate an eight hour day he said "you can look forward to kind of see how to extrapolate how much time that would encompass over a day." When asked if it was a guess he responded that it was an estimate based upon the tasks he was performing. When asked about the second area of his report, page one, entitled "Subjective interviews," he was referring to information he had been provided from Respondent. He said he did not speak to Petitioner, but he did speak to Michelle Frye, Respondent's occupational nurse and health and safety person at the plant, about Petitioner's duties. He said she did not work on the floor to the best of his knowledge, nor had she ever been a maintenance mechanic. He did not know if she ever went on the floor and watched what the employees were doing.

Mr. Vitale was asked if the job duties Petitioner performed on October 3, 2019 were representative of his usual daily tasks and he responded, "He was performing them that day, so yes." He said he knew Petitioner did more than use grease guns to grease fitting, inspect machine belts and assist a co-worker in chain tensioning. He said Petitioner would perform maintenance on rollers, motors , gear box linkages, tighten bolts, greasing, check for leaks and change oil lines, though he did not do those things while he observed him. He said he was advised of that other work in writing from Respondent, though none of the documentation he received from Respondent was contained in his report. When asked about caution zone criteria contained in his report that asked about "movements or postures that are regular and foreseeable part of the job, occurring more than one day per week and more frequently than one week per year,' he agreed he only observed Petitioner for three hours, but his opinions were based on the job information which had been provided to him about the other jobs mentioned earlier. He said his opinions were based on the tasks he observed that day, which were reported to him as being the typical tasks Petitioner would perform. He was told that by one of the supervisors who took him out to observe Petitioner, though he did not know his name and did not know if he was a working supervisor, a floor supervisor, or a supervisor in the maintenance team. He said Petitioner did not tell him these were his typical duties.

When it was pointed out that the assessment forms addressed the amount of force involved in the work and how he measured the force, Mr. Vitale said he did it by observation, there was no opportunity to utilize a grip gauge or a pinch gauge on the day he did his observation. He said he did not remember weighing any of

the tools Petitioner used. He said none of the ergonomic evaluation tools he used took age or an employee's physical condition into consideration. He agreed he was not a medical doctor.

Petitioner in Rebuttal

Petitioner was recalled as a witness and testified that what was observed on October 3, 2019 was not his usual activity, that Respondent would not pay him to do that little every day. He said these were easy activities.

On cross-examination Petitioner was reminded that he said he did not know he was being observed and was asked if the video showed him speaking to the camera if that could change his opinion. Petitioner said it could, he could not say yes or no. [The Arbitrator would note that in viewing the video there is no sound and no clear conversation with the person taking the video, though Petitioner does look in the direction of the camera on a couple of occasions.]

MEDICAL EVIDENCE

On the referral of Dr. Peterson, Petitioner was seen by Dr. Trudeau on February 25, 2019. During his physical examination of Petitioner, Dr. Trudeau found hypesthesia in the ulnar sensory distribution of both hands and when palpated over the right antecubital fossa, tingling and numbness in the right small finger. Petitioner had reduction of the right biceps and brachioradialis deep tendon reflex and a slight reduction of the right triceps deep tendon reflex. No atrophy was found. The EMG findings of that date were interpreted by Dr. Trudeau to show bilateral cubital tunnel syndrome, moderately severe on the right, mild on the left, as well as bilateral carpal tunnel syndrome, relatively slight, which he felt was more of an incidental or subclinical finding and could be a residual element of median nerve compromise from his previous surgery or a recurrent component. Dr. Trudeau did not address the subject of work relatedness, stating that subject should be addressed with a hand specialist, an upper extremity orthopedic specialist, or a plastic reconstructive specialist as they are very familiar with the work-related nature of these kinds of conditions. (PX 8 p.2-6)

Petitioner was seen by Dr. Greatting on May 8, 2019. Dr. Greatting received a history of pain in both shoulders and into his deltoid areas right greater than left for 4 – 5 months, numbness and tingling in the ring and small fingers primarily, but at times all fingers, that the numbness and tingling would bother him significantly during the day with work activities and would bother him at night. He told the doctor that he also noticed some decreased range of motion of the right elbow and some weakness of the right shoulder. He said he could still lift things, but he could not hold them as long as he formerly could. The testing by Dr. Trudeau was noted, as were Dr. Trudeau's interpretations. Dr. Greatting's physical examination of Petitioner revealed limited flexion and extension of the right elbow, tenderness over the right elbow joint area, positive Tinel's over both cubital tunnels, positive Tinel's and median compression tests over both carpal tunnels, intact motor function for the radial, median, and ulnar nerve distributions bilaterally. His right shoulder was tender over the anterior and lateral shoulder joint area but not over the AC joint. Petitioner had significant pain with abduction to about 90 degrees, but better range of motion and pain through an impingement arc. He had pain and some weakness with resisted forward flexion and mild pain with Speed test, empty can test, Hawkins impingement

test and resisted abduction and external rotation. His left shoulder only indicated mil pain through an impingement arc and mild pain with empty can test, but good strength. Dr. Greatting felt Petitioner had bilateral cubital tunnel syndrome and recurrent carpal tunnel syndrome as well as a likely chronic right rotator cuff tear and rotator cuff symptoms of the left shoulder. He recommended an MRI of the right shoulder. Petitioner described he work for Petitioner as 30 or more years as a key punch operator for Respondent with the last ten years primarily working as a mechanic using hand tools and power tools, lifting, and using grinders. X-rays of May 8, 2019 showed Petitioner to have moderate AC joint arthritis and a Type III acromion. Dr. Greatting felt Petitioner's work over time could contribute to the development, aggravation or acceleration of carpal and cubital tunnel syndromes, but with no specific injury or trauma to either shoulder he advised Petitioner that he did not think Petitioner's work activities would really have any contribution to his shoulder problems. (PX 2 p.1,2; PX 3)

An MRI of the right shoulder was performed on May 21, 2019. It revealed mild right supraspinatus and infraspinatus tendinopathy with no evidence of tearing, moderate to severe right AC joint chondrosis and mild right glenohumeral chondrosis. (PX 4)

Dr. Greatting saw Petitioner again on June 10, 2019. Dr. Greatting had reviewed the MRI images and found Petitioner's physical examination to be unchanged. He discussed treatment options with Petitioner in regard to the right shoulder and injected the shoulder joint during this visit. Petitioner was sent to physical therapy for the right shoulder. Dr. Greatting discussed possible surgery if the physical therapy did not help as well as surgeries to the right carpal and cubital tunnels at that same time. He noted that the left carpal and cubital tunnel conditions might be released at another time. At this visit Petitioner reviewed his work activities with the doctor, including a job description which the doctor thought was pretty nonspecific in regard to lifting and forceful activities. Petitioner apparently brought his shoulder tool bag to the visit which he described as weighing 30 pounds, and which he said he had to carry frequently. He described moving his 800 pound cart, including going up and down ramps, and he brought multiple photographs of tools he used regularly including pry bars and large wrenches. He also described the large machines he would have to work on and the moving of manipulating large pieces and heavy pieces of equipment with forceful pushing, pulling, gripping, and grasping. He note he had done this type of work over a period of years. Dr. Greatting said that based on his work history as he now understood it, he felt it could significantly contribute to the development or aggravation or acceleration of symptoms in his current shoulder conditions, right more than left, as well as the bilateral carpal and cubital tunnel syndromes. (PX 2 p.10)

Petitioner received physical therapy at Passavant Area Hospital from June 17, 2019 through July 8, 2019. The physical therapy was to his right shoulder. Petitioner did give history of right and left nerve complaints to the therapists, and of a spur in his right elbow which limited his motion of that joint. He complained of shoulder pain beginning in December which had gradually worsened as well as tingling and pain in his right upper bicep. He said his lower arm numbness and tingling was not associated with the shoulder but due to carpal and cubital tunnel. He noted his complaints were worse with job activity and trying to dry his back. He tolerated therapy well and they believed he did well with his exercises. When last seen on July 2019 it was noted that Petitioner had not met any of his long term goals. He had not cancelled any appointments and he had no failed to attend scheduled appointments. (PX 5 p.1,17,18)

Petitioner was seen again by Dr. Greatting on July 8, 2019. Petitioner reported no significant relief from the injection he had received at his last visit. Physical examination showed no tenderness over the right AC joint but tenderness over the anterolateral shoulder joint area and mild limitation ov active motion of the shoulder, significant pain with resisted forward flexion during the empty can test, the Hawkins impingement test and with resisted abduction. He had some mild limitation with flexion and extension of his elbow, with the latter in Dr. Greatting's opinion probably due to some arthritic changes. He continued to have a positive Tinel's over the cubital tunnel and positive Tinel's and positive compression test over his carpal tunnel The notes do not reflect if this is on the left wrist, the right wrist, or bilateral, but the previous findings had been in regard to his right arm and hand. It was Dr. Greatting's intention to perform right shoulder surgery and right cubital and carpal tunnel surgery. (PX 2 p.14)

On August 6, 2020, over a year after his last visit, Petitioner saw Dr. Greatting, reporting that things seemed to be getting worse over time. His physical examination on that date showed limitation of active motion of the shoulder, pain through the impingement arc, good strength in the shoulder but pain with certain motions and tests, as it had been before. He continued to have pain when resisting forward flexion, abduction and the an empty can test. He continued to have positive Hawkins and impingement tests. He had a positive Tinel's over both cubital tunnels and positive Tinel's and positive compression tests over both carpal tunnels. Dr. Greatting was still recommending right shoulder arthroscopy with subacromial decompression and right cubital and carpal tunnel releases, followed four weeks later by left cubital and carpal tunnel releases. Petitioner wished to proceed with the surgeries. (PX 2 p.20)

DEPOSITION TESTIMONY OF DR. MARK GREATTING

Dr. Greatting was deposed as a witness for Petitioner on August 3, 2021. He testified that he is a board-certified orthopedic surgeon with a subspecialty certification in hand surgery. He said 20 percent of his patients were seen for shoulder problems and he did more than 200 shoulder surgeries per year. (PX 6 p. 5,6,8)

Dr. Greatting testified in regard to the history of injuries and complaints, his examination and test findings and his treatment of Petitioner consistent with the medical summary, above. (PX 6 p.8-11,

Dr. Greatting said that on May 8, 2019, after he spoke with and examined Petitioner and reviewed the EMG findings, he diagnosed Petitioner to have bilateral cubital tunnel syndrome and recurrent bilateral carpal tunnel syndrome, and felt he might have a chronic tight rotator cuff tear as well as some rotator cuff symptoms in his left shoulder. He said that by recurrent he was not saying this was a continuation of the same symptoms Petitioner was having in 2004, he felt this was a new presentation of symptoms per Petitioner's reporting, that went back four to five months. At this visit Petitioner described his job duties for the past years as primarily work as a mechanic using hand tools and power tools, doing lifting, and using grinders. At that time he recommended an MRI of the shoulder, it was performed. On June 10, 2019, and he reviewed the MRI with Petitioner. He said the MRI showed tendinopathy in Petitioner's supraspinatus and infraspinatus tendons without tearing, moderate to severe right acromioclavicular joint arthritis and mild right glenohumeral joint arthritis. At this second visit with Petitioner Dr. Greatting, based upon the MRI images, changed his diagnosis for the right shoulder changed to impingement syndrome, for which he recommended a steroid injection and physical therapy. Petitioner had brought a job description to the visit that day, as well as the bag he carried his

tools in, which weighed about 30 pounds. Petitioner told him he had to carry it frequently and he also had to push an 800-pound tool cart around the factory. Petitioner also showed him photographs of various tools he used and some of the equipment he had to take apart and work on. Petitioner said he had to lift some of the equipment with forklifts or other devices and had to manually manipulate the equipment as well. Dr. Greatting administered the injection to the subacromial bursa that day. (PX 6 p.12-15,17,18)

On July 8, 2019 Petitioner was seen again and reported that neither physical therapy nor the injection had relieved his symptoms. Dr. Greatting's treatment recommendations then changed to arthroscopy with subacromial decompression for the shoulder as well as right carpal and cubital tunnel releases, followed four weeks later by left carpal and cubital tunnel releases. Dr. Greatting said Petitioner was next seen by his nurse practitioner, to whom he complained of pain in the right elbow. Dr. Greatting felt Petitioner was basically treated at that time for mild osteoarthritis in his right elbow, which would not be related to the cubital tunnel condition. (PX 6 p.15-17)

At his deposition Dr. Greatting reviewed what was later introduced at arbitration as Petitioner Exhibit 1. He said that based on Petitioner's description of his job duties, and his understanding of those duties, Petitioner's carpal tunnel conditions were related to his job duties as they were sufficiently repetitive and forceful to either contribute to his developing carpal tunnel or accelerating or aggravating the symptoms. He also based that opinion on Petitioner's describing his symptoms bothering him significantly while performing his work activities. He said the description noted frequent wrist turning and frequent gripping and grasping, both of which could be causative factors in the development of carpal tunnel, as could the use of vibratory tools as described to him by Petitioner and noted on the job description. (PX 6 p.19-22)

Dr. Greatting was also of the opinion that Petitioner's job duties contributed to his development of bilateral cubital tunnel syndrome for essentially the same reasons. (PX 6 p.22,23)

As far as the right shoulder was concerned, Dr. Greatting felt Petitioner's job duties could be a factor in the development of his shoulder condition. He said that was because of frequent activities above the shoulder, and frequent, fairly heavy lifting, pushing, and pulling activities. He said this was due to the repeated lifting of weight for over-the-shoulder reaching and the repetitive nature of the overhead work, though he did not believe the weight of the occasional lifting above the shoulder shown in Petitioner Exhibit 1 would be enough. He felt pushing and pulling could contribute to the shoulder condition. Based on his understanding of Petitioner's description of his duties he felt Petitioner's activities were sufficiently repetitive to contribute to carpal tunnel, cubital tunnel and his right shoulder conditions. (PX 6 p.23-25)

Dr. Greatting was asked if he ordered the type of study performed by Apex Network Physical Therapy, later introduced at arbitration as Respondent Exhibit 2, and he said he did not. He said the section of that report which described the types of duties that were observed by the person performing the analysis did not include all of the tasks and duties described to him by Petitioner. He said the analysis did not mention the 30-pound tool bag or the 800-pound tool cart, not did it note forceful manipulation of large pieces of equipment or the use of vibratory tools. (PX 6 p.25-28)

Dr. Greatting said that as of the date of arbitration Petitioner had not yet reached maximum medical improvement in regard to his carpal or cubital tunnels or his right shoulder conditions. He said if Petitioner continued to have the same complaints, he would continue to recommend the surgeries. He said he was of the

opinion that all of the treatment he had thus far provided was reasonable and necessary, as was the physical therapy and the injection, and that all were causally related to Petitioner job activities. (PX 6 p.33-35)

On cross examination Dr. Greatting agreed that if Petitioner was inaccurate in his description of his job duties it was possible that the analysis in Respondent Exhibit 2 was accurate. He agreed that the job description, Petitioner Exhibit 1, did not reflect Petitioner's pushing an 800-pound cart. (PX 6 p.37,38)

Dr. Greatting said that when he saw Petitioner on May 8, 2019 and in August of 2019 Petitioner was working his regular job. He agreed that on May 8, 2019 when he initially saw Petitioner, he told Petitioner that he did not think Petitioner' work duties would have contributed to his shoulder problems. He said he had not conducted an inspection of Petitioner's job duties or the tasks at Respondent's plant and that his opinion reference job duties was based solely on Petitioner's description of those duties. Dr. Greatting said the job description, Petitioner Exhibit 1, did not indicate the amount of force of any task other than pushing and pulling. He said Petitioner did not tell him how often he used vibratory tools, nor did hi tell the doctor the number of times he forcefully flexed or extended his wrists on a daily basis. (PX 6 p.38-40)

On redirect examination Dr. Greatting said he had no reason to doubt Petitioner's description and nothing he described to him caused him to think that Petitioner was being untruthful with him. He agreed the job analysis report said Petitioner's tasks varied, so it was possible the duties observed on the date of the analysis were not a full accounting of Petitioner's duties. (PX 6 p.40,41)

In regard to the May 8, 2019 office conversation with Petitioner wherein he advised Petitioner he did not believe Petitioner's job duties contributed to his shoulder problems, Dr. Greatting noted that when next seen on June 1 Petitioner gave him additional descriptions of his job duties, the duties discussed in the deposition, and that based on that additional description his opinion became that Petitioner's job duties could significantly contribute to the development, aggravation or acceleration of symptoms related to the shoulder, he changed his opinion based upon the new information. (PX 6 p.43,44)

On recross examination Dr. Greatting said he had not seen the Apex Report, Respondent Exhibit 2, until the time of the deposition, he had not reviewed prior to the deposition. He said he had not seen Petitioner Exhibit 1 prior to the date of the deposition, and he had no idea if this was the job description Petitioner initially provided to him. (PX 6 p.45,47,48)

DEPOSITION TESTIMONY OF DR. DAVID J. KING

Dr. King was deposed as a witness for Respondent on September 21, 2020. Dr. King is a board certified orthopedic surgeon concentrating in the knee, shoulder, hip and upper extremities. He testified that he performed an independent medical examination of Petitioner on October 7, 2019. He said when examined Petitioner's complaints were of right shoulder pain and bilateral hand numbness. He said the history Petitioner gave him was of an onset early in 2019, without injury. He said he reviewed medical records and reports of the MRIs of the right elbow and both shoulders, actually viewing the MRI images of the right shoulder. He thought the right shoulder MRI showed mild rotator cuff tendinopathy and severe degenerative changes of the AC joint, but no evidence of a labral tear or a rotator cuff tear. He performed a physical examination and during that he said he observed excessive facial grimacing and demonstration of pain which he felt was out of proportion to

the objective findings. He did, however, find evidence of impingement via Neer's and Hawkins testing. He did not gauge Petitioner's strength as he felt Petitioner was self-limiting. He said x-rays showed evidence of arthritis. (RX 1 p.6-14)

Dr. King said he did not see any pathology would have been caused, triggered, or aggravated by Petitioner's work activities, given his job description, as while it showed him reaching above his shoulder, the lifting was limited to five pounds. He said he did not believe Petitioner's job activities or description would have caused repetitive issues with the right shoulder. As for Petitioner's carpal tunnel conditions, he believed Petitioner, having had prior carpal tunnel surgeries, had some residual numbness, which was common. He did not believe Petitioner's work activities met criteria to be considered an aggravating or causal factor for that condition. He did not believe additional testing was necessary. He said that after his examination and initial report he received a copy of the functional analysis report prepared by Apex Physical Therapy. He reviewed that and said it did not cause him to change any of his opinions on causation. He did not believe Petitioner needed any work restrictions. (RX 1 p.15,17,18)

On cross examination Dr. King said he reviewed the Essential Job Functions form, and should have mentioned that in his report, but he had not done so. He said he did not dispute Petitioner's diagnoses of bilateral carpal and cubital tunnel syndromes, saying Petitioner did have those conditions. He said that his statement that Petitioner's carpal tunnel conditions had not resolved following the prior surgeries was due to Petitioner saying he had "improved" after those surgeries and Petitioner's not using the word "resolved" to describe them. So his not having had it resolve was just his interpretation based upon Petitioner's use of the word "improve." He said Petitioner's medical records indicated Petitioner's numbness began at about the beginning of 2019 and he agreed that he had not reviewed any document or medical record demonstrating Petitioner's continuing to have symptoms between 2004 and 2019. (RX 1 p.19,20,22-25)

Dr. King said he did not discuss the job description with Petitioner and ask him if it was accurate, he did not know if the document was correct, he just took it at face value. He admitted that the use of hand tools could involve forceful gripping and twisting and that wrist turning and gripping/grasping were both noted to be frequent as essential job functions on the job description. He said frequent forceful gripping and twisting could be a contributing factor or cause of carpal and cubital tunnel syndrome in certain circumstances, as could lifting, pushing and pulling, use of power tools, grinders, and vibratory tools. He agreed frequent vibration was part of Petitioner's job, per Petitioner's job description. He said he did not now how frequently Petitioner worked with vibratory tools. He just did not think Petitioner did any of those things enough to cause the conditions. He agreed that many of the tasks described on the job description were as witnessed in the analysis performed by Apex Physical Therapy, and he did not know if the job duties performed on the day of their evaluation were representative of Petitioner's typical work. He also said the Assessment Tools used in their study only used the activities seen on that day and could also be different if they had observed him doing different duties, and his opinions reference carpal and cubital tunnel syndromes could have changed if they had observed him doing different tasks. He said repetitive tasks could exacerbate or aggravate Petitioner's shoulder condition, also, for instance if he were doing frequent heavy above-the-shoulder lifting. It was his understanding that Petitioner's work only required him to work with nothing in his hand weighing more than five pounds, and even that would only be done on an occasional basis. (RX 1 p.25-35)

Dr. King said that as far as his work conditions were concerned, he felt Petitioner was at maximum medical improvement, but later said that generally, not just including work related conditions, Petitioner was not at maximum medical improvement, that he in fact would recommend additional treatment for Petitioner, bilateral carpal and cubital tunnel release surgeries. He said he would not have recommended right shoulder surgery as there was no obvious structural injury to treat. He said if Petitioner's symptoms were significant enough and he wanted surgery to clean up has arthritis and impingement, he could elect to do so, he just did not feel there was a need for intervention. He said if it were recommended by a doctor he would not consider it malpractice or unreasonable surgery to perform. (RX 1 p.39,40)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner

Petitioner appeared to be forthright in his testimony, answering all questions from both attorneys without any apparent attempt to exaggerate, minimize or evade full answers to the questions posed. He did not appear to physically exaggerate any action as causing pain in any way. His testimony was quite consistent with the medical records submitted and his description of the work he performed was supported with photographs showing many of the tools which would appear to be needed to perform the duties he described. The Arbitrator finds Petitioner to be a credible witness.

Andrew Vitale

Mr. Vitale appeared to also be forthright in his testimony, testifying accurately, for the most part, in regard to his observations, with confirmation of his descriptions via videotape admitted into evidence showing approximately 42 minutes of Petitioner's actions during the approximately three hours he was observed. He said his opinions were based on the tasks he observed that day, which were reported to him as being the typical tasks Petitioner would perform. He was told that by one of Respondent's supervisors who took him out to observe Petitioner, though he did not know his name and did not know if he was a working supervisor, a floor supervisor, or a supervisor in the maintenance team. While Mr. Vitale's knowledge of Petitioner's actual typical work may have been in error, he appeared to be testifying to the best of his own limited, personal knowledge. The Arbitrator finds Mr. Vitale to be a credible witness.

Dr. Mark D. Greatting and Dr. David J. King

Both Dr. Greatting and Dr. King appeared to honestly answer all questions put to them with no attempt to evade or argue with the questioners on cross examination. While their opinions differ, so did the amount of information each had received, and they both appeared to be giving their opinions as they saw them. The Arbitrator finds Dr. Greatting and Dr. King to both be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on May 8, 2019, and whether Petitioner's current condition of ill-being, bilateral carpal tunnel and cubital tunnel syndromes and right shoulder impingement, are causally related to the accident of May 8, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

Petitioner testified at great length in regard to the work he performed for Respondent for numerous years prior to the onset of symptoms in December of 2018, his initial visits with his primary care physician, his testing and his eventual post-EMG diagnosis by Dr. Greatting on May 8, 2019. Many of the tools described by Petitioner and evidenced by photographs introduced into evidence at arbitration, along with Petitioner's unrebutted testimony, indicate work which would be repetitive, such as ratcheting of wrenches, pulling of come-a-long chains, which would also be above shoulder level against resistance, forceful pulling against resistance with heavy, long wrenches, carrying of a 30 pound tool bag on his right shoulder up and down ladders and stairways, pushing of a cart weighing approximately 800 pounds throughout the factory and up and down ramps, using power tools which required forceful gripping and created torque high enough in at least the case of one tool that two people were required to hold and use it, grinders to cut steel, and other vibratory tools. Petitioner testified that he would use these tools nearly all day in performing his job. These tools and the manner in which they are used far exceed the job descriptions included on Respondent Exhibit on Petitioner's Exhibit 1, the Essential Job Functions form. That form does, however, note that those performing Petitioner's job had to frequently reach above their shoulders, and reach forward, frequently, as well as reach to the side occasionally. It also notes that they have to frequently turn their wrists and grip or grasp with their hands. It is noted that the weights estimated on that form appear far lighter than what would be anticipated based upon the testimony of Petitioner and the photographs of the tools to be used. While the form states that Petitioner would have to push or pull up to 40 pounds, his tool cart weighed approximately 800 pounds and had to not only be pushed on flat floors, but up and down ramps. The ergomatic evaluation by Mr. Vitale was similarly flawed, but not due to Mr. Vitale's lack of judgment or expertise, but due to his only watching two basic tasks, lubrication of machinery and assisting in work on three gears driven by one relatively short chain, as evidenced by Respondent Exhibit 3, a 42 minute video, and by apparent misinformation supplied by the company representative who advised him that what he would see on the morning he performed his evaluation was Petitioner's typical work, when it instead would appear to be much lighter work than he normally performed, preventative maintenance lubrication as opposed to heavy machinery repairs which could include removing jammed augers from pipes, taking pieces of machinery weighing in excess of 1,000 pounds off of machinery, fabricating steel parts in the workshop, etc.. The risk assessments included in his report were similarly of little to no value as they only included the limited, light work Mr. Vitale was sent to watch during his evaluation.

Dr. Greatting had a superior description of the work performed by Petitioner when compared to the information provided to Dr. King. Petitioner provided Dr. Greatting with information similar to that testified to

by Petitioner at arbitration, and Dr. Greatting had an opportunity to view the photographs as well. Dr. King's information was largely derived from the essential jobs function form which was, as noted above, deficient.

Respondent disputes that Petitioner's conditions of ill-being are causally related to his job duties based on the opinions of orthopedic surgeon Dr. King. While Dr. King holds the opinion there is no causal connection, he agreed that Petitioner performed the types of job duties which could contribute to his carpal tunnel, cubital tunnel, and right shoulder conditions. Specifically, he testified he agreed that using hand tools can involve forceful gripping and twisting, agreed these activities were noted in Petitioner's job description, and agreed that in certain circumstances these activities can contribute to the development of carpal or cubital tunnel syndrome. He also agreed that lifting, depending on the weight, and the use of vibratory tools can also contribute to the development of these conditions.

With respect to Petitioner's right shoulder, Dr. King agreed that frequent, above-the-shoulder lifting can aggravate the type of shoulder conditions he assessed Petitioner with. Dr. King disagreed, however, that Petitioner met certain thresholds of repetitiveness and force for his duties to contribute to his conditions. The Arbitrator finds that Dr. King's opinions are based upon an incomplete understanding of Petitioner's job duties, and therefore gives more weight to the opinions of Dr. Greatting in this regard.

Petitioner testified extensively regarding his job duties. He testified his job duties included the use of a wide variety of hand tools, including sledgehammers, three-foot-long wrenches, four-foot-long pipe wrenches, and ratcheting tools known as come-a-longs. He testified regarding the weights of various tools, and photographs depicting a variety of tools used by Petitioner in his employment with Respondent, including the larger tools described, were entered into evidence. Petitioner further testified regarding the force required to use many of these tools, that he used hand tools all day in his job, and that the use of these tools required forceful gripping. He also testified that to operate come-a-longs he would pull up and down on a handle to operate the ratcheting mechanism, and that they were often hooked above his head. Additionally, he testified that, depending on which part of a machine required maintenance, he would have to use tools while in an awkward position.

Petitioner also testified he used power tools in his job, including high torque tools such as power drills which required two employees to operate, and vibratory tools such as grinders. He testified that almost all of the power tools he used required him to squeeze and hold a trigger, and he estimated he used power tools for approximately 10 percent of a shift.

Petitioner testified his job required forceful lifting, pulling and pushing. He testified he would push a tool cart from machine to machine between jobs, and that the tool cart weighed between 750 and 800 pounds. A photograph was entered into evidence documenting the cart on a scale, which read 819 pounds. Petitioner testified he is right-hand dominant, but that he would also use tools with his left hand.

On May 8, 2019, during his initial evaluation with Dr. Greatting, Petitioner described a number of his job duties, and Dr. Greatting opined that his duties over time could contribute to or aggravate his carpal and cubital tunnel syndrome. Petitioner provided additional information regarding his job duties at his next follow up with Dr. Greatting on June 10, 2019, and also brought in a job description, his tool bag, and pictures of various tools and machines he worked on in his job as a mechanic. Dr. Greatting again opined his job duties could significantly contribute to his development of carpal and cubital, and also noted they could significantly contribute to his right shoulder condition.

Dr. Greatting testified that, based on his understanding of Petitioner's job duties, his carpal tunnel condition was related to his job duties. Specifically, he opined that Petitioner described duties which were sufficiently repetitive and forceful to either contribute to or accelerate the development of, or aggravate, his carpal tunnel syndrome. Further, his job description noted frequent wrist turning, gripping and grasping, all of which can be factors in the development of carpal tunnel syndrome, as can the use of power tools, grinders and vibratory tools. Dr. Greatting also opined that Petitioner's job duties contributed to his development of cubital tunnel syndrome for the same reasons, and that repetitive, forceful pushing and pulling, if he had to flex and extend his elbow, could also contribute.

Dr. Greatting further opined that Petitioner's job duties were a factor in his development of his right shoulder condition, that he had to do frequent activities with his arm above shoulder level, and his job involved frequent, fairly heavy lifting, pushing and pulling. He testified that the force involved with pushing and pulling is generated through the arm up into the shoulder area.

As noted above in regard to accident, Dr. Greatting demonstrated a greater understanding of Petitioner's job duties than did Dr. King. Dr. Greatting's May 8 and June 10, 2019 office notes document extensive conversations with Petitioner regarding his job duties. The description of Petitioner's job activities contained in Dr. Greatting's office notes are both much more detailed than those of Dr. King, and also more closely match Petitioner's testimony regarding his job duties. No evidence was introduced to contradict Petitioner's overall description of his duties.

Dr. King's testiimony and opinions were also based on the flawed job description and on the flawed ergonomic assessment performed by Occupation Therapist Vitale. For the reasons herein, the Arbitrator finds these documents to contain incomplete and inaccurate descriptions of Petitioner's job duties, and by relying on these documents, Dr. King's opinions are likewise of limited to no value as they are based upon an incomplete understanding of Petitioner's duties.

Dr. King's opinions in regard to the onset of Petitioner's carpal tunnel syndrome also are of little to no value, as his interpretation of and based upon the opinions of Dr. King, argues that Petitioner continued to experience symptoms following his 2004 carpal tunnel release procedures. Respondent does not dispute the onset period of either Petitioner's bilateral cubital tunnel or right shoulder conditions. The Arbitrator finds no evidence in support of Dr. King's opinion that Petitioner continued to experience carpal tunnel symptoms following his 2004 procedures.

Petitioner's testimony and medical records, as well as Dr. King's Report, all support an onset of symptoms from mid to late December 2018 to through early January 2019. Petitioner testified he began noticing numbness and weakness in his hands, as well as trouble reaching with his right shoulder, in December 2018. At his initial office visit with Dr. Greatting on May 8, 2019, Petitioner complained of bilateral hand pain, numbness and tingling over the past 4-5 months. In his Report, Dr. King noted Petitioner stated his numbness improved for a while after his 2004 procedures, and Petitioner then specified that "improved for a while" meant through the beginning of 2019. Further, Plaintiff testified he did not have any residual numbness or tingling in his hands following his 2004 carpal tunnel procedures.

While Dr. King opined that Petitioner never fully recovered following his 2004 carpal tunnel release procedures, his opinion is based in large part on Petitioner saying he had "improved" after his earlier surgeries.

He appears to think that unless Petitioner chooses to use Dr. King's preferred word of "resolved," he must have had ongoing complaints. He admitted on cross examination that his opinion that Petitioner contimued to have problems following the prior surgeries was just his interpretation based upon Petitioner's use of the word "improved." Dr. King acknowledged in his deposition that he had not reviewed any medical records documenting symptoms between 2004 and 2019, and that he could not say whether Petitioner had in fact experienced symptoms during that time. The entire basis for his opinion rather, was his subjective interpretation of Petitioner's statement that his condition improved for a while, which he took to mean that his condition improved, but did not fully recover, despite Petitioner having told him that the symptoms came on in approximately December of 2018. The Arbitrator finds no evidence supporting Dr. King's interpretation. The Arbitrator finds that Dr. Greatting's opinion, that Petitioner's bilateral carpal tunnel syndrome was not a continuation of his symptoms from 2004, is more consistent with Petitioner's testimony and medical records.

The Arbitrator finds that Petitioner suffered a repetitive trauma accident which manifested itself on May 8, 2019, which arose out of and in the course of his employment by Respondent.

The Arbitrator further finds that Petitioner's current conditions of ill-being, bilateral carpal and cubital tunnel syndromes and right shoulder impingement, are causally related to the repetitive trauma accident of May 8, 2019. These findings are based upon a thorough evaluation of the testimony of Petitioner as well as the treating medical records introduced into evidence. The Arbitrator relies primarily on the testimony of Petitioner regarding his job duties, and on the opinions of Dr. Greatting. The Arbitrator gives little to no weight to the reports, testimony and opinions of Dr. King and Mr. Vitale as they had inferior knowledge of the work Petitioner was performing.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the accident of May 8, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

The medical bills included in Petitioner's Exhibit 7 have been carefully reviewed and all appear to be for treatment and testing of Petitioner's bilateral carpal and cubital tunnel syndrome and right shoulder impingement maladies. Respondent disputes that Petitioner's medical treatment was causally related to his job duties with Respondent, and therefore denies liability for Petitioner's medical bills. Respondent does not dispute that any of Petitioner's treatment was reasonable, necessary, or related to the medical conditions at issue. Both Dr. Greatting and Dr. King testified that he agreed the treatment Petitioner had undergone by the time of Dr. King's evaluation and during Dr. Greatting's treatment of Petitioner had been reasonable and necessary.

The Arbitrator finds that all of the bills introduced into evidence in Petitioner's Exhibit 7 are related to Petitioner's bilateral carpal and cubital tunnel and right shoulder impingement injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule. This finding is based upon the medical records introduced into evidence, the testimony of Petitioner and the testimony of Dr. Greatting and Dr. King in regard to reasonableness and necessity of the treatment.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Dr. Greatting has recommended a right shoulder arthroscopy with subacromial decompression and right carpal and cubital tunnel releases, to be followed approximately four weeks later by left carpal and cubital tunnel releases. While Respondent disputes these procedures would be causally related to Petitioner's job duties, Dr. King testified that, putting aside issues of causation, he would recommend bilateral carpal and cubital tunnel release procedures.

Petitioner testified he continues to experience bilateral hand numbness, and that his symptoms went into his forearms. Dr. Greatting testified Petitioner has not reached maximum medical improvement, and that if Petitioner were to report the same symptoms to him today, he would recommend the same procedures. He also testified that the procedures would be causally related to Petitioner's job duties.

Regarding the right shoulder, Dr. King testified he would not recommend additional right shoulder treatment. He also testified, however, that Petitioner could electively choose to have a cleanup procedure if his symptoms worsened. He further testified that if a doctor were to recommend and perform a right shoulder procedure, he would not consider that to be unreasonable.

Petitioner testified he continues to experience right shoulder pain, particularly with reaching and exertion. Dr. Greatting testified Petitioner has not reached maximum medical improvement, and that if Petitioner were to report the same symptoms to him today, he would recommend the same procedure. He also testified that the procedure would be causally related to Petitioner's job duties.

The Arbitrator gives more weight to Dr. Greatting's opinion regarding Petitioner's need for further right shoulder treatment. While Dr. King testified he would not recommend additional treatment, he testified that the procedure recommended by Dr. Greatting would not be unreasonable. As Petitioner's treating physician, Dr. Greatting had significantly more time to examine, evaluate and treat Petitioner.

The Arbitrator finds Petitioner has not reached maximum medical improvement with respect to his bilateral carpal tunnel and bilateral cubital tunnel syndromes, and that he is entitled to prospective medical

treatment consisting of the bilateral carpal and cubital tunnel release procedures as recommended by Dr. Greatting, as well as regular post-operative treatment as recommended by Greatting.

The Arbitrator further finds Petitioner has not reached maximum medical improvement with respect to his right shoulder, and that he is entitled to prospective medical treatment consisting of the arthroscopic procedure as recommended by Dr. Greatting, as well as regular post-operative treatment as recommended by Greatting.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC000978
Case Name	Mikyya Bridgeman v. State of Illinois – Shapiro Developmental Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0306
Number of Pages of Decision	10
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Drew Dierkes

DATE FILED: 8/15/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIKYYA BRIDGEMAN,

Petitioner,

vs. NO: 12 WC 00978

STATE OF ILLINOIS,
SHAPIRO DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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 March 25, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $256.35 for medical expenses, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $459.55 per week for a period of 75.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 35% loss of use of the right leg.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

August 15, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 8/10/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC000978
Case Name	BRIDGEMAN, MIKYYA v. SHAPIRO DEVELOPMENTAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Drew Dierkes

DATE FILED: 3/25/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 22, 2022 0.87%

/s/ Jessica Hegarty, Arbitrator
Signature

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

March 25, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

☐ 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

Mikyya Bridgeman
Employee/Petitioner

v.

Shapiro Developmental Center
Employer/Respondent

Case # **12** WC **000978**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Joliet**, on **January 21, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 3, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**38,827.84**; the average weekly wage was $**765.92**.

On the date of accident, Petitioner was years of age, ***single*** with 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.

ORDER

- Respondent shall pay Petitioner reasonable and necessary medical expenses of $256.35 as provided in §8(a) 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 the Respondent is receiving this credit, as provided in §8(j) of the Act.

- Respondent shall pay to the Petitioner permanent partial disability benefits of **$459.55/week for 75.25 weeks** because the injuries sustained by Petitioner caused the **35% loss of the right leg**, as provided in §8(e) of the Act. (*See the attached Addendum for the Arbitrator's permanency analysis pursuant to Section 8.1b(b) 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.

Jessica A. Mozart

Signature of Arbitrator

MARCH 25, 2022

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIKYYA BRIDGEMAN, Petitioner, vs. SHAPIRO DEVELOPMENTAL CENTER, Respondent.	))))))))	No. 12 WC 000978

ADDENDUM TO THE DECISION OF THE ARBITRATOR

PROCEDURAL HISTORY

On June 12, 2017, this case proceeded to hearing pursuant to §19(b) and §8(a) of the Illinois Workers' Compensation Act. The disputed issues of accident, casual connection, medical bills and Petitioner's entitlement to TTD/maintenance benefits were addressed by the Arbitrator whose Decision was appealed to the Illinois Workers' Compensation Commission ("Commission").

On November 30, 2018, the Commission's Decision and Opinion on Review held the following:

a) The Petitioner sustained accidental injuries to her right leg arising out of her employment on November 3, 2011.
b) All medical treatment pertaining to Petitioner's right knee, to date, had been reasonable and necessary.
c) The current condition of ill being in Petitioner's right knee was causally related to the subject injury.
d) TTD/maintenance benefits were terminated effective March 19, 2013, the date the Petitioner reached maximum medical improvement.

The case was remanded to the Arbitrator for further proceedings consistent with the Commission's Decision. (See 18 IWCC 000728).

FINDINGS OF FACT

On January 21, 2022, this matter proceeded to hearing and proofs were closed before Arbitrator Jessica Hegarty in Joliet, Illinois. The disputed issues are causal connection, medical treatment and bills, and the nature and extent of Petitioner's injury. (Arb. 1).

The Petitioner testified that she remained employed by the Respondent following §19(b) hearing but was not placed in a new position at Shapiro Developmental Center as they could not accommodate her restrictions. Petitioner remains under the care of her primary care provider, Dr. Didwania for prescription maintenance.

The following restrictions, in place at the time of the §19(b) hearing, have not been modified: Maximum single lifting limit of 20 lbs. on an occasional basis, not to exceed 2/3 of a normal 8-hour workday and a more frequent lift and/or carry of up to 10 lbs. not to exceed 1/3 of a normal 8-hour workday. (Arb. Ex. 2)

In July 2018, Respondent placed Petitioner in a sedentary job as an office assistant with the Calumet Park Family Community Resource Center. When necessary, Petitioner was assisted by coworkers when a task fell outside her work restrictions. In December 2019, Petitioner transferred to the Will County Family Community Resource Center where

she remains employed today as a Public Aid Eligibility Assistant for the Department of Human Services. Petitioner currently works remotely due to Covid restrictions. Petitioner anticipates she will be required to travel to the Joliet office at some point in the future.

Petitioner earns approximately $50,000.00 per year but is not eligible for the overtime hours that she worked at Shapiro Developmental Center.

The last treatment record of Dr. Didwania admitted into evidence in the prior hearing was from May 1, 2017.

Petitioner next saw Dr. Didwania on May 26, 2017. (PX 1, p. 83). Petitioner continued to see Dr. Didwania on a monthly basis for medication management through July 20, 2018, after which, she began seeing the doctor every three months for medication management.

Dr. Didwania's records from May 26, 2017, until June 14, 2021, document consistent complaints of right knee pain and tenderness.

On June 21, 2018, Dr. Didwania administered prescriptions for Norco to address Petitioner's complaints of persistent right knee pain. (Id., p. 52-53). In December of 2019, the doctor prescribed Cyclobenzaprine for Petitioner's right knee while the December 3, 2021, records show prescriptions Norco and Cyclobenzaprine were administered. At that time, Petitioner was instructed to follow up in 3-month intervals. (Id., p. 2-3; 30)

The Petitioner testified she has not sustained injury or trauma to her right leg since she her testimony at the §19(b) hearing.

Regarding permanency, Petitioner testified that her persistent right knee pain and disability stemming from the accident at issue has vastly diminished her quality of life. She takes daily pain medications to manage her right knee symptoms and her ability to walk and traverse stairs has declined. Although she is able to drive, she experiences pain when doing so. On occasion, Petitioner will use a cane and has had multiple knee braces. Her knee pain causes issues when attending social events or her children's football games.

CONCLUSIONS OF LAW

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

Petitioner presented as an exceedingly credible witness at the hearing. To the Arbitrator, Petitioner's demeanor, testimony, and overall presentation was honest and sincere.

F. Whether Petitioner's current condition of ill-being is causally related to the injury:

There is no evidence in the record of an intervening accident or break in the chain of causation following the §19(b) hearing and subsequent Commission Decision.

The Arbitrator finds, based on a preponderance of evidence contained in the record, including Petitioner's credible testimony and the medical records, that Petitioner has sustained her burden with respect to this issue.

J. Whether the medical services that were provided to Petitioner were reasonable and necessary; Whether Respondent has paid for all reasonable and necessary medical services:

Based on a preponderance of the evidence contained in the record, including Petitioner's credible testimony and the medical records, that Petitioner has sustained her burden with respect to this issue. The Petitioner testified that her ongoing right knee treatment was being paid by her health insurance maintained through the Respondent.

Petitioner's Exhibit 2 contains medications (Norco and Cyclobenzaprine) issued Dr. Didwania to address Petitioner's on-going symptoms in her right knee. (Px.1). The Arbitrator finds that Cyclobenzaprine and Hydrocodone were the only medications listed in Petitioner's Exhibit 2 that were prescribed for degenerative joint disease. The out-of-pocket costs for those medications totaled $256.35, for which, Respondent is liable.

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 the Respondent is receiving this credit, as provided in §8(j) of the Act.

L. The nature and extent of Petitioner's injury:

§8.1b(b) of the Act provides the following:

> 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) (AMA impairment rating); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b(b).

With regard to subsection (i) of §8.1b(b), permanent partial disability impairment report and/or opinion:

No such evidence is contained in the record. Accordingly, this factor will not be considered.

Regarding subsection (ii) of §8.1b(b), the occupation of the employee:

Petitioner was employed as a Mental Health Technician for the Shapiro Developmental Center, caring for disabled individuals, for over eleven years preceding the accident at issue. The nature of Petitioner's pre-accident job required her to lift, bend and physically control patients. As a consequence of the accident at issue, Petitioner can no longer perform those physically demanding duties and cannot return to work in her prior capacity. Respondent was unable to accommodate the Petitioner's restrictions until one year following the accident, at which time, she was placed in a sedentary office job. Currently, she works remotely (due to Covid restrictions) and can perform her job duties, so long as she is able to walk, stand and sit as necessary to address her right knee pain.

Because Petitioner can no longer work in her former occupation (or any physically demanding job) and is relegated to sedentary, light duty work as a consequence of the accident at issue, the Arbitrator gives greater weight to this factor.

Regarding subsection (iii) of §8.1b(b), the age of Petitioner:

Petitioner was only 32 years old at the time of the accident. Because she has a considerable amount of time left in the work force dealing with the permanent consequences of her right knee disability and consequential job restrictions, the Arbitrator gives greater weight to this factor.

Regarding subsection (iv) of §8.1b(b), diminished future earning capacity:

Although Petitioner is earning similar wages to that earned at the time of the subject accident, she no longer

has the same overtime work opportunities that she enjoyed prior to the accident at issue. The Arbitrator gives some weight to this factor

Regarding subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records:

The Petitioner was diagnosed with degenerative joint disease of the knee following this accident. Petitioner's right knee condition remains unchanged from the time of the 19(b) hearing, her work restrictions remain in place and she is being prescribed Norco to address her pain. No alternative treatment is being recommended and it appears that the symptomology arising from the injury is consistent and permanent given the length of time that has elapsed. All of her day-to-day activities are impacted by the symptomology present in her knee. She can perform her job duties if she is allowed to sit and stand as necessitated by her symptoms. The Arbitrator gives greater weight to this factor.

Based upon the above factors and the record taken as a whole, the Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of **35% loss of use of the right leg** pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC028414
Case Name	Barry Murtaugh v. House of Blues
Consolidated Cases	16WC010441;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0307
Number of Pages of Decision	26
Decision Issued By	Deborah Baker, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	David Martay
Respondent Attorney	Peter Havighorst

DATE FILED: 8/15/2022

/s/Deborah Baker,Commissioner

Signature

DISSENT: /s/Deborah Baker,Commissioner

Signature

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

Barry Murtaugh,

Petitioner,

vs. NO: 11 WC 028414

Live Nation,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects a scrivener's error in the Arbitrator's Decision on page 18, the last sentence of the first paragraph under heading (J), should read as follows, "Accordingly, the Arbitrator finds that Petitioner failed to prove that the medical care he received following Dr. Nelson's October 18, 2011 IME was reasonable and necessary to treat or cure his claimed injuries."

The Commission corrects a scrivener's error in the Arbitrator's Decision on page 2, second paragraph of the Order, and hereby strikes, "as provided in §8(d)2," and replaces with, "as provided in §8(e)."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 29, 2021, is modified as stated herein, and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent pay to Petitioner the sum of $286.78 per week for a period of 21.5 weeks, as provided in §8(e) of the Act, for the reason that the injury sustained caused the loss of use of 10% loss of use of the right leg.

IT IS FURTHER ORDERED that Respondent is liable for payment of medical bills through October 18, 2011, subject to §8(a)/§8.2 of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,300.00. 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.

August 15, 2022

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DJB/ldm
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/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

DISSENT, IN PART

I respectfully dissent from the opinion of the majority. I would have reversed the Arbitrator's findings as to causal connection, awarded all medical expenses for treatment to the right leg, and increased the permanent partial disability award. I agree with the Arbitrator's finding that Petitioner's condition of ill-being (neuropraxia) is causally related to the stipulated August 13, 2010 work accident; however, I would have extended this finding and awarded benefits beyond October 18, 2011. Additionally, I would not have limited my findings to the sural nerve neuropraxia condition diagnosed by Dr. Noren, Respondent's section 12 examining physician. Rather, I would have also found that Petitioner's work-related injury resulted in the diagnosis of complex regional pain syndrome (CRPS)/reflex sympathetic dystrophy (RSD), of the right leg as diagnosed by Dr. Omar Garcia (8/19/13), Dr. Paul Atkenson (2/17/15), Dr. Renata Variakojis (5/19/15), and Dr. Timothy Lubenow (11/30/17 and reiterated 3/7/18). In my view, the evidence establishes that Petitioner's current condition of ill-being to the right leg is either CRPS, neuropraxia, or a combination of both conditions. Regardless of which condition, the evidence shows Petitioner continues to suffer from the effects of the August 13, 2010 work accident. Further, I disagree with the Arbitrator's credibility assessment of Petitioner as it is unsupported by the evidence.

The Commission is not bound by the Arbitrator's findings as to credibility. The Illinois 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)). To address Petitioner's credibility, the Arbitrator noted that Petitioner was a poor historian but incorrectly equated being a poor historian with withholding information. Arb.'s Dec. p. 16. In my view, Petitioner may have been a poor historian, but it would have been understandable considering the fact that the stipulated work accident occurred in 2010 and the arbitration hearing occurred 10 years later, in 2020. With respect to the information he relayed to his treating physicians, there is no evidence in the record of Petitioner lying, misleading, or failing to inform his doctors of material information. In fact, the medical records are quite consistent. While Petitioner may have had difficulty remembering specific dates, doctors' names, or other details, Petitioner confirmed the relevant details of his major diagnoses and treatments. In my view, the medical records support Petitioner's credible testimony and there is no evidence that Petitioner was untruthful during his testimony or to his doctors. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

Additionally, I disagree with several negative inferences in the Decision of the Arbitrator. The Arbitrator noted that Petitioner continued to work security for Respondent, which involved standing on his feet the entire shift. The Arbitrator also noted that Petitioner had reported to Dr. Variakojis that he would bear weight 90% of the time on his left leg because of his severe right leg pain. The Arbitrator found this to be "inherently inconsistent" with working full-time security and with "Petitioner's complaints of 8/10, even 10/10, pain to his treating physicians, as well as his testimony regarding his pain, limitations, and disability." I disagree.

I note that the Arbitrator did not point to any specific testimony or medical records in making these findings. Regardless, it should be noted that Petitioner never claimed and never testified that he was completely unable to stand or unable to work. To his credit, he continued to work while seeking medical treatment and despite having intermittent pain. Petitioner testified that the pain and numbness he felt fluctuated with the weather. Further, Dr. Variakojis' May 19, 2015 note actually helps explain how Petitioner was able to continue working and performing daily activities. Dr. Variakojis noted that Petitioner bears 90% of his weight on his left foot because the right leg is too painful. This is a reasonable explanation consistent with Petitioner's testimony that he continued to work although he continued to have fluctuating pain in his right leg. In further support of Petitioner's testimony, Dr. Atkenson's September 13, 2016 note indicates that Petitioner had fluctuating pain and numbness in the right calf since the work accident and took pain medications as well as drank beer (which he truthfully acknowledged during the hearing) to help manage the pain as "[h]e continues however to work as best as able performing security work as well as part time electrician jobs."

Further, the Arbitrator found that Petitioner should have mentioned his August 13, 2010 work injury to the chiropractor who was treating him for rib injuries he sustained in March 2016. I find this to be an unreasonable and improper inference as he did not seek treatment at Revello Chiropractic for his right leg condition. Further, when he presented to the chiropractor on March 15, 2016, his pain was listed as 10 out of 10 and he had trouble breathing. The chiropractor could not perform any testing due to his severe pain and muscle spasms. It is understandable given the severity of his rib injury that his prior calf injury was not his primary concern at that time and was not relevant to his treatment for the rib injury.

With respect to the absence of medical treatment approximately between September 2011 and August 2013, Petitioner testified as follows:

> Q. So I did notice about a two-year gap in your treatment from about September 2011 to August 2013. What was the reason for that two-year gap in treatment for your leg?
> A. I guess I had given up a little bit, and then I went to see another doctor because the pain was just killing me.
>
> Q. And what was the last date that you saw a doctor for your leg?
> A. January maybe of this year.
>
> Q. January of 2020?
> A. Yeah, I think. Since the pandemic, I haven't been out. T. 34-35.

I find his testimony to be credible as he had been treating for right leg pain for over a year without making much progress.

The parties agree that Petitioner sustained a crushing injury to his right lower leg at work on August 13, 2010. The medical records clearly document that no less than four physicians diagnosed Petitioner with CRPS/RSD:

1. August 19, 2013 note from Dr. Omar Garcia, Finlay Occupational Health:

   "Diagnoses attached to this encounter:
   Pain in limb…
   Reflex sympathetic dystrophy of the lower limb…"

2. February 17, 2015 note from Dr. Paul Atkenson, Atkenson Orthopedics:

   "Barry is having symptoms which could be compatible with chronic reflex sympathetic dystrophy syndrome (complex regional pain syndrome). Due to its chronicity unfortunately there is likely little that can be offered him from an orthopedic standpoint…."

3. May 19, 2015 note from Dr. Renata Variakojis, Center For Pain Treatment:

   "Diagnosis: Right calf complex regional pain syndrome
   Plan: At his initial visit, I had a detailed discussion with the patient about his diagnosis, the pathophysiology of complex regional pain syndrome, and his treatment options…."

4. November 30, 2017 note from Dr. Timothy Lubenow, Rush Pain Center:

   "Assessments: 1. Complex regional pain syndrome type 1 of right lower extremity…."

5. March 7, 2018 note from Dr. Timothy Lubenow, Rush Pain Center:

   "Assessments: 1. Complex regional pain syndrome type 1 of right lower extremity … discussed treatments of lumbar sympathetic block and DRG spinal cord stimulation….

   Disposition & Communication: Notes [t]oday he has physical exam findings of erythema and allodynia which fulfill the Budapest criteria for diagnosis of crps. for either crps or neuropathic pain, DRG stimulation is the preferred treatment…."

The diagnoses of CRPS/RSD are repeated in several progress notes from the above physicians and are consistently related to the August 13, 2010 work accident.

Further, the Arbitrator explicitly found the opinions of both Dr. Nelson and Dr. Noren, Respondent's section 12 examining physicians, to be reasonable and persuasive, and further found that both physicians "diagnosed a work-related neuropraxia of the right sural nerve." However, I find that Dr. Nelson and Dr. Noren's opinions differ drastically, at least initially. Dr. Noren's opinions, before he changed them in an addendum report, actually supported Petitioner's claim. To fully weigh Dr. Noren's credibility, we must look at his complete opinions, which show a material change in the opinions in his first report and the opinions in his addendum report. On April 26, 2018, Dr. Noren opined:

1. It is my opinion, to a reasonable degree of medical and surgical certainty, that Mr. Murtaugh likely has myofascial and muscular injury to his right calf related to the [8/13/2010] crush injury. **He has neuropathic findings consisting of the subjective findings of allodynia and hyperalgesia.** He has decreased motor strength consistent with decreased plantar motor function consistent with muscular injury and his pain complaints. **While here in the office, he had the objective findings of my observing his right calf turning red during the history portion of this evaluation. This swelling appears to be throughout the calf.** It is not cutaneous edema. **While Mr. Murtaugh does meet Budapest**

criteria for complex regional pain syndrome based on my examination today, it is my opinion that he has neuropathic pain localized to the region of his crush injury and consistent with his mechanism of injury. Anatomically, it would appear, based upon his injury and his complaints, that **Mr. Murtaugh has had a compression injury of the sensory sural nerve. This would be consistent with his complaints of allodynia (dyesthesia) in the back of his leg along with symptoms on the outside of his foot and fifth toe.** His pain symptoms are related to a neuropraxia of the sural nerve. Unfortunately, the Budapest criteria lacks specificity and will over-diagnose patients with this syndrome consistent with Mr. Murtaugh's pain topography and complaints. It is my opinion that Mr. Murtaugh has a neuropraxia of the sural nerve.

2. **His current complaints are related to the work injury of August 2010.**

3. **Treatment to date appears to be reasonable and appropriate**…

4. He is currently working full duty…

5. He is presently at maximum medical improvement. Use of analgesics such as low dose Norco for intermittent exacerbations of his pain may be warranted based on the history he provides that this provides relief of his symptoms. Use of Schedule II narcotic analgesics like Norco should be monitored per current guidelines. (Emphasis added.)

On May 21, 2018, Dr. Noren issued an addendum report, changing his opinions as follows:

I am in receipt of your email 5/15/18 regarding Barry Murtaugh…. It was my opinion at that time that Mr. Murtaugh has a neuropraxia of the sural nerve as related to his crush injury of 8/13/10.

I understand that he has seen Dr. Dirk Nelson on 2 occasions in 2011 and June 2016. Both of those physical exams were consistent with my exam noting decreased plantar flexion and an antalgic gait.

While I would agree with Dr. Nelson that Mr. Murtaugh was likely at maximum medical improvement as of 2011, he is likely to continue to have subjective symptoms related to his peripheral nerve injury…. I am unaware of anything within the medical record to suggest that Mr. Murtaugh is misusing opiate analgesics for the treatment of his subjective pain complaints**. While I would agree that he is a maximum medical improvement, intermittent use of opiate analgesics for his subjective pain is reasonable and appropriate….** I would agree with Dr. Nelson's assessment that, at the time of his evaluation October 2011,

> Mr. Murtaugh was likely at maximum medical improvement as related to the injury of August 2010. (Emphasis added.)

Dr. Noren's opinions from his April 26, 2018 examination and initial report are very similar to the findings of Petitioner's treating physicians. Dr. Noren found Petitioner had neuropathic findings as well as objective findings on examination. Specifically, Dr. Noren pointed out that he personally observed Petitioner's right calf turning red and swelling during the evaluation. Dr. Noren admitted that Petitioner indeed met the Budapest criteria for CRPS; however, he opined that Petitioner had a compression injury of the sensory sural nerve instead. Significantly, Dr. Noren found Petitioner's current complaints were in fact related to the August 2010 work injury and that his treatment to date had been reasonable and appropriate. The drastic change in Dr. Noren's opinion after receiving an email on May 15, 2018 from Respondent's counsel and after reviewing Dr. Nelson's section 12 examination reports, calls the opinions in his addendum report into question. Dr. Noren suddenly concluded that Petitioner had reached maximum medical improvement in 2011, just as Dr. Nelson had concluded previously. Additionally, Dr. Noren chose to highlight Petitioner's subjective complaints instead of the objective physical examination findings and his own observations. While Dr. Noren did acknowledge that Petitioner would likely continue to experience subjective symptoms and that intermittent use of opiate analgesics would be reasonable, the focus and tone of his opinions changed completely compared to his initial report. Thus, I find that the opinions in Dr. Noren's May 21, 2018 section 12 report addendum are unreliable, unpersuasive, and are not credible.

Based on: (1) the consistent histories in all the medical records which relate Petitioner's right leg symptoms to the August 13, 2010 work accident; (2) Petitioner's forthcoming, credible, and unrebutted testimony; and (3) the opinions of Dr. Garcia, Dr. Atkenson, Dr. Variakojis, Dr. Lubenow, and also Dr. Noren's opinions as detailed in his initial April 26, 2018 report, I would have found that Petitioner proved by a preponderance of the evidence that his current right leg condition is causally related to the stipulated work accident. The only contrary evidence is the lone opinion of Dr. Nelson, which was not persuasive or supported by the medical records. The only issue in this case is whether to categorize Petitioner's condition as CRPS or as neuropraxia of the sural nerve. In my view, Petitioner has proven that both conditions are related to the stipulated work accident.

Accordingly, I would have awarded the medical expenses incurred by Petitioner for treatment to the right leg and I would have increased the permanent partial disability award to 20 percent loss of use of the right leg. I note that there was no pending recommendation for prospective medical care by a treating physician and prospective medical care was not an issue at arbitration.

For the above reasons, I respectfully dissent.

/s/ *Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0307

MURTAUGH, BARRY
Employee/Petitioner

Case# **11WC028414**
16WC010441

LIVE NATION
Employer/Respondent

On 3/29/2021, 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 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2573 MARTAY LAW OFFICE
DAVID W MARTAY
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CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
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CHICAGO, IL 60603

1STATE 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

Barry Murtaugh
Employee/Petitioner

v.

Live Nation
Employer/Respondent

Case # **11 WC 28414**

Consolidated cases: **16 WC 10441**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **October 26, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 13, 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 neuropraxia ***is*** causally related to the accident but that the claimed chronic regional pain syndrome ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**24,853.92**; the average weekly wage was $**477.96**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

Respondent ***has*** 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 §8(j) of the Act.

ORDER

The Arbitrator finds that Respondent is liable for payment of medical bills through October 18, 2011 subject to the fee schedule provided by §8.2 of the Act. Respondent has paid all reasonable and necessary medical services as provided in §8(a) of the Act through this date. Petitioner failed to prove that medical care and intervention provided after October 18, 2011 was reasonable or necessary to cure or treat his claimed injuries.

Respondent shall pay Petitioner permanent partial disability benefits of $**286.78**/week for **21.5** weeks, because the injuries sustained caused the **10%** loss of the right leg, as provided in §8(d)2 of the Act.

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

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

Signature of Arbitrator

March 25, 2021
Date

MAR 29 2021

Barry Murtaugh v. Live Nation a/k/a House of Blues
11 WC 28414, consolidated 16 WC 10441

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

11 WC 28414 (DOI 8/13/2010): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

16 WC 10441 (DOI 3/12/2016): ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

Petitioner's oral Motion to Amend the Application for Benefits to substitute Live Nation as Respondent was granted without objection.

STATEMENT OF FACTS

Petitioner Barry Murtaugh was working for Respondent Live Nation's House of Blues on August 13, 2010, at which time he was 56 years old. Petitioner testified that he worked security and had been doing so for about one year. His job duties included making sure people were orderly and that there were no disruptions.

On August 13, 2010 Petitioner suffered an injury to his right leg when he was hit by a car and his leg became trapped underneath. The car hit his right calf. Petitioner testified that he did not note any pain at first but over the next hour he developed right calf pain. Petitioner testified that he went to the emergency room at Northwestern Memorial Hospital but left after about 6 hours since he was not seen.

On August 16, 2010 Petitioner presented to Dr. Joseph Mitton at Northwestern Memorial Physicians Group ("Northwestern Physicians") with pain and tenderness in his right calf (RX #1). Examination of the right calf was unremarkable except for tenderness. Dr. Mitton diagnosed right calf contusion and muscle strain. Petitioner was released to

return to work without restrictions. Petitioner followed up with Dr. Gilberto Munoz at Northwestern Physicians complaining of right leg dull throbbing. The examination was again unremarkable except for tenderness to palpation. Dr. Munoz also diagnosed right calf contusion and muscle strain. He too released Petitioner to full duty work.

Petitioner returned to Dr. Mitton October 22, 2010. Petitioner reported that his symptoms had improved but had not completely resolved. The right lower extremity was again tender. Full extension of the ankle reproduced calf pain. Dr. Mitton ordered X-rays of the lower leg and a vascular flow test. He again diagnosed right calf contusion and muscle strain and again released Petitioner to work without restrictions.

Tibia/fibula X-rays and a venous duplex study of the legs were performed at Northwestern Memorial Hospital on October 22. The X-rays were normal except for mild degenerative changes in the right knee. There was no evidence of acute deep vein thrombosis on the venous duplex examination (PX #1 & RX #2). Petitioner saw Dr. Mitton again on October 26, 2010, who ordered 6 sessions of physical therapy but again released Petitioner to return to work without restrictions.

Petitioner began physical therapy at Accelerated Rehabilitation Centers (now Athletico) on November 22, 2010 (PX #10). Petitioner complained about Dole throb and tenderness in the posterior right calf which is aggravated by any pressure.. He did complain of some difficulty walking due to right calf pain and was able to run. He reported sleep disturbed by pressure on the right calf when rolling over in bed. He rated his pain at 0–6/10. Petitioner continued with therapy through December 14, 2020. He reported his pain was 1/10 but increased to 7/10 when walking for prolonged periods of time, climbing stairs, and twisting or pivoting to the left. The therapist noted some improvement through the 6 sessions of therapy but recommended additional therapy at 2 times a week for an additional 3 weeks.

Dr. Mitton saw Petitioner again on January 14, 2011 after 6 sessions of physical therapy (RX #1). Petitioner's presentation was essentially unchanged, although he complained of tenderness was over a larger area of the right lower leg. He was unable to stand on tiptoe with the right foot. He reported no improvement with physical therapy and reported occasional tingling in all toes of the right foot. Dr. Mitton recommended an MRI of the right calf, which was done February 1, 2011 at Oak Lawn MRI (PX #1). The MRI was negative.

Petitioner testified he returned to Dr. Mitton on February 7, 2011 to review the results of the MRI. Dr. Mitton diagnosed neuropathy and referred him to Dr. Joseph Ihm. Petitioner presented to Dr. Ihm that same day with continued right calf pain. Petitioner

gave a history of his calf being pinned at by a car bumper. Petitioner reported the pain was fairly localized to the calf but did occasionally radiate down to the ankle. Petitioner also reported chronic low back stiffness. He also had very rare toe numbness (PX #1).

On examination Dr. Ihm found no atrophy, ecchymosis, edema, erythema, or swelling around the area of pain. Petitioner reported 3/10 pain to light palpation along the midline of the calf. Dr. Ihm noted altered sensation from the midline of the mid-calf down into the distal leg to the lateral heel, compared to the left side. Straight-leg raise provoked his usual symptoms. Dr. Ihm diagnosed possible right traumatic sural neuropathy and recommended a Lidoderm patch for the right leg. Dr. Ihm made no recommendation regarding work status.

Petitioner's presentation was essentially unchanged at a follow-up visit with Dr. Ihm on February 28, 2011. The diagnosis and recommendation remained the same. Dr. Ihm again made no recommendation regarding work status.

Petitioner saw Dr. Mitton again on March 11, 2011 and April 15, 2011 (PX #1). There were no clinical notes for either visit. Dr. Mitton at again noted that Petitioner could return to work without restrictions. Petitioner had an EMG/NCS of the right leg July 20, 2010 on referral by Dr. Mitton. There was no evidence of right lower sciatic, sural, or tibial mononeuropathy (RX #2).

Petitioner testified he saw Dr. Jane Cullen at Northwestern Physicians on July 22, 2011 for his right calf pain. There were no clinical notes for this visit. Dr. Cullen recommended Petitioner return to work with mostly seated work. Petitioner testified he returned to Dr. Mitton on September 23, 2011 and was prescribed narcotics for his pain.

At the request of Respondent, Petitioner was examined by orthopedic surgeon Dr. Dirk Nelson for a §12 IME on October 18, 2011 (RX #3). Petitioner gave a history of being slowly struck on the back of his right calf but being pinned in a flexed position with his heel pinned to the ground. Petitioner had ongoing right leg complaints from the injury on August 14, 2010. Dr. Nelson noted a Doppler flow study, plain X-rays, and an EMG showed no abnormalities. Petitioner reported that he had been working full duty except for a couple of weeks after his EMG when he had increased symptoms. Petitioner was not on any medication, "as they do not make any difference in his symptoms." He has mid-calf pain when he points his toes down, as in plantar flexion. He also had occasional numbness in his great toe as well as the third or fourth toes.

Dr. Nelson noted the physical examination was essentially normal except for weaker plantar flexion power. He diagnosed a crush injury to the right calf resulting in

muscular damage. Dr. Nelson opined that Petitioner had reached a healing endpoint, required no additional medical care, and could continue full duty work.

Petitioner presented to Dr. Omar Garcia at Finlay Occupational Health for his ongoing right leg issues on August 19, 2013 (PX #9). Petitioner gave a history of his accident that was consistent with prior accounts. He reported he was taking hydrocodone for pain. He had pain when he points his toes down such as plantar flexion. He had occasional numbness in the great toe as well as third and fourth toes, but not often. He rated his pain as 2/10. He also reported consuming 6 beers a day.

On examination Petitioner had discomfort to superficial palpation of the calf. Dorsiflexion strength was normal but plantar flexion strength was decreased. Sharp and dull sensation to the right foot was also increased. Skin on the right foot appeared slightly hyperhemic [*sic*] but there was no edema in either foot. Dr. Garcia diagnosed reflex sympathetic dystrophy of the lower limb and ordered a bone scan.

The bone scan, performed September 4, 2013 at Ingalls Memorial Hospital, noted degenerative uptake in both hands, the right ankle, and the first toe of the right foot (PX #7). Petitioner returned to Dr. Garcia at Finlay Occupational on September 23, 2013, March 31, 2014, July 21, 2014, and November 14, 2014. His clinical presentations were essentially the same except for gradually increasing complaints of pain, 8/10 as of November 14, 2014. A referral to a pain specialist for a lumbar sympathetic block was advised each time. On November 14 Petitioner reported he had seen one pain specialist but disagreed with that diagnosis. He had since seen another pain specialist who agreed to perform a sympathetic block (PX #9).

Petitioner saw orthopedic surgeon Dr. Paul Atkenson on February 17, 2015 with chronic right calf and leg pain (PX #8). Petitioner reported that he worked as a security guard and part time electrician. He gave a history of the accident that was consistent with other reports. He reported that he has chronic right calf pain would fluctuate from only annoying to at times severe. He was taking Norco for pain relief and as a sleep aid. A trial dose of Gabapentin caused adverse side effects.

The physical examination was noteworthy for increased tenderness to light touch over the right calf. The calf was less tender when the knee was flexed but more pronounced when extended. Petitioner was unable to toe walk secondary to pain. Dr. Atkenson found Petitioner's symptoms "could be compatible" with complex regional pain syndrome ("CRPS"). He recommended a consultation with pain management to determine if a sympathetic block or treatment with other medication would be beneficial.

Dr. Renata J. Variakojis wrote a consultation note to Dr. Atkenson May 19, 2015 regarding his evaluation of Petitioner's condition (PX #14). Dr. Variakojis noted Petitioner's history of injury on August 13, 2010 when a car drove onto his right calf. Petitioner complained of persistent right calf pain since then which was steadily growing worse. Petitioner complained of calf pain all the time and experiencing burning, sharp, shooting, aching, throbbing, stabbing, and cramping pains. The doctor noted the right calf and foot were discolored compared to the left. Hypersensitivity to light touch was also noted. Petitioner reported that he bears "90%" of his weight on his left foot because his right leg was too painful. Petitioner complained of shooting pains into the right heel.

On examination Dr. Variakojis noted a positive straight-leg raise test on the right. Right leg motor strength was normal except for 3/5 strength in right ankle plantar flexion. The doctor noted decreased temperature, hyperalgesia, allodynia, and increased muscle tension in the right calf. Dr. Variakojis diagnosed right CRPS. He recommended a right S1 nerve root block as well as a series of nerve blocks to attenuate the neurogenic pain. He added that if that plan failed Petitioner might benefit from a trial of spinal cord stimulation.

Petitioner returned to Dr. Variakojis at the Center for Pain Treatment on September 3, 2015 (PX #6 & PX #14). He complained of 7/10 right calf pain and numbness in the right toes. Petitioner reported that his pain had gotten worse throughout the right calf and that it hurts to drive. The doctor's notes were handwritten and occasionally difficult to decipher. On examination Dr. Variakojis noted right calf myalgia and spasm but no color changes. The doctor diagnosed right calf CRPS and prescribed Lorzone as well as continuing Norco.

Petitioner returned to Dr. Variakojis on December 8, 2015, complaining that his toes were numb and that is right calf felt "like as brick." Petitioner complained that "things are getting worse." Dr. Variakojis noted the allodynia was worse. He also noted right calf hyperesthesia but no color changes. Dr. Variakojis continued with his diagnosis of CRPS but added right lumbosacral radiculopathy. He recommended a lumbar MRI and noted that Petitioner could benefit from an S-1 nerve root block.

Petitioner was injured again on the job on March 12, 2016, at which time he was 62 years old. He was again working security for Respondent. Petitioner was escorting a patron who had been punching somebody out of the club when the patron fell and pulled Petitioner down with him. Petitioner testified he fell onto the edge of a bench with his ribs and "fractured a few ribs."

Petitioner was transported that day by ambulance to Northwestern Memorial Hospital where he was examined and treated in the emergency department (PX #1). X-

rays of the thoracic and lumbar spines were negative for fracture. Reports on X-rays of ribs were not included in Petitioner's Exhibit #1.

Petitioner returned to Dr. Variakojis on March 15, 2016 complaining of 9/10 right-sided mid back pain which radiated into the lower back (PX #8 & PX #14). He also complained of right calf pain and told numbness. Petitioner reported that on Saturday he broke up a fight and landed on his back against a chair. The doctor diagnosed right rib fractures and contusions.

Petitioner returned to Dr. Variakojis on March 24, April 4, April 20, May 5, May 19, June 2, June 16, July 7, August 31, October 13, November 10, December 8, 2016 January 9 and March 7, 2017. Petitioner complained of mid back and right calf pain of varying intensity. Dr. Variakojis' care seemed limited to managing medication.

Petitioner presented for care at J Revello Chiropractic on March 15, 2016 (PX #3). Petitioner reported that he sustained multiple rib fractures while trying to break up a bar fight. Petitioner complained of 10/10 pain. A pain diagram indicated pain over the spine from the neck to the low back and in the right flank. Petitioner was diagnosed with mid back pain, muscle spasms, and neck pain. There were no documented complaints of right calf pain or pain diagram markings of the right calf on intake or at any time during treatment. There was no history recorded of Petitioner's right leg injury from August 2010. Petitioner received chiropractic care through July 9, 2016.

At the request of Respondent, Petitioner saw Dr. Dirk Nelson for another §12 IME on June 7, 2016 (RX #3). In addition to a clinical examination Dr. Nelson reviewed additional medical records. On examination Dr. Nelson noted Petitioner was in no acute distress. He walked with a slight right-sided limp. Dr. Nelson noted a slight muscle contour or irregularity on the right calf. There was hypersensitivity in the upper third of the calf. Dr. Nelson noted no skin changes, particularly no trophic changes. Dorsiflexion power of the right foot was normal but plantar flexion was weak. Petitioner could toe-raise on the left but not on the right.

Petitioner reported he had been injured March 12, 2016 when he fell and broke three or four ribs on his right side. He was currently off work at the time of the IME. He did not report rib cage or back pain.

Dr. Nelson diagnosed a crush injury to the right calf on August 14, 2010 which caused a condition of chronic pain. He disagreed with Dr. Variakojis' diagnosis of CRPS, noting there were no trophic skin changes and that CRPS is actually pain in the entire extremity and not a localized pain problem. Dr. Nelson noted Petitioner's extensive chiropractic care which would not be indicated for a crush injury diagnosis. He added

that the chiropractic treatment was for back related conditions and not related to Petitioner's calf injury. Dr. Nelson also noted a significant gap in treatment between 2010 in 2011 and Petitioner's pain management consultation in May 2015.

Dr. Nelson continued to opine that Petitioner was at MMI and that additional medical care would not improve Petitioner's chronic pain condition. Dr. Nelson noted that Petitioner did not find any positive Waddell signs or other non-physiologic findings but noted there were no objective findings to support Petitioner's complaints of increasing pain or hypersensitivity. He further opined that Petitioner could return to full-time regular duty work.

Petitioner returned Dr. Atkenson on September 13, 2016 complaining of continued pain in his right calf (PX #8). He described pain throughout the calf which was worse with walking or resting the calf on a mattress or even a blanket resting on it. Petitioner reported taking Norco for pain or drinking several beers for the same purpose. The examination noted tenderness upon palpation of the right calf as well as "more firmness" than the left.

Dr. Atkenson assessed continued pain from a severe crush injury. He suspected neuropathic pain given the character and severity of the pain as well as the duration. He recommended a series of sympathetic blocks which Petitioner should pay out-of-pocket if not approved by workers compensation. He was unclear on how beneficial sympathetic block injections would be, noting administration of sympathetic block injections are more helpful in the early stages. Dr. Atkenson recommended Petitioner wean off Norco but did recommend a trial of Lyrica.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Atkensen.

Petitioner consulted Dr. Timothy Lubenow at Rush Pain Center on November 30, 2017 with continued right leg complaints (PX #5). Petitioner gave a history consistent with prior accounts. He complained of pain starting in his calf and radiating to the lateral aspect of his right mid shin. He described the pain as burning electrical pain on average 2–6/10. He reported that he no longer used Norco and that he felt "loopy" with Gabapentin. Petitioner did not try the recommended Lyrica because of his mother's adverse reaction to that medication.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Lubenow.

On examination Dr. Lubenow noted some skin color changes in the foot, some swelling/hardening of the right calf, numbness in the right 3rd to 5th toes, and decreased range of motion in his ankle/foot. Petitioner noted he had been scheduled for some LSB (lumbar sympathetic block) but had been unable to obtain authorization. Dr. Lubenow diagnosed Petitioner with type 1 CRPS and started Cymbalta.

Petitioner saw Dr. Lubenow again on December 28, 2017. His presentation was unchanged from before Dr. Lubenow's assessment then was neuropathic pain (primary). A spinal cord stimulator was discussed as an option, but Petitioner preferred oral medication. Dr. Lubenow recommended a trial of Zanaflex as well as prescription drug monitoring. Petitioner testified that he saw Dr. Lubenow again on March 7, 2018 with continued right calf pain since a motor vehicle accident, then almost 8 years prior. Dr. Lubenow thought he may require sympathetic blocks.

At the request of Respondent, Petitioner presented to Dr. Richard Noren for another §12 IME on April 26, 2018 (RX #4). In addition to a clinical exam Dr. Noren reviewed Petitioner's medical records including Dr. Nelson's IME reports. Petitioner gave a history of his injury which was consistent with his other accounts of the event. Dr. Noren noted that Petitioner was currently being treated by Dr. Lubenow but that a prior pain physician's practice privileges had been suspended due to medication prescribing.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Noren.

Petitioner reported continued right leg complaints from the work-injury on August 13, 2010. Petitioner complained that his right leg intermittently turned red and felt swollen. He stayed in stated it felt like a "brick.". He denied any hair or nail changes. He reported intermittent weakness in the calf. Although the calf never felt cold but intermittently felt hot. Petitioner reported that sometimes the pain was worse due to his pant leg rubbing across it. He reported that he felt terrible when he rode his motorcycle. He reported his pain fluctuates between 2–8/10 and that pain interferes with his sleep.

Dr. Noren noted an antalgic gait. There was allodynia and hyperalgesia over the right calf but none on the left. Right plantar flexion strength was 1/5. Dr. Noren did note that Petitioner's right calf briefly turned red during the history portion. He also noted the right calf appeared swollen while seated compared to the left.

Dr. Noren diagnosed a myofascial and muscular injury to the right calf related to the crush injury. Petitioner had neuropathic findings consistent with the allodynia and hyperalgesia. Dr. Noren noted Petitioner met the Budapest criteria for CRPS but opined

that he had localized neuropathic pain consistent with the mechanism of his injury. Dr. Noren opined that Petitioner had a compression injury of the sensory sural nerve and neuropraxia of the sural nerve. Dr. Noren clearly stated that Petitioner did not have CRPS.

Dr. Noren opined that treatment to date appeared to be reasonable and appropriate. He did not believe a spinal cord stimulator or dorsal root ganglion stimulator were indicated. Likewise, lumbar parasympathetic plexus blocks were also not indicated for the treatment of CRPS. Dr. Noren noted that Petitioner had no occupational deficits, observing that Petitioner worked as security at House of Blues as well as a second job as an electrician. He opined that Petitioner was at MMI but that intermittent low dose Norco may be warranted for exacerbations of pain. He added that use of Schedule II narcotics should be monitored per current guidelines.

Dr. Noren authored an addendum report May 21, 2018 ((RX #2). He repeated his diagnosis of sural nerve neuropraxia related to the work-injury on August 13, 2010. Dr. Noren reiterated his agreement with Dr. Nelson that Petitioner had been at MMI since 2011. He also noted that Petitioner was likely to continue to have intermittent subjective symptoms that would require palliative care with monitored opiates.

Petitioner saw Dr. Lubenow again on July 18, 2019 who advised Petitioner he may require ongoing pain management (PX #16). Petitioner's complaints and presentation were unchanged. He reported he had tried Gabapentin, Cymbalta, and Zanaflex but did not like the cognitive and sedating side effects. Petitioner did not fill a Mobic prescription since the last visit. He stated that Norco is the only thing that has helped his pain. Petitioner also stated that he was hesitant to try a spinal cord stimulator because friends had had bad results and that he did not want "a hockey puck in my back."

Dr. Lubenow repeated his assessment of CRPS type I. A spinal cord stimulator versus peripheral nerve stimulator was discussed. Petitioner was hesitant to pursue any interventional procedure.

Petitioner testified that he still works at House of Blues, both inside and outside, although he was not working at the time of trial due to Covid-19 pandemic restrictions. His work shifts varied from 4 hours to 14 hours, all of which he spent on his feet. Respondent did not provide any accommodation for his continuing complaints. The injuries had not affected his earnings from Respondent.

Petitioner testified that he continues to experience stabbing pain and numbness in his right leg. Four of his toes are numb especially with weather changes. Petitioner testified that he has pain every day with walking and standing. He also noted that the

skin around his calf turns colors from time to time. He testified that narcotic medication is not currently prescribed and that he does not take over-the-counter medication for pain relief. Rather, he drinks 6 to 10 beers a day for pain relief.

On cross-examination Petitioner acknowledged that he had also worked a second job as an electrician. He added that he asked his employer for lighter work because of his leg but admitted that his job did not change much.

Petitioner further testified that had "given up a bit" when he did not seek medical care from September 2011 to August 2013. He also testified that he was off work about 4 or 5 months due to his rib injuries, although no claim for unpaid Total Temporary Disability was made. He added that riding his motorcycle was painful but that he could otherwise perform daily activities.

CONCLUSIONS OF LAW

11 WC 28414 (DOI 8/13/2010):

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

There is no dispute that Petitioner sustained an injury of some sort to his right lower leg that was causally related to his work accident on March 13, 2010. The dispute is whether Petitioner sustained chronic regional pain syndrome ("CRPS"), as diagnosed by Drs. Paul Atkensen, Renata Variakojis, Omar Garcia, and Timothy Lubenow, or a crush injury to the sural nerve with neuropathic pain, as diagnosed by Drs. Dirk Nelson and Richard Noren.

The number of witnesses testifying to a particular fact or rendering opinions may not be convincing if a lesser number of witnesses as to that fact or opinion is more convincing. Here, the Arbitrator finds the lesser number more convincing. The Arbitrator finds that Petitioner failed to prove that he sustained CRPS that was causally related to his work accident on March 13, 2010.

The diagnoses proffered by Drs. Atkensen, Variakojis, Garcia, and Lubenow are based, as is any diagnosis, on both objective findings and subjective complaints. A valid and reliable diagnosis is reliant on a full and accurate history and report of subjective complaints. In this matter Petitioner was a poor historian in that he withheld pertinent elements of his history from treating healthcare providers. As such, Petitioner's credibility is questionable. This lack of credibility and reliability as a historian undermines the diagnoses of Drs. Atkensen, Variakojis, Garcia, and Lubenow.

Petitioner testified that while employed as security for House of Blues he also worked part-time as an electrician. Petitioner's working as an electrician presents an inherent inconsistency with Petitioner's testimony regarding continuing pain, limitations, and disability. The Arbitrator notes that work as an electrician often requires climbing, crawling, and squatting. Someone with Petitioner's claimed injury would a difficult time performing the ordinary work of an electrician.

In addition, Petitioner testified that he continued to work security for Respondent, even with occasional 12 to 14-hour shifts, all of which were on his feet. He reported to Dr. Variakojis that he would bear weight 90% of the time on his left leg because of his severe right leg pain which is also inconsistent with working full time security for shifts up to 14 hours long. Petitioner further testified that Respondent afforded no accommodation for his claim limitations and disability. This too is inherently inconsistent with Petitioner's complaints of 8/10, even 10/10, pain to his treating physicians, as well as his testimony regarding his pain, limitations, and disability.

Further, when Petitioner sought chiropractic care for the rib injuries he sustained in his later work accident in March 2016 he did not give a history of his 2010 work accident, or the injuries he claims from that accident, or the continuing complaints of pain, limitation, and disability he claims in this matter. There were no markings on pain diagrams indicating any pain or other complaint with the lower right leg.

As noted above the Arbitrator found the opinions Drs. Nelson and Noren reasonable and persuasive. Drs. Atkensen, Variakojis, Garcia, and Lubenow based their diagnoses of CRPS on Petitioner's subjective complaints and their clinical findings limited to a relatively small area of Petitioner's right calf. Drs. Nelson and Noren opined persuasively that Petitioner's presentation did not satisfy the diagnostic criteria for CRPS, specifically noting that CRPS is a regional pain syndrome. They emphasized that Petitioner's subjective complaints and clinical findings were localized and not regional.

It is noteworthy that neither Dr. Mitton nor Dr. Ihm diagnosed CRPS or neuropraxia. It is equally noteworthy that Petitioner continued to work without medical intervention between September 2011 and August 2013. This too casts doubt on the credibility of Petitioner's claims of pain, limitation, and disability.

Drs. Nelson and Noren diagnosed a work-related neuropraxia of the right sural nerve. Both persuasively opined that Petitioner had achieved MMI as of Dr. Nelson's first §12 exam on October 18, 2011. Accordingly, the Arbitrator adopts the diagnoses and causation opinions of Drs. Nelson and Noren.

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?

There is no dispute that Petitioner injured his right leg on August 13, 2010 when his right leg was hit by a car while working for Respondent. Petitioner has received significant medical intervention since his injury, albeit with a gap between September 2011 and August 2013. However, as noted above, the Arbitrator found the opinions of Drs. Nelson and Noren that Petitioner had achieved MMI by October 2011 reasonable and persuasive. Accordingly, the Arbitrator finds that Petitioner failed to prove that the medical care he received following Dr. Nelson's October 28, 2011 IME was reasonable and necessary to treat or cure his claimed injuries.

Dr. Nelson opined at his October 2011 and June 2016 IMEs that Petitioner did not require further medical intervention, particularly noting that further medical care would not relieve petitioner's chronic complaints. Dr. Noren did opine that although at MMI Petitioner may require monitored use of opiates for symptomatic relief of his subjective complaints. There was no evidence offered to the frequency or extent of monitored prescribed opiates. Further, the issue of monitored prescribed opiates apparently is mooted by Petitioner's testimony that none of his treating physicians would prescribe these drugs and that he self-medicated for pain with 6 to 10 beers a day.

Accordingly, the Arbitrator finds that Petitioner failed to prove that the medical care and intervention provided after Dr. Nelson's October 18, 2011 IME was reasonable and necessary to cure or relieve the effects of the injury he sustained at work on August 13, 2010. Charges and fees for any and all medical care or intervention provided before October 18, 2011 shall be adjusted in accord with the medical fee schedule provided in §8.2 of the Act.

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

It is undisputed that Petitioner sustained some sort of right leg injury as a result of his August 13, 2010 work accident.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating was admitted in evidence. The Arbitrator cannot give any weight to this factor.
ii) Petitioner work as security at a nightclub/music venue working shifts he testified would last up to 14 hours. The Arbitrator gives some weight to this factor.

iii) Petitioner was 56 years old at the time of his injury. He had a statistical life expectancy of approximately 25 years. Given the chronic nature of his continuing complaints, albeit disputed causation, the Arbitrator gives moderate weight to this.

iv) Petitioner was continually released to full duty work by his treating physicians. In addition, there was evidence that Petitioner worked part-time as an electrician during the period of his claim disability. There was no evidence that Petitioner's earning capacity was adversely affected by his claimed disability. The Arbitrator gives great weight to this factor.

v) Petitioner was treated by a string of physicians who opined that he developed chronic regional pain syndrome ("CRPS"). Due to petitioner's questionable credibility the Arbitrator found these physicians' diagnoses were not persuasive. The medical records demonstrated that Petitioner was an unreliable reporter of his medical history as well as testifying to complaints of pain, limitation, and disability that were inherently inconsistent with the totality of evidence. The arbitrator gives great weight to this factor.

After reviewing and weighing all the evidence as well as the above five factors, the Arbitrator finds Petitioner sustained a permanent partial disability of 10% loss of the use of the right leg, 21.5 weeks, pursuant to §8(e) of the Act.

16 WC 10441 (DOI 3/12/2016)

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

The Arbitrator finds that Petitioner proved that the medical care and treatment he received and the bills and charges for that care and treatment were reasonable and necessary. Accordingly, Respondent is liable for unpaid medical bills for the rib injury through the last date of treatment, July 9, 2016. Unpaid bills include:

- Elite Ambulance Bill from date of accident 3/12/2016 for $923.00, (PX #15).
- J Revello Chiropractic from 3/14/2016 - 7/9/2016 for $5,645.00, (PX #3).
- Dr. Variakojis bills for 3/15/2016 - 6/16/2016, for $3,659.00, (PX #14).

The foregoing medical bills and charges shall be adjusted in accord with the medical fee schedule is provided for §8.2 of the Act.

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

It is undisputed that Petitioner sustained fractured ribs as a result of his work accident on March 12, 2016.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating was admitted in evidence. The Arbitrator cannot give any weight to this factor.

ii) Petitioner work as security at a nightclub/music venue working shifts he testified would last up to 14 hours. The Arbitrator gives some weight to this factor.

iii) Petitioner was 62 years old at the time of his injury. He had a statistical life expectancy of approximately 20 years. Given the lack of significant continuing complaints related to the ribs injuries the Arbitrator gives little weight to this.

iv) Petitioner was released to full duty work by his treating physicians. In addition, there was evidence that Petitioner worked part-time as an electrician during the period of his claim disability. There was no evidence that Petitioner's earning capacity was adversely affected by his claimed disability. The Arbitrator gives great weight to this factor.

v) Petitioner reported a "twinge" every once in a while. He testified that he had no formal treatment for his ribs besides "laying around," the extensive chiropractic care for his low back notwithstanding. In fact, there was negligible testimony regarding any complaints of low back pain. On August 31, 2016, Petitioner told Dr. Variakojis that his rib pains were "100% better." In addition, based on the medical records, Petitioner has not received any additional medical care related to his injuries from this work accident since July 9, 2016 and had not been given any work restrictions for the work accident. The Arbitrator gives great weight to this factor.

After reviewing and weighing all the evidence as well as the above five factors, the Arbitrator finds Petitioner sustained a permanent partial disability of 3% loss of a person-as-a-whole, 15 weeks, pursuant to §8(d)2 of the Act.

Steven J. Fruth, Arbitrator

March 25, 2021
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010441
Case Name	Barry Murtaugh v. House of Blues
Consolidated Cases	11WC028414
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0308
Number of Pages of Decision	21
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	David Martay
Respondent Attorney	Peter Havighorst

DATE FILED: 8/15/2022

/s/ Deborah Baker, Commissioner

Signature

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

BARRY MURTAUGH,

Petitioner,

vs. NO: 16 WC 10441

LIVE NATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. This case was consolidated for hearing with case number 11WC28414.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 29, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of Petitioner's rib injury pursuant to §8(a) and subject to §8.2 of the Act, as detailed in: (1) Petitioner's Exhibit 3 (J Revello Chiropractic bills from 3/14/16 – 7/9/16 for $5,645.00; (2) Petitioner's Exhibit 14 (Dr. Variakojis – Center for Pain Treatment – bills from 3/15/16 – 6/16/16 for $3,659.00); and (3) Petitioner's Exhibit 15 (Elite Ambulance bill from 3/12/16 for $923.00). Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.78 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 3% loss of the person-as-a whole.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,600.00 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.

August 15, 2022
o061422
DJB/ldm
043

/s/*Deborah J. Baker*
Deborah J. Baker

/s/*Maria E. Portela*
Maria E. Portela

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION 22IWCC0308
NOTICE OF ARBITRATOR DECISION

MURTAUGH, BARRY
Employee/Petitioner

Case# **16WC010441**
11WC028414

LIVE NATION
Employer/Respondent

On 3/29/2021, 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 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
HEATHER V deBETTENCOURT
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Barry Murtaugh
Employee/Petitioner

v.

Live Nation
Employer/Respondent

Case # **16 WC 10441**

Consolidated cases: **11 WC 28414**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **October 26, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 12, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,853.92**; the average weekly wage was $**477.96**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds that Respondent shall pay for reasonable and necessary medical services as provided in §8(a) of the Act though the date of July 11, 2016, if the bills have not already paid, and adjusted in accord with the medical fee schedule provided in §8.2 of the Act, as follows:

- Elite Ambulance Bill from date of accident 3/12/2016 for $923.00, (PX #15).
- J Revello Chiropractic from 3/14/2016 - 7/9/2016 for $5,645.00, (PX #3).
- Dr. Variakojis bills for 3/15/2016 - 6/16/2016, for $3,659.00, (PX #14).

Respondent shall pay Petitioner permanent partial disability benefits of $**286.78**/week for **15** weeks because the injuries sustained caused the **3**% loss of the person-as-a-whole, as provided in §8(d)2 of the Act.

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

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

Signature of Arbitrator

March 25, 2021
Date

MAR 29 2021

Barry Murtaugh v. Live Nation a/k/a House of Blues
11 WC 28414, consolidated 16 WC 10441

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

11 WC 28414 (DOI 8/13/2010): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

16 WC 10441 (DOI 3/12/2016): ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***L:*** What is the nature and extent of the injury?

Petitioner's oral Motion to Amend the Application for Benefits to substitute Live Nation as Respondent was granted without objection.

STATEMENT OF FACTS

Petitioner Barry Murtaugh was working for Respondent Live Nation's House of Blues on August 13, 2010, at which time he was 56 years old. Petitioner testified that he worked security and had been doing so for about one year. His job duties included making sure people were orderly and that there were no disruptions.

On August 13, 2010 Petitioner suffered an injury to his right leg when he was hit by a car and his leg became trapped underneath. The car hit his right calf. Petitioner testified that he did not note any pain at first but over the next hour he developed right calf pain. Petitioner testified that he went to the emergency room at Northwestern Memorial Hospital but left after about 6 hours since he was not seen.

On August 16, 2010 Petitioner presented to Dr. Joseph Mitton at Northwestern Memorial Physicians Group ("Northwestern Physicians") with pain and tenderness in his right calf (RX #1). Examination of the right calf was unremarkable except for tenderness. Dr. Mitton diagnosed right calf contusion and muscle strain. Petitioner was released to

return to work without restrictions. Petitioner followed up with Dr. Gilberto Munoz at Northwestern Physicians complaining of right leg dull throbbing. The examination was again unremarkable except for tenderness to palpation. Dr. Munoz also diagnosed right calf contusion and muscle strain. He too released Petitioner to full duty work.

Petitioner returned to Dr. Mitton October 22, 2010. Petitioner reported that his symptoms had improved but had not completely resolved. The right lower extremity was again tender. Full extension of the ankle reproduced calf pain. Dr. Mitton ordered X-rays of the lower leg and a vascular flow test. He again diagnosed right calf contusion and muscle strain and again released Petitioner to work without restrictions.

Tibia/fibula X-rays and a venous duplex study of the legs were performed at Northwestern Memorial Hospital on October 22. The X-rays were normal except for mild degenerative changes in the right knee. There was no evidence of acute deep vein thrombosis on the venous duplex examination (PX #1 & RX #2). Petitioner saw Dr. Mitton again on October 26, 2010, who ordered 6 sessions of physical therapy but again released Petitioner to return to work without restrictions.

Petitioner began physical therapy at Accelerated Rehabilitation Centers (now Athletico) on November 22, 2010 (PX #10). Petitioner complained about Dole throb and tenderness in the posterior right calf which is aggravated by any pressure.. He did complain of some difficulty walking due to right calf pain and was able to run. He reported sleep disturbed by pressure on the right calf when rolling over in bed. He rated his pain at 0–6/10. Petitioner continued with therapy through December 14, 2020. He reported his pain was 1/10 but increased to 7/10 when walking for prolonged periods of time, climbing stairs, and twisting or pivoting to the left. The therapist noted some improvement through the 6 sessions of therapy but recommended additional therapy at 2 times a week for an additional 3 weeks.

Dr. Mitton saw Petitioner again on January 14, 2011 after 6 sessions of physical therapy (RX #1). Petitioner's presentation was essentially unchanged, although he complained of tenderness was over a larger area of the right lower leg. He was unable to stand on tiptoe with the right foot. He reported no improvement with physical therapy and reported occasional tingling in all toes of the right foot. Dr. Mitton recommended an MRI of the right calf, which was done February 1, 2011 at Oak Lawn MRI (PX #1). The MRI was negative.

Petitioner testified he returned to Dr. Mitton on February 7, 2011 to review the results of the MRI. Dr. Mitton diagnosed neuropathy and referred him to Dr. Joseph Ihm. Petitioner presented to Dr. Ihm that same day with continued right calf pain. Petitioner

gave a history of his calf being pinned at by a car bumper. Petitioner reported the pain was fairly localized to the calf but did occasionally radiate down to the ankle. Petitioner also reported chronic low back stiffness. He also had very rare toe numbness (PX #1).

On examination Dr. Ihm found no atrophy, ecchymosis, edema, erythema, or swelling around the area of pain. Petitioner reported 3/10 pain to light palpation along the midline of the calf. Dr. Ihm noted altered sensation from the midline of the mid-calf down into the distal leg to the lateral heel, compared to the left side. Straight-leg raise provoked his usual symptoms. Dr. Ihm diagnosed possible right traumatic sural neuropathy and recommended a Lidoderm patch for the right leg. Dr. Ihm made no recommendation regarding work status.

Petitioner's presentation was essentially unchanged at a follow-up visit with Dr. Ihm on February 28, 2011. The diagnosis and recommendation remained the same. Dr. Ihm again made no recommendation regarding work status.

Petitioner saw Dr. Mitton again on March 11, 2011 and April 15, 2011 (PX #1). There were no clinical notes for either visit. Dr. Mitton at again noted that Petitioner could return to work without restrictions. Petitioner had an EMG/NCS of the right leg July 20, 2010 on referral by Dr. Mitton. There was no evidence of right lower sciatic, sural, or tibial mononeuropathy (RX #2).

Petitioner testified he saw Dr. Jane Cullen at Northwestern Physicians on July 22, 2011 for his right calf pain. There were no clinical notes for this visit. Dr. Cullen recommended Petitioner return to work with mostly seated work. Petitioner testified he returned to Dr. Mitton on September 23, 2011 and was prescribed narcotics for his pain.

At the request of Respondent, Petitioner was examined by orthopedic surgeon Dr. Dirk Nelson for a §12 IME on October 18, 2011 (RX #3). Petitioner gave a history of being slowly struck on the back of his right calf but being pinned in a flexed position with his heel pinned to the ground. Petitioner had ongoing right leg complaints from the injury on August 14, 2010. Dr. Nelson noted a Doppler flow study, plain X-rays, and an EMG showed no abnormalities. Petitioner reported that he had been working full duty except for a couple of weeks after his EMG when he had increased symptoms. Petitioner was not on any medication, "as they do not make any difference in his symptoms." He has mid-calf pain when he points his toes down, as in plantar flexion. He also had occasional numbness in his great toe as well as the third or fourth toes.

Dr. Nelson noted the physical examination was essentially normal except for weaker plantar flexion power. He diagnosed a crush injury to the right calf resulting in

muscular damage. Dr. Nelson opined that Petitioner had reached a healing endpoint, required no additional medical care, and could continue full duty work.

Petitioner presented to Dr. Omar Garcia at Finlay Occupational Health for his ongoing right leg issues on August 19, 2013 (PX #9). Petitioner gave a history of his accident that was consistent with prior accounts. He reported he was taking hydrocodone for pain. He had pain when he points his toes down such as plantar flexion. He had occasional numbness in the great toe as well as third and fourth toes, but not often. He rated his pain as 2/10. He also reported consuming 6 beers a day.

On examination Petitioner had discomfort to superficial palpation of the calf. Dorsiflexion strength was normal but plantar flexion strength was decreased. Sharp and dull sensation to the right foot was also increased. Skin on the right foot appeared slightly hyperhemic [*sic*] but there was no edema in either foot. Dr. Garcia diagnosed reflex sympathetic dystrophy of the lower limb and ordered a bone scan.

The bone scan, performed September 4, 2013 at Ingalls Memorial Hospital, noted degenerative uptake in both hands, the right ankle, and the first toe of the right foot (PX #7). Petitioner returned to Dr. Garcia at Finlay Occupational on September 23, 2013, March 31, 2014, July 21, 2014, and November 14, 2014. His clinical presentations were essentially the same except for gradually increasing complaints of pain, 8/10 as of November 14, 2014. A referral to a pain specialist for a lumbar sympathetic block was advised each time. On November 14 Petitioner reported he had seen one pain specialist but disagreed with that diagnosis. He had since seen another pain specialist who agreed to perform a sympathetic block (PX #9).

Petitioner saw orthopedic surgeon Dr. Paul Atkenson on February 17, 2015 with chronic right calf and leg pain (PX #8). Petitioner reported that he worked as a security guard and part time electrician. He gave a history of the accident that was consistent with other reports. He reported that he has chronic right calf pain would fluctuate from only annoying to at times severe. He was taking Norco for pain relief and as a sleep aid. A trial dose of Gabapentin caused adverse side effects.

The physical examination was noteworthy for increased tenderness to light touch over the right calf. The calf was less tender when the knee was flexed but more pronounced when extended. Petitioner was unable to toe walk secondary to pain. Dr. Atkenson found Petitioner's symptoms "could be compatible" with complex regional pain syndrome ("CRPS"). He recommended a consultation with pain management to determine if a sympathetic block or treatment with other medication would be beneficial.

Dr. Renata J. Variakojis wrote a consultation note to Dr. Atkenson May 19, 2015 regarding his evaluation of Petitioner's condition (PX #14). Dr. Variakojis noted Petitioner's history of injury on August 13, 2010 when a car drove onto his right calf. Petitioner complained of persistent right calf pain since then which was steadily growing worse. Petitioner complained of calf pain all the time and experiencing burning, sharp, shooting, aching, throbbing, stabbing, and cramping pains. The doctor noted the right calf and foot were discolored compared to the left. Hypersensitivity to light touch was also noted. Petitioner reported that he bears "90%" of his weight on his left foot because his right leg was too painful. Petitioner complained of shooting pains into the right heel.

On examination Dr. Variakojis noted a positive straight-leg raise test on the right. Right leg motor strength was normal except for 3/5 strength in right ankle plantar flexion. The doctor noted decreased temperature, hyperalgesia, allodynia, and increased muscle tension in the right calf. Dr. Variakojis diagnosed right CRPS. He recommended a right S1 nerve root block as well as a series of nerve blocks to attenuate the neurogenic pain. He added that if that plan failed Petitioner might benefit from a trial of spinal cord stimulation.

Petitioner returned to Dr. Variakojis at the Center for Pain Treatment on September 3, 2015 (PX #6 & PX #14). He complained of 7/10 right calf pain and numbness in the right toes. Petitioner reported that his pain had gotten worse throughout the right calf and that it hurts to drive. The doctor's notes were handwritten and occasionally difficult to decipher. On examination Dr. Variakojis noted right calf myalgia and spasm but no color changes. The doctor diagnosed right calf CRPS and prescribed Lorzone as well as continuing Norco.

Petitioner returned to Dr. Variakojis on December 8, 2015, complaining that his toes were numb and that is right calf felt "like as brick." Petitioner complained that "things are getting worse." Dr. Variakojis noted the allodynia was worse. He also noted right calf hyperesthesia but no color changes. Dr. Variakojis continued with his diagnosis of CRPS but added right lumbosacral radiculopathy. He recommended a lumbar MRI and noted that Petitioner could benefit from an S-1 nerve root block.

Petitioner was injured again on the job on March 12, 2016, at which time he was 62 years old. He was again working security for Respondent. Petitioner was escorting a patron who had been punching somebody out of the club when the patron fell and pulled Petitioner down with him. Petitioner testified he fell onto the edge of a bench with his ribs and "fractured a few ribs."

Petitioner was transported that day by ambulance to Northwestern Memorial Hospital where he was examined and treated in the emergency department (PX #1). X-

rays of the thoracic and lumbar spines were negative for fracture. Reports on X-rays of ribs were not included in Petitioner's Exhibit #1.

Petitioner returned to Dr. Variakojis on March 15, 2016 complaining of 9/10 right-sided mid back pain which radiated into the lower back (PX #8 & PX #14). He also complained of right calf pain and told numbness. Petitioner reported that on Saturday he broke up a fight and landed on his back against a chair. The doctor diagnosed right rib fractures and contusions.

Petitioner returned to Dr. Variakojis on March 24, April 4, April 20, May 5, May 19, June 2, June 16, July 7, August 31, October 13, November 10, December 8, 2016 January 9 and March 7, 2017. Petitioner complained of mid back and right calf pain of varying intensity. Dr. Variakojis' care seemed limited to managing medication.

Petitioner presented for care at J Revello Chiropractic on March 15, 2016 (PX #3). Petitioner reported that he sustained multiple rib fractures while trying to break up a bar fight. Petitioner complained of 10/10 pain. A pain diagram indicated pain over the spine from the neck to the low back and in the right flank. Petitioner was diagnosed with mid back pain, muscle spasms, and neck pain. There were no documented complaints of right calf pain or pain diagram markings of the right calf on intake or at any time during treatment. There was no history recorded of Petitioner's right leg injury from August 2010. Petitioner received chiropractic care through July 9, 2016.

At the request of Respondent, Petitioner saw Dr. Dirk Nelson for another §12 IME on June 7, 2016 (RX #3). In addition to a clinical examination Dr. Nelson reviewed additional medical records. On examination Dr. Nelson noted Petitioner was in no acute distress. He walked with a slight right-sided limp. Dr. Nelson noted a slight muscle contour or irregularity on the right calf. There was hypersensitivity in the upper third of the calf. Dr. Nelson noted no skin changes, particularly no trophic changes. Dorsiflexion power of the right foot was normal but plantar flexion was weak. Petitioner could toe-raise on the left but not on the right.

Petitioner reported he had been injured March 12, 2016 when he fell and broke three or four ribs on his right side. He was currently off work at the time of the IME. He did not report rib cage or back pain.

Dr. Nelson diagnosed a crush injury to the right calf on August 14, 2010 which caused a condition of chronic pain. He disagreed with Dr. Variakojis' diagnosis of CRPS, noting there were no trophic skin changes and that CRPS is actually pain in the entire extremity and not a localized pain problem. Dr. Nelson noted Petitioner's extensive chiropractic care which would not be indicated for a crush injury diagnosis. He added

that the chiropractic treatment was for back related conditions and not related to Petitioner's calf injury. Dr. Nelson also noted a significant gap in treatment between 2010 in 2011 and Petitioner's pain management consultation in May 2015.

Dr. Nelson continued to opine that Petitioner was at MMI and that additional medical care would not improve Petitioner's chronic pain condition. Dr. Nelson noted that Petitioner did not find any positive Waddell signs or other non-physiologic findings but noted there were no objective findings to support Petitioner's complaints of increasing pain or hypersensitivity. He further opined that Petitioner could return to full-time regular duty work.

Petitioner returned Dr. Atkenson on September 13, 2016 complaining of continued pain in his right calf (PX #8). He described pain throughout the calf which was worse with walking or resting the calf on a mattress or even a blanket resting on it. Petitioner reported taking Norco for pain or drinking several beers for the same purpose. The examination noted tenderness upon palpation of the right calf as well as "more firmness" than the left.

Dr. Atkenson assessed continued pain from a severe crush injury. He suspected neuropathic pain given the character and severity of the pain as well as the duration. He recommended a series of sympathetic blocks which Petitioner should pay out-of-pocket if not approved by workers compensation. He was unclear on how beneficial sympathetic block injections would be, noting administration of sympathetic block injections are more helpful in the early stages. Dr. Atkenson recommended Petitioner wean off Norco but did recommend a trial of Lyrica.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Atkensen.

Petitioner consulted Dr. Timothy Lubenow at Rush Pain Center on November 30, 2017 with continued right leg complaints (PX #5). Petitioner gave a history consistent with prior accounts. He complained of pain starting in his calf and radiating to the lateral aspect of his right mid shin. He described the pain as burning electrical pain on average 2–6/10. He reported that he no longer used Norco and that he felt "loopy" with Gabapentin. Petitioner did not try the recommended Lyrica because of his mother's adverse reaction to that medication.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Lubenow.

On examination Dr. Lubenow noted some skin color changes in the foot, some swelling/hardening of the right calf, numbness in the right 3rd to 5th toes, and decreased range of motion in his ankle/foot. Petitioner noted he had been scheduled for some LSB (lumbar sympathetic block) but had been unable to obtain authorization. Dr. Lubenow diagnosed Petitioner with type 1 CRPS and started Cymbalta.

Petitioner saw Dr. Lubenow again on December 28, 2017. His presentation was unchanged from before Dr. Lubenow's assessment then was neuropathic pain (primary). A spinal cord stimulator was discussed as an option, but Petitioner preferred oral medication. Dr. Lubenow recommended a trial of Zanaflex as well as prescription drug monitoring. Petitioner testified that he saw Dr. Lubenow again on March 7, 2018 with continued right calf pain since a motor vehicle accident, then almost 8 years prior. Dr. Lubenow thought he may require sympathetic blocks.

At the request of Respondent, Petitioner presented to Dr. Richard Noren for another §12 IME on April 26, 2018 (RX #4). In addition to a clinical exam Dr. Noren reviewed Petitioner's medical records including Dr. Nelson's IME reports. Petitioner gave a history of his injury which was consistent with his other accounts of the event. Dr. Noren noted that Petitioner was currently being treated by Dr. Lubenow but that a prior pain physician's practice privileges had been suspended due to medication prescribing.

Petitioner did not report his accident injury and treatment from the incident at work on March 12, 2016 to Dr. Noren.

Petitioner reported continued right leg complaints from the work-injury on August 13, 2010. Petitioner complained that his right leg intermittently turned red and felt swollen. He stayed in stated it felt like a "brick.". He denied any hair or nail changes. He reported intermittent weakness in the calf. Although the calf never felt cold but intermittently felt hot. Petitioner reported that sometimes the pain was worse due to his pant leg rubbing across it. He reported that he felt terrible when he rode his motorcycle. He reported his pain fluctuates between 2–8/10 and that pain interferes with his sleep.

Dr. Noren noted an antalgic gait. There was allodynia and hyperalgesia over the right calf but none on the left. Right plantar flexion strength was 1/5. Dr. Noren did note that Petitioner's right calf briefly turned red during the history portion. He also noted the right calf appeared swollen while seated compared to the left.

Dr. Noren diagnosed a myofascial and muscular injury to the right calf related to the crush injury. Petitioner had neuropathic findings consistent with the allodynia and hyperalgesia. Dr. Noren noted Petitioner met the Budapest criteria for CRPS but opined

that he had localized neuropathic pain consistent with the mechanism of his injury. Dr. Noren opined that Petitioner had a compression injury of the sensory sural nerve and neuropraxia of the sural nerve. Dr. Noren clearly stated that Petitioner did not have CRPS.

Dr. Noren opined that treatment to date appeared to be reasonable and appropriate. He did not believe a spinal cord stimulator or dorsal root ganglion stimulator were indicated. Likewise, lumbar parasympathetic plexus blocks were also not indicated for the treatment of CRPS. Dr. Noren noted that Petitioner had no occupational deficits, observing that Petitioner worked as security at House of Blues as well as a second job as an electrician. He opined that Petitioner was at MMI but that intermittent low dose Norco may be warranted for exacerbations of pain. He added that use of Schedule II narcotics should be monitored per current guidelines.

Dr. Noren authored an addendum report May 21, 2018 ((RX #2). He repeated his diagnosis of sural nerve neuropraxia related to the work-injury on August 13, 2010. Dr. Noren reiterated his agreement with Dr. Nelson that Petitioner had been at MMI since 2011. He also noted that Petitioner was likely to continue to have intermittent subjective symptoms that would require palliative care with monitored opiates.

Petitioner saw Dr. Lubenow again on July 18, 2019 who advised Petitioner he may require ongoing pain management (PX #16). Petitioner's complaints and presentation were unchanged. He reported he had tried Gabapentin, Cymbalta, and Zanaflex but did not like the cognitive and sedating side effects. Petitioner did not fill a Mobic prescription since the last visit. He stated that Norco is the only thing that has helped his pain. Petitioner also stated that he was hesitant to try a spinal cord stimulator because friends had had bad results and that he did not want "a hockey puck in my back."

Dr. Lubenow repeated his assessment of CRPS type I. A spinal cord stimulator versus peripheral nerve stimulator was discussed. Petitioner was hesitant to pursue any interventional procedure.

Petitioner testified that he still works at House of Blues, both inside and outside, although he was not working at the time of trial due to Covid-19 pandemic restrictions. His work shifts varied from 4 hours to 14 hours, all of which he spent on his feet. Respondent did not provide any accommodation for his continuing complaints. The injuries had not affected his earnings from Respondent.

Petitioner testified that he continues to experience stabbing pain and numbness in his right leg. Four of his toes are numb especially with weather changes. Petitioner testified that he has pain every day with walking and standing. He also noted that the

skin around his calf turns colors from time to time. He testified that narcotic medication is not currently prescribed and that he does not take over-the-counter medication for pain relief. Rather, he drinks 6 to 10 beers a day for pain relief.

On cross-examination Petitioner acknowledged that he had also worked a second job as an electrician. He added that he asked his employer for lighter work because of his leg but admitted that his job did not change much.

Petitioner further testified that had "given up a bit" when he did not seek medical care from September 2011 to August 2013. He also testified that he was off work about 4 or 5 months due to his rib injuries, although no claim for unpaid Total Temporary Disability was made. He added that riding his motorcycle was painful but that he could otherwise perform daily activities.

CONCLUSIONS OF LAW

11 WC 28414 (DOI 8/13/2010):

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

There is no dispute that Petitioner sustained an injury of some sort to his right lower leg that was causally related to his work accident on March 13, 2010. The dispute is whether Petitioner sustained chronic regional pain syndrome ("CRPS"), as diagnosed by Drs. Paul Atkensen, Renata Variakojis, Omar Garcia, and Timothy Lubenow, or a crush injury to the sural nerve with neuropathic pain, as diagnosed by Drs. Dirk Nelson and Richard Noren.

The number of witnesses testifying to a particular fact or rendering opinions may not be convincing if a lesser number of witnesses as to that fact or opinion is more convincing. Here, the Arbitrator finds the lesser number more convincing. The Arbitrator finds that Petitioner failed to prove that he sustained CRPS that was causally related to his work accident on March 13, 2010.

The diagnoses proffered by Drs. Atkensen, Variakojis, Garcia, and Lubenow are based, as is any diagnosis, on both objective findings and subjective complaints. A valid and reliable diagnosis is reliant on a full and accurate history and report of subjective complaints. In this matter Petitioner was a poor historian in that he withheld pertinent elements of his history from treating healthcare providers. As such, Petitioner's credibility is questionable. This lack of credibility and reliability as a historian undermines the diagnoses of Drs. Atkensen, Variakojis, Garcia, and Lubenow.

Petitioner testified that while employed as security for House of Blues he also worked part-time as an electrician. Petitioner's working as an electrician presents an inherent inconsistency with Petitioner's testimony regarding continuing pain, limitations, and disability. The Arbitrator notes that work as an electrician often requires climbing, crawling, and squatting. Someone with Petitioner's claimed injury would a difficult time performing the ordinary work of an electrician.

In addition, Petitioner testified that he continued to work security for Respondent, even with occasional 12 to 14-hour shifts, all of which were on his feet. He reported to Dr. Variakojis that he would bear weight 90% of the time on his left leg because of his severe right leg pain which is also inconsistent with working full time security for shifts up to 14 hours long. Petitioner further testified that Respondent afforded no accommodation for his claim limitations and disability. This too is inherently inconsistent with Petitioner's complaints of 8/10, even 10/10, pain to his treating physicians, as well as his testimony regarding his pain, limitations, and disability.

Further, when Petitioner sought chiropractic care for the rib injuries he sustained in his later work accident in March 2016 he did not give a history of his 2010 work accident, or the injuries he claims from that accident, or the continuing complaints of pain, limitation, and disability he claims in this matter. There were no markings on pain diagrams indicating any pain or other complaint with the lower right leg.

As noted above the Arbitrator found the opinions Drs. Nelson and Noren reasonable and persuasive. Drs. Atkensen, Variakojis, Garcia, and Lubenow based their diagnoses of CRPS on Petitioner's subjective complaints and their clinical findings limited to a relatively small area of Petitioner's right calf. Drs. Nelson and Noren opined persuasively that Petitioner's presentation did not satisfy the diagnostic criteria for CRPS, specifically noting that CRPS is a regional pain syndrome. They emphasized that Petitioner's subjective complaints and clinical findings were localized and not regional.

It is noteworthy that neither Dr. Mitton nor Dr. Ihm diagnosed CRPS or neuropraxia. It is equally noteworthy that Petitioner continued to work without medical intervention between September 2011 and August 2013. This too casts doubt on the credibility of Petitioner's claims of pain, limitation, and disability.

Drs. Nelson and Noren diagnosed a work-related neuropraxia of the right sural nerve. Both persuasively opined that Petitioner had achieved MMI as of Dr. Nelson's first §12 exam on October 18, 2011. Accordingly, the Arbitrator adopts the diagnoses and causation opinions of Drs. Nelson and Noren.

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?

There is no dispute that Petitioner injured his right leg on August 13, 2010 when his right leg was hit by a car while working for Respondent. Petitioner has received significant medical intervention since his injury, albeit with a gap between September 2011 and August 2013. However, as noted above, the Arbitrator found the opinions of Drs. Nelson and Noren that Petitioner had achieved MMI by October 2011 reasonable and persuasive. Accordingly, the Arbitrator finds that Petitioner failed to prove that the medical care he received following Dr. Nelson's October 28, 2011 IME was reasonable and necessary to treat or cure his claimed injuries.

Dr. Nelson opined at his October 2011 and June 2016 IMEs that Petitioner did not require further medical intervention, particularly noting that further medical care would not relieve petitioner's chronic complaints. Dr. Noren did opine that although at MMI Petitioner may require monitored use of opiates for symptomatic relief of his subjective complaints. There was no evidence offered to the frequency or extent of monitored prescribed opiates. Further, the issue of monitored prescribed opiates apparently is mooted by Petitioner's testimony that none of his treating physicians would prescribe these drugs and that he self-medicated for pain with 6 to 10 beers a day.

Accordingly, the Arbitrator finds that Petitioner failed to prove that the medical care and intervention provided after Dr. Nelson's October 18, 2011 IME was reasonable and necessary to cure or relieve the effects of the injury he sustained at work on August 13, 2010. Charges and fees for any and all medical care or intervention provided before October 18, 2011 shall be adjusted in accord with the medical fee schedule provided in §8.2 of the Act.

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

It is undisputed that Petitioner sustained some sort of right leg injury as a result of his August 13, 2010 work accident.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating was admitted in evidence. The Arbitrator cannot give any weight to this factor.
ii) Petitioner work as security at a nightclub/music venue working shifts he testified would last up to 14 hours. The Arbitrator gives some weight to this factor.

iii) Petitioner was 56 years old at the time of his injury. He had a statistical life expectancy of approximately 25 years. Given the chronic nature of his continuing complaints, albeit disputed causation, the Arbitrator gives moderate weight to this.

iv) Petitioner was continually released to full duty work by his treating physicians. In addition, there was evidence that Petitioner worked part-time as an electrician during the period of his claim disability. There was no evidence that Petitioner's earning capacity was adversely affected by his claimed disability. The Arbitrator gives great weight to this factor.

v) Petitioner was treated by a string of physicians who opined that he developed chronic regional pain syndrome ("CRPS"). Due to petitioner's questionable credibility the Arbitrator found these physicians' diagnoses were not persuasive. The medical records demonstrated that Petitioner was an unreliable reporter of his medical history as well as testifying to complaints of pain, limitation, and disability that were inherently inconsistent with the totality of evidence. The arbitrator gives great weight to this factor.

After reviewing and weighing all the evidence as well as the above five factors, the Arbitrator finds Petitioner sustained a permanent partial disability of 10% loss of the use of the right leg, 21.5 weeks, pursuant to §8(e) of the Act.

16 WC 10441 (DOI 3/12/2016)

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

The Arbitrator finds that Petitioner proved that the medical care and treatment he received and the bills and charges for that care and treatment were reasonable and necessary. Accordingly, Respondent is liable for unpaid medical bills for the rib injury through the last date of treatment, July 9, 2016. Unpaid bills include:

- Elite Ambulance Bill from date of accident 3/12/2016 for $923.00, (PX #15).
- J Revello Chiropractic from 3/14/2016 - 7/9/2016 for $5,645.00, (PX #3).
- Dr. Variakojis bills for 3/15/2016 - 6/16/2016, for $3,659.00, (PX #14).

The foregoing medical bills and charges shall be adjusted in accord with the medical fee schedule is provided for §8.2 of the Act.

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

It is undisputed that Petitioner sustained fractured ribs as a result of his work accident on March 12, 2016.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating was admitted in evidence. The Arbitrator cannot give any weight to this factor.

ii) Petitioner work as security at a nightclub/music venue working shifts he testified would last up to 14 hours. The Arbitrator gives some weight to this factor.

iii) Petitioner was 62 years old at the time of his injury. He had a statistical life expectancy of approximately 20 years. Given the lack of significant continuing complaints related to the ribs injuries the Arbitrator gives little weight to this.

iv) Petitioner was released to full duty work by his treating physicians. In addition, there was evidence that Petitioner worked part-time as an electrician during the period of his claim disability. There was no evidence that Petitioner's earning capacity was adversely affected by his claimed disability. The Arbitrator gives great weight to this factor.

v) Petitioner reported a "twinge" every once in a while. He testified that he had no formal treatment for his ribs besides "laying around," the extensive chiropractic care for his low back notwithstanding. In fact, there was negligible testimony regarding any complaints of low back pain. On August 31, 2016, Petitioner told Dr. Variakojis that his rib pains were "100% better." In addition, based on the medical records, Petitioner has not received any additional medical care related to his injuries from this work accident since July 9, 2016 and had not been given any work restrictions for the work accident. The Arbitrator gives great weight to this factor.

After reviewing and weighing all the evidence as well as the above five factors, the Arbitrator finds Petitioner sustained a permanent partial disability of 3% loss of a person-as-a-whole, 15 weeks, pursuant to §8(d)2 of the Act.

Steven J. Fruth, Arbitrator

March 25, 2021
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC022576
Case Name	Stevie Lewis v. Southern Illinois Healthcare
Consolidated Cases	
Proceeding Type	Remand Order of the Appellate Court Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0309
Number of Pages of Decision	10
Decision Issued By	Kathryn Doerries, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Douglas Dorris
Respondent Attorney	D. Brian Smith

DATE FILED: 8/17/2022

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVIE LEWIS,

Petitioner,

vs. NO: 14 WC 22576

SOUTHERN ILLINOIS HEALTHCARE, INC.,
d/b/a Memorial Hospital of Carbondale,

Respondent.

DECISION AND OPINION ON APPELLATE COURT REMAND

This matter comes before the Commission pursuant to a Rule 23 Remand Order of the Appellate Court of Illinois, Fifth District, for a determination of whether Petitioner is entitled to temporary total disability (TTD) for the period between April 25, 2017 and April 30, 2018. The Appellate Court affirmed in part, and reversed in part, the judgment of the circuit court in case number 20 MR 14 and affirmed in part, and reversed in part, the Commission's decision in case number 20 IWCC 0013. The Court reversed that part of the circuit court's judgment which affirmed the Commission decision finding that the Petitioner's bilateral shoulder surgeries were not causally related to the work accident on May 2, 2014, awarded medical expenses pursuant to Sections 8(a) and 8.2 and remanded the case to the Commission for further proceedings relative to the Petitioner's TTD entitlement for the period between April 25, 2017 and April 30, 2018, at the time of, and subsequent to, her three shoulder surgeries.

Procedural History

For context, the Appellate Court summarized the background of the appeal as follows:

Claimant, Stevie Lewis, a certified nursing assistant (CNA), filed two applications for adjustment of claim against her employer, Southern Illinois Healthcare (SIH), pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), seeking benefits for separate injuries she sustained while working as a CNA for SIH on May 13, 2013 (13 WC 23310) and May 2, 2014 (14 WC 22576). Both of claimant's applications sought benefits for injuries she sustained to the "MAW," presumably man as a whole, on each of the alleged accident dates.

Both claims were consolidated for hearing, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2018)), before the arbitrator on January 8, 2019. SIH stipulated that claimant had sustained a work-related accident on May 13, 2013, which resulted in injuries to her lower back and left leg, but SIH disputed claimant had sustained a work-related accident on May 2, 2014. The issues in dispute regarding both cases included temporary total disability (TTD), causal relationship, and the reasonableness and necessity of both past and prospective medical treatment.

On February 22, 2019, the arbitrator issued separate decisions. With respect to claimant's first claim (13 WC 23310), which involved the undisputed work injury, the arbitrator ordered SIH to pay all medical services provided to claimant and related TTD benefits.

With respect to claimant's second claim (14 WC 22576), the arbitrator found that claimant had sustained an accident that arose out of and in the course of her employment. The arbitrator further found that claimant's lumbar condition was causally related to the May 2, 2014, accident and ordered SIH to pay all reasonable and necessary medical services. The arbitrator further awarded prospective medical services (including lumbar fusion surgery) and related TTD benefits. However, the arbitrator denied benefits for certain past medical treatment as not reasonable and necessary, namely, 15 of 17 epidural and subcutaneous steroid injections and the magnetic resonance imaging-spectroscopy (MR Spectroscopy). The arbitrator also found that claimant failed to prove her shoulder condition was causally related to the May 2, 2014, work accident. For that reason, the arbitrator denied benefits for claimant's three shoulder surgeries and related TTD benefits.

Claimant and SIH each filed a petition for review before the Illinois Workers' Compensation Commission (Commission), limiting review of the arbitrator's decision to the second claim (14 WC 22576). The Commission, with one commissioner dissenting, issued a decision modifying the arbitrator's decision on January 5, 2020. The Commission reversed the arbitrator's finding that claimant's current condition of ill-being related to her lumbar spine was causally connected to the May 2, 2014, accident. Thus, the Commission vacated the

arbitrator's award of prospective medical services for the lumbar fusion surgery and lessened the period of TTD benefits from 8 3/7 weeks to 8 weeks, commencing May 6, 2014, to June 30, 2014. In adopting the arbitrator's finding that claimant's avascular necrosis of both shoulders was not causally connected, the Commission affirmed the arbitrator's denial of TTD and medical benefits. The Commission affirmed the arbitrator's decision in all other respects and remanded the matter to the arbitrator for further proceedings consistent with its decision pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

On January 17, 2020, claimant filed a petition for judicial review in the circuit court of Jackson County. Shortly thereafter, SIH filed a cross-appeal on January 29, 2020. The court subsequently entered an order affirming the Commission's decision on September 15, 2020. On September 22, 2020, claimant filed a timely notice of appeal, and SIH filed a cross-appeal the next day.

Lewis v. Ill. Workers' Comp. Comm'n, 2021 IL App (5th) 200302WC-U, ¶2-¶7, 2021 Ill. App. Unpub. LEXIS 1621, ¶1-4.

The Appellate Court reversed that portion of the circuit court's judgment that confirmed the Commission's finding as to the denial of reimbursement for Petitioner's three shoulder surgeries and remanded the case to the Commission for a determination of associated TTD benefits. The judgment of the circuit court was affirmed in all other respects; the Commission decision reversed in part and remanded for further proceedings. *Lewis v. Ill. Workers' Comp. Comm'n,* 2021 IL App (5th) 200302WC-U, ¶141-¶142, 2021 Ill. App. Unpub. LEXIS 1621, ¶67.

Thus, the Appellate Court, in short, affirmed the judgment of the circuit court confirming the Commission's Decision with regard to the denial of past medical expenses related to the MR Spectroscopy, vacating the Arbitrator's award of prospective medical services for the lumbar fusion surgery and a reduction of the Petitioner's TTD benefit from 8-3/7 weeks to 8 weeks, however, reversed the Commission's decision finding that the Petitioner's bilateral shoulder condition caused by unreasonable and unnecessary treatment is not related to the work accident. The Appellate Court held that the medical expenses related to the shoulder surgeries were related to the work accident and further remanded the case to the Commission to determine Petitioner's entitlement to TTD, if any, for the period between April 25, 2017 and April 30, 2018.

Analysis

Prior to the start of the consolidated arbitration hearing, SIH stipulated that claimant had sustained a work-related accident on May 13, 2013, but disputed that claimant had sustained a work-related accident on May 2, 2014. In addition, the parties stipulated to the admission of 39 exhibits (containing medical bills, treatment records, and 10 deposition transcripts of treating physicians and retained medical experts); that SIH had a policy of accommodating light-duty work for employees

> with workers' compensation claims; claimant had voluntarily resigned her employment with SIH on September 1, 2014; and that the job duties of a CNA at SIH were the same or substantially similar to the physical requirements of claimant's nursing school clinicals. *Lewis v. Ill. Workers' Comp. Comm'n*, 2021 IL App (5th) 200302WC-U, ¶12, 2021 Ill. App. Unpub. LEXIS 1621, ¶6

The Commission takes note of the Petitioner's testimony relevant to her resignation. Per the stipulation and her testimony, Petitioner voluntarily resigned effective September 1, 2014. Petitioner testified that she had been accepted into "RN school at Shawnee Community College" however, she did not "think that I could physically, emotionally, or mentally handle the stress of working and going to school." (T. 50) She had been working light duty as a secretary in interventional radiology prior to that with Respondent. (T. 50) Petitioner further testified that Respondent had advised her that if she was having pain, or even if she could only come in for a couple hours here and there, that they would accommodate. (T. 51) Petitioner testified that she was in an office without doors and windows and was making phone calls, so she was in an area that she could lay down and stretch if she needed to or get up and walk around if she needed to, and that she did those things multiple times throughout the day. (T. 51)

Petitioner further testified that when she resigned she concentrated her life at that point for her "RN studies." (T. 51) She then took a year off, quitting the program and obtaining permission to start the following August, 2015. (T. 52-53) The Commission notes that relative to Petitioner's lumbar back condition, Dr. Gornet released the Petitioner to full-duty work as of October 5, 2015, according to his work status note. (PX23, 10/5/15) Petitioner testified that she finished her RN schooling in May 2016 and passed the boards before the shoulder surgeries. (T. 58-59) Petitioner further testified that she got married on October 6, 2016. (T. 48) Petitioner also testified that she started having problems with her left shoulder in October, 2016 and complained to Dr. Alexander, her family physician, in December 2016. (T. 47-48) She first saw Dr. Paletta in January 2017. (T. 49)

With respect to her first, left shoulder surgery, Petitioner testified that she was off work when she received notice, nine days in advance of surgery that was scheduled for April 25, 2017. Petitioner testified that she was not allowed to do anything with her left arm for two weeks; after two weeks she could lift "a bottle of water or a drink, that was about it." (T. 54-55) She was rehabbing her left shoulder while waiting for a donor bone for the right shoulder. Petitioner testified she had not been released to return to work for the left shoulder surgery when the right donor bone became available. She had right shoulder surgery on July 27, 2017. She then had complications from that surgery that required a third surgery on November 2, 2017. (T. 55-56) Petitioner testified that at the time of the third surgery, she had not been released to return to work from the first shoulder surgery. Further, her attorney asked the following questions in summation:

> Q. So the time line was left shoulder surgery, off work orders, waiting for rehab on the left shoulder, right shoulder surgery occurs, off work for both shoulders?
> A. Yes.

Q. Complications with the right shoulder, a third surgery on the right shoulder, and you're still off work?
A. Yes. (T. 57)

Petitioner then testified that Dr. Paletta eventually released her to go back to work at the end of April 2018 effective on May 1, 2018. (T. 57-58)

On cross-examination, Respondent's attorney asked Petitioner if she would defer to Dr. Paletta in terms of her ability to work during the time he was treating her and Petitioner responded, "[y]es." (T. 72)

Further, on cross-examination, Petitioner testified that following the May 2, 2014, work accident, Respondent offered light duty restrictions on July 1, 2014, allowing her to work in an office where she "could lay down, stretch, get up, walk around, et cetera." (T. 74-75) Petitioner further agreed on cross-examination that Respondent was accommodating her restrictions when she voluntarily resigned her employment as of September 1, 2014 and she was working light duty at the time. (T. 75)

At his second evidence deposition, Dr. Paletta testified on direct examination that he performed Petitioner's first surgery, on her left shoulder on April 25, 2017, and the second surgery, the first on her right shoulder, on July 27, 2017, which was similar to the procedure he had done on the left shoulder. (PX38, 8-9) The third shoulder surgery he performed was on November 2, 2017, to repair the right shoulder, a residual effect from the July 27, 2017, earlier right shoulder surgery. The third surgery involved a right open repair of a subscapularis tendon and open stabilization with capsular repair. (PX38, 10)

Dr. Paletta was asked on cross-examination about Petitioner's work status following each of the three surgeries. (PX38, 44-51) Respondent's attorney asked Dr. Paletta about Petitioner's ability to work as of May 17, 2017, the date of her first post-operative office visit following the April 25, 2017, left shoulder surgery. Dr. Paletta testified that her work status would have been similar to what he had explained about her right shoulder work status ability and that Petitioner would have been capable of primarily one-handed use of her left arm for light activities only. (PX38, 49-50) She would have advanced to restrictions of a ten-pound lift from the floor to chest and one pound overhead at the time of her next visit on June 7, 2017, six weeks post operative. At that time, Dr. Paletta felt that Petitioner was doing well enough from the left shoulder that if the allograft became available for the right shoulder, he felt they could go ahead with right shoulder surgery. A graft did become available on the right before her next scheduled left shoulder follow-up office visit. (PX38, 50)

Dr. Paletta testified that the first time he saw Petitioner after her first right shoulder surgery was on August 2, 2017. (PX38, 43-44) Dr. Paletta testified that Petitioner was two weeks out from her surgery and with respect to her ability to work, she "really would have been primarily one-handed duty with that just assisting in light tasks." (PX38, 44) Specifically, Dr. Paletta

testified that Petitioner would not have been off work completely, "if they could accommodate that type of restriction." (PX38, 45) This was true up until the date of her second surgery, on November 2, 2017. In fact, Dr. Paletta testified that he increased her ability to lift by September 11, 2017, allowing 10 pounds from floor to chest and no more than one pound above chest level. (PX38, 45-46) On October 16, 2017, he would have recommended that she go back to primarily one-handed duty with no lifting with no changes until the second right shoulder surgery. (PX38, 46)

After the subscapular repair done on November 2, 2017, Dr. Paletta testified that he first saw Petitioner on November 13, 2017, and his recommendations relative to Petitioner's ability to work were strictly one-handed work with no use of the right arm. That would have stayed in effect until he saw her at the next follow-up visit on November 27, 2017, when she had a low grade fever and a little wound issue. (PX38, 46-47) Thus, he did not change the work restrictions until the office visit on December 20, 2017, at which time he would have allowed her to come out of the sling and based on her exam would have gone back to those same restrictions of ten-pound lift from floor to chest and one pound overhead, keeping those in effect until February 7, 2018. (PX38, 47-48) He adjusted them again on February 7, 2018, stating, "Typically at that point in time I would have gone to no-lift limit from the floor to the chest, but typically would have put her on either five or ten pound lift limit overhead. Nothing changed as of April 4, 2018, until she completed the work hardening and the same restrictions were in effect as of the date of Dr. Paletta's second evidence deposition on April 25, 2018 and for "five more days." At that point, Dr. Paletta expected Petitioner to be released to full-duty without restrictions. The expectation was "May the 1st, no restrictions." (PX38, 48-49)

Dr. Paletta testified that Petitioner would be at maximum medical improvement for both shoulders on May 1, 2018, and that she would be able to work full duty without restrictions. (PX38, 42, 51)

Based upon the Appellate Court's finding that the Petitioner's necroses in her bilateral shoulders are causally related to the May 2, 2014, work accident, and the parties' stipulations that Respondent SIH had a policy of accommodating light-duty work for employees with workers' compensation claims; claimant had voluntarily resigned her employment with SIH on September 1, 2014; and that the job duties of a CNA at SIH were the same or substantially similar to the physical requirements of claimant's nursing school clinicals, the Commission finds that Petitioner is entitled to TTD for only the period she was temporarily totally disabled, the periods between April 25, 2017, through May 17, 2017; July 27, 2017, through August 2, 2017; and November 2, 2017 through November 13, 2017.

The Commission notes the absence of work status reports in evidence authored by Dr. Paletta contemporaneous with Petitioner's treatment. However, Petitioner testified that he authorized her off-work. The Commission finds any opinion that Dr. Paletta had regarding Petitioner's work status was done retroactively through his second evidence deposition testimony.

At Dr. Paletta's second evidence deposition, during his cross-examination, Dr. Paletta stated that he did not have the work status form in front of him and asked for time to get a copy "so that I can speak directly to it. I did not print that up—" (PX38, 43) Respondent's attorney then requested a copy of "any work status that you have. I don't think I have any of them." *Id.* There was a pause, then notation that the parties were back on the record, however, no further acknowledgement of receipt or relevant comment about work status notes ensued. *Id.* Instead, Respondent's counsel continued to question Dr. Paletta about post-operative office visits. (PX38, 43-51) The Commission infers that Dr. Paletta did not author any work status notes contemporaneous with Petitioner's treatment because Petitioner had no job. She had not worked since August 2014, and never returned to work despite having no work restrictions between October 15, 2015 and January 2017 when she first consulted Dr. Paletta despite having finished "RN" school by May 2016.

The Commission finds that Petitioner has not sustained her burden of proving entitlement to TTD during the periods after her bilateral shoulder surgeries when Dr. Paletta opined that she would have been released to work with restrictions. Almost three years prior, Petitioner had voluntarily resigned her employment with Respondent, while Respondent was accommodating her work restrictions,. Dr. Paletta testified that he would assign one-handed work and light duty restrictions as of the first post-operative office visits following each of the three shoulder surgeries and that she could work if Respondent could accommodate those restrictions. Given that the parties stipulated that Respondent had a policy of accommodating light-duty work for employees with workers' compensation claims, and had been accommodating Petitioner's restrictions at the time she voluntarily resigned, the Commission finds that Petitioner is not entitled to TTD for those periods that she was not temporarily totally disabled.

The Appellate Court has consistently held that when a Petitioner has restrictions that are being accommodated, and voluntarily resigns, the Petitioner is no longer entitled to TTD benefits. Some of these cases are noted by the *Land & Lakes* Court:

> This court has upheld Commission decisions to deny TTD benefits after finding that the claimant voluntarily ceased working. See *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090-91, 666 N.E.2d 827, 217 Ill. Dec. 158 (1996) (upholding decision to deny TTD benefits beyond date claimant took a disability retirement where there was no evidence that claimant could not return to light-duty work); *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 887, 559 N.E.2d 526, 147 Ill. Dec. 353 (1990) (three physicians released claimant to light-duty work, and no medical evidence corroborated claimant's testimony that she could not work at the light-duty job employer offered). *Land & Lakes Co. v. Indus. Comm'n (Dawson),* 359 Ill. App. 3d 582, 595, 834 N.E.2d 583, 594, 2005 Ill. App. LEXIS 873, ¶25, 296 Ill. Dec. 26, 37.

To be entitled to TTD benefits, the claimant must prove not only that he did not work but that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d at 1090,

666 N.E.2d at 828-29 (1996). *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 177, 741 N.E.2d 1144, 1150, 2000 Ill. App. LEXIS 1021, *12, 251 Ill. Dec. 966, 972.

In this instance, the evidence is overwhelming that Petitioner could have worked for Respondent during the periods following her shoulder surgeries but for her voluntary resignation. Therefore, pursuant to Appellate Court remand, the Commission finds that the Petitioner's bilateral shoulder surgeries were causally related to the work accident on May 2, 2014, and Respondent is liable for the related medical expenses pursuant to Sections 8(a) and 8.2, and further, Petitioner is entitled to TTD for the periods she was authorized temporarily and totally off-work by Dr. Paletta, the periods between April 25, 2017, through May 17, 2017; July 27, 2017, through August 2, 2017; and November 2, 2017 through November 13, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical for the lumbar fusion surgery is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 242.87 per week for a period of fourteen weeks, beginning May 6, 2014 through June 30, 2014, and for the periods beginning April 25, 2017, through May 17, 2017; July 27, 2017, through August 2, 2017; and November 2, 2017 through November 13, 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 reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule and as identified in Petitioner's Exhibit 1, except for medical charges for epidural steroid injections administered to Petitioner subsequent to July 2, 2014 and the MR Spectroscopy charge.

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.

August 17, 2022
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Maria E. Portela

DISSENT, IN PART

I disagree with the majority's decision to award temporary total disability (TTD) benefits *only* for the following time periods: April 25, 2017, through May 17, 2017; July 27, 2017, through August 2, 2017; and November 2, 2017, through November 13, 2017. I would have awarded TTD benefits for the entire period of April 25, 2017, through May 1, 2018.

Petitioner testified that Dr. Paletta placed her off work after her left shoulder surgery on April 25, 2017, and she remained off work until she had recovered from her third shoulder surgery (right shoulder) as of May 1, 2018. T. 53-60. Both the Commission and the Appellate Court found Petitioner's testimony to be credible and persuasive. As Petitioner was ready to return to work (Petitioner had finished nursing school and had passed her board exams by May 2016) and had been placed off work by Dr. Paletta from April 25, 2017, through May 1, 2018 (T. 57-60), Petitioner is entitled to TTD benefits during this period. Petitioner's previous resignation from Respondent's employment does not negate her entitlement to TTD benefits during this period of time as she was no longer in school, and she was ready to work as of May 2016. (T. 58-59.) The only reason she did not return to work during that time was because she had been placed off work by her physician. (T. 57-60.) See *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 177 (5th Dist. 2000).

Based on the evidence contained in the record and the findings of fact contained in both the Commission decision and the Appellate Court's decision (see *Lewis v. Ill. Workers' Comp. Comm'n,* 2021 IL App (5th) 200302WC-U, ¶ 73), I would award TTD benefits for the entire period of April 25, 2017, through May 1, 2018. I note that the Appellate Court's Rule 23 decision states: "…we reverse the Commission's decision and remand for a determination of TTD benefits *consistent with this order*." (Emphasis added.) See *Lewis v. Ill. Workers' Comp. Comm'n,* 2021 IL App (5th) 200302WC-U, ¶ 139. For the above reasons, I respectfully dissent.

/s/ *Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027630
Case Name	Melissa Winget v. State of Illinois - SIU Carbondale
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0310
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 8/17/2022

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melissa Winget,

Petitioner,

vs. NO. 17WC 27630

SIU Carbondale,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2022 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.

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.

August 17, 2022

SJM/sj
o-6/29/2022
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027630
Case Name	WINGET, MELISSA v. SIU CARBONDALE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 1/13/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/William Gallagher, Arbitrator
Signature

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

January 13, 2022

/s/ Michele Kowalski

Michele Kowalski, 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

Melissa Winget
Employee/Petitioner

v.

SIU Carbondale
Employer/Respondent

Case # 17 WC 27630

Consolidated cases: n/a

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 William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on November 17, 2021. By stipulation, the parties agree:

On the date of accident, December 16, 2016, 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 $46,872.96; the average weekly wage was $901.40.

At the time of injury, Petitioner was 41 years of age, married, with 2 dependent child(ren).

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

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

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.

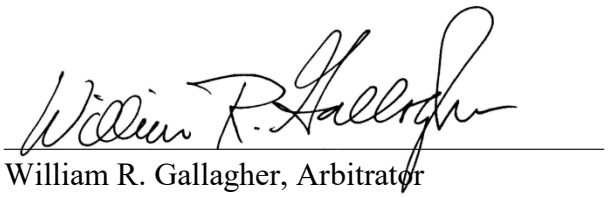
ORDER

Respondent shall pay Petitioner $540.84 per week for 212.5 weeks because the injuries she sustained caused the permanent partial disability to the extent of 42 1/2% loss of use of the person as a whole (20% loss of use of the person as a whole because of the cervical spine injury; 12 1/2% loss of use of the person as a whole because of the lumbar spine injury; and 10% loss of use of the person as a whole because of the left shoulder injury), as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from January 28 2021, through November 17, 2021, 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.



JANUARY 13, 2022

William R. Gallagher, Arbitrator

ICArbDecN&E p. 2

Findings of Fact

Petitioner filed three Applications for Adjustment of Claim which alleged she sustained accidental injuries arising out of and in the course of her employment by Respondent. In case 17 WC 27631, the Application alleged that on June 14, 2015, Petitioner was "Cleaning windows outside with [pole], cleaning up floods" and sustained an injury to her "Left shoulder, neck, body as a whole" (Arbitrator's Exhibit 4). In case 17 WC 27630, the Application alleged that on December 16, 2016, Petitioner was "Lifting up and moving stage ramp" and sustained an injury to her "Back, left shoulder, neck, body as a whole" (Arbitrator's Exhibit 2). In case 19 WC 06546, the Application alleged that on November 6, 2018, Petitioner was "Bending over to pick up trash bags" and sustained an injury to her "Back, right leg, right foot, body as a whole" (Arbitrator's Exhibit 6). In all three cases Petitioner and Respondent stipulated temporary total disability benefits and medical had been paid in full and the only disputed issue was the nature and extent of disability (Arbitrator's Exhibits 1, 3 and 5).

Petitioner worked for Respondent as a sub foreman for building services. Petitioner's job duties included locking/unlocking buildings, cleaning buildings, trash removal, cleaning/stripping floors, working events, etc.

On June 14, 2015, Petitioner was cleaning windows on a four story building after a flood. The following day, Petitioner experienced pain in her left shoulder and could not reach behind her back. Petitioner initially sought medical treatment on July 8, 2015, and was seen by Dr. Matin Nekzad. Dr. Nekzad diagnosed Petitioner with a trapezius strain, prescribed medication and ordered physical therapy. Petitioner was subsequently seen on July 22 and August 18, 2015. On August 18, 2015, Petitioner's condition had improved and she was released to return to work (Petitioner's Exhibit 3).

On December 16, 2016, Petitioner was in the process of building a stage for the graduation ceremony. She lifted a piece of one of the legs of the stage and injured her left shoulder, neck and back. Petitioner initially sought medical treatment on December 19, 2016, at Heartland Regional Medical Center. At that time, Petitioner complained primarily of low back and left leg pain. Medication was prescribed and Petitioner was directed to follow up with her primary care physician (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Cathy Bless, a Nurse Practitioner, on December 23, 2016. At that time, Petitioner complained primarily of low back pain and left shoulder pain/stiffness. NP Bless prescribed medication, directed Petitioner to do stretching exercises and apply ice and moist heat (Petitioner's Exhibit 3).

Petitioner was again seen by NP Bless on January 6, 2017, and Petitioner advised her that the low back and left shoulder pain was getting worse. NP Bless ordered physical therapy (Petitioner's Exhibit 3). Petitioner received physical therapy from January 18, 2017, through April 4, 2017 (Petitioner's Exhibit 6).

An MRI of Petitioner's lumbar spine was performed on March 17, 2017. According to the radiologist, the MRI revealed a posterior herniation at L5-S1 and mild bulges at L3-L4 and L4-L5 (Petitioner's Exhibit 7).

Petitioner was subsequently evaluated by Lisa Arnold, a Nurse Practitioner associated with Dr. Gerson Criste, on May 18, 2017. At that time, Petitioner complained of low back pain with radiation into the left buttock and right leg. NP Arnold reviewed the MRI and opined Petitioner had low back pain with radiculopathy. She recommended pain management with Dr. Christe (Petitioner's Exhibit 8).

Petitioner was seen by Dr. Christe on July 27, 2017. At that time, Dr. Christe administered an epidural steroid injection at L5-S1. This only gave Petitioner temporary relief (Petitioner's Exhibit 9).

On August 3, 2017, an MRI of Petitioner's left shoulder was performed. According to the radiologist, the MRI revealed a tear with retraction of the long head of the biceps tendon, a questionable labral tear and tendinopathy of the supraspinatus and infraspinatus (Petitioner's Exhibit 7).

Petitioner was subsequently evaluated by Dr. Nathan Mall, an orthopedic surgeon, on September 12, 2017. Dr. Mall reviewed the MRI and opined it revealed a superior labral tear. Because of its poor quality, Dr. Mall ordered an MRI arthrogram of Petitioner's left shoulder. Petitioner also had cervical spine complaints and Dr. Mall opined there was a possible cervical disc herniation. He referred Petitioner to Dr. Matthew Gornet, an orthopedic surgeon, for treatment of her spine condition (Petitioner's Exhibit 10).

The MRI arthrogram was performed on September 18, 2017. According to the radiologist, it revealed a superior labral tear (Petitioner's Exhibit 12).

Dr. Mall saw Petitioner on September 18, 2017, and reviewed the MRI arthrogram. He also opined it revealed a superior labral tear. Dr. Mall recommended Petitioner undergo arthroscopic surgery consisting of a biceps tenodesis and AC joint resection (Petitioner's Exhibit 10).

Petitioner was evaluated by Dr. Gornet on September 18, 2017. At that time, Petitioner complained of low back pain on both sides, but more on the left than right as well as left trapezius/shoulder pain. Dr. Gornet opined Petitioner's left trapezius/shoulder symptoms were because of problems in both the left shoulder and cervical spine. Dr. Gornet ordered an MRI scan of the cervical spine (Petitioner's Exhibit 11).

The MRI of Petitioner's cervical spine was performed on September 18, 2017. According to the radiologist, the MRI revealed central disk herniations at C4-C5 and C5-C6 and a left sided disc herniation at C6-C7 (Petitioner's Exhibit 12).

Dr. Gornet reviewed the MRI of September 18, 2017, and his interpretation of it was consistent with that of the radiologist; however, he described the disc herniation at C4-C5 as being "massive."

Dr. Gornet referred Petitioner to Dr. Helen Blake for steroid injections at C6-C7 and C4-C5. He also ordered a high resolution MRI of Petitioner's lumbar spine (Petitioner's Exhibit 11).

Dr. Blake saw Petitioner on November 7, 2017, and November 21, 2017. On those occasions, she administered epidural steroid injections on the left at C6-C7 and C4-C5, respectively (Petitioner's Exhibit 13).

The MRI of Petitioner's lumbar spine was performed on December 4, 2017. According to the radiologist, it revealed a central protrusion, likely an annular tear, at L5-S1 (Petitioner's Exhibit 12).

Dr. Gornet saw Petitioner on December 4, 2017, and Petitioner's primary symptoms were in regard to the left shoulder. Dr. Gornet opined Petitioner should proceed with left shoulder surgery with Dr. Mall and put treatment for her cervical and lumbar spine conditions on hold (Petitioner's Exhibit 11).

Dr. Mall performed arthroscopic surgery on Petitioner's left shoulder on January 4, 2018. The procedure consisted of superior labral repair, subacromial decompression/acromioplasty, debridement of labrum, AC joint resection and biceps tenotomy (Petitioner's Exhibit 14).

Dr. Mall continued to treat Petitioner following surgery. When he saw Petitioner on January 30, 2018, he ordered physical therapy. Petitioner's left shoulder condition improved; however, when Dr. Mall saw her on May 7, 2018, Petitioner continued to have symptoms which went into her left arm/hand which Dr. Mall opined were related to the cervical spine. He found Petitioner was at MMI in regard to her left shoulder condition (Petitioner's Exhibit 10).

At the direction of Respondent, Petitioner was examined by Dr. Michael Nogalski, an orthopedic surgeon, on January 9, 2018, in regard to her left shoulder condition. In connection with his examination of Petitioner, Dr. Nogalski reviewed medical records provided to him by Respondent, excluding the report of the shoulder surgery which had just been performed five days prior. Dr. Nogalski opined the medical treatment which had been provided to Petitioner to date was reasonable and necessary (Respondent's Exhibit 12).

At the direction of Respondent, Petitioner was examined by Dr. David Robson, an orthopedic surgeon, on March 14, 2018, in regard to her cervical spine condition. In connection with his examination of Petitioner, Dr. Robson reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Robson opined Petitioner should undergo disc replacement surgery at C4-C5 and C5-C6 (Respondent's Exhibit 13).

Petitioner was seen by Dr. Gornet on May 7, 2018. At that time, Dr. Gornet recommended Petitioner proceed with disc replacement surgery at C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 11).

On May 30, 2018, Dr. Gornet performed disc replacement surgery on Petitioner's cervical spine. The procedure consisted of disc replacements at C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 16).

Dr. Gornet continued to treat Petitioner following the cervical disc replacement surgery and ordered physical therapy. When he saw Petitioner on September 10, 2018, he authorized her to return to work without restrictions effective October 1, 2018. However, he opined Petitioner had a disc injury at L5-S1 and recommended further treatment including steroid injections and possible diagnostic tests (Petitioner's Exhibit 11).

On November 6, 2018, Petitioner was bending over to pick up a trash bag and experienced an onset of low back pain. Following the accident, Petitioner contacted Dr. Gornet who referred her to Dr. Blake for an injection. Dr. Blake saw Petitioner on November 20, 2018, and administered an epidural steroid injection at L5-S1 (Petitioner's Exhibit 13).

Dr. Gornet evaluated Petitioner on December 13, 2018. Petitioner advised the injection had given her two weeks of relief. Dr. Gornet ordered a CT discogram and MRI spectroscopy and opined the need for the diagnostic studies was related to the accident of December 16, 2016 (Petitioner's Exhibit 11).

The diagnostic studies recommended by Dr. Gornet were performed and subsequently reviewed by him. When he saw Petitioner on May 6, 2019 Dr. Gornet recommended Petitioner undergo disc replacement surgery at L5-S1 (Petitioner's Exhibit 11).

Again, at the direction of Respondent, Petitioner was examined by Dr. Robson on August 7, 2019. Dr. Robson reviewed diagnostic studies performed on Petitioner in December, 2017, February, 2019, and April, 2019, and opined they all revealed an annular tear at L5-S1. He opined Petitioner had experienced a flare up of symptoms as a result of the November, 2018, accident and, with time, they would return to baseline. He did not recommend any further diagnostic testing or treatment (Respondent's Exhibit 15).

Dr. Gornet was deposed on October 7, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to the cervical disc replacement surgery he performed, Dr. Gornet testified Petitioner did "extremely well" and experienced "dramatic improvement" in her neck pain symptoms. In regard to Petitioner's lumbar spine condition, Dr. Gornet testified Petitioner needed disc replacement surgery at L5-S1 (Petitioner's Exhibit 19; pp 10, 19).

On cross-examination, Dr. Gornet was questioned about his opinion regarding causality. He testified Petitioner's neck and low back conditions were related to the accident of December 16, 2016 (Petitioner's Exhibit 19; p 22).

Dr. Robson was deposed on November 7, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Robson's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, he testified he agreed with Dr. Gornet's recommendation Petitioner undergo cervical disc replacement surgery. While he recommended Petitioner undergo a two level cervical spine disc replacement surgery, he had "no

problem" with Dr. Gornet having performed a three level disc replacement surgery (Respondent's Exhibit 16; pp 11-13).

In regard to Dr. Gornet's recommendation Petitioner undergo disc replacement surgery at L5-S1, Dr. Robson testified Petitioner had a small annular tear at that level, but that was not sufficient pathology to warrant disc replacement surgery. He did not recommend any further treatment in regard to Petitioner's low back (Respondent's Exhibit 16; pp 18-19).

Dr. Gornet performed surgery on Petitioner's lumbar spine on January 22, 2020. The procedure consisted of an anterior decompression and disc replacement at L5-S1 (Petitioner's Exhibit 16).

Subsequent to surgery, Dr. Gornet continued to treat Petitioner and ordered physical therapy. When he saw Petitioner on July 6, 2020, he authorized her to return to work at full duty effective August 17, 2020. Dr. Gornet last saw Petitioner on January 28, 2021. At that time, he noted Petitioner was very pleased with her recovery and was continuing to work full duty (Petitioner's Exhibit 11).

At trial, Petitioner testified she was very happy with the medical treatment she received and was able to return to work without restrictions. However, she testified she does experience some flare ups of symptoms usually associated with increased activities. Petitioner said she experienced an onset of low back pain when she attempted to move some furniture at work and her right leg does get weak and the sciatic nerve gets aggravated. Petitioner still continues to take pain medication for low back pain on as needed basis.

In regard to her left shoulder, Petitioner testified she experiences pain in the top and front of her left shoulder whenever she has to do any overhead lifting. This, in turn, causes symptoms in both her neck and low back.

Petitioner testified she has to use a special pillow for sleeping because of her neck symptoms. She still experiences neck stiffness and headaches and takes medication on an as needed basis. She said that performing overhead activities at work causes pain in her neck which goes up into her head.

Petitioner's various symptoms have also impacted her personal life in regard to her performing household tasks as well as gardening and fishing. Further, Petitioner testified she has experienced a weight gain which she attributes to her low back surgery and lack of activity.

Conclusion of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 42 1/2% loss of use of the person as a whole (20% loss of use of the person as a whole because of the cervical spine injury; 12 1/2% loss of use of the person as a whole because of the lumbar spine injury; and 10% loss of use of the person as a whole because of the left shoulder injury).

In support of this conclusion the Arbitrator notes the following:

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

At the time the Petitioner sustained the accident, she worked as a sub foreman for Respondent. Petitioner testified her job duties included physically demanding tasks. The Arbitrator gives this factor significant weight.

Petitioner was 41 years old at the time she sustained the accident. She will have to live with the effects of the injury for the remainder of her working and natural life. The Arbitrator gives this factor significant weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity because she was able to return to work to the job she had at the time she sustained the accident. The Arbitrator gives this factor moderate weight.

Petitioner sustained a significant injury to her left shoulder, cervical spine and lumbar spine. Petitioner's left shoulder injury required extensive arthroscopic surgery. Petitioner's cervical spine injury required cervical disc replacement at three levels. Petitioner's lumbar spine injury required a one level disc replacement surgery. Petitioner testified she was able to return to work to her regular job, but also testified she continues to have symptoms referable to her left shoulder, neck and low back. The Arbitrator finds Petitioner's testimony regarding her ongoing symptoms to be credible and consistent with the injury she sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC008070
Case Name	Jason Stram v. Spahn and Rose Lumber
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0311
Number of Pages of Decision	24
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Brad Reynolds
Respondent Attorney	Kevin Luther

DATE FILED: 8/17/2022

/s/ Deborah Simpson, Commissioner

Signature

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

Jason Stram,

Petitioner,

vs. NO: 18 WC 8070

Spahn & Rose Lumber Company,

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 accident, medical and 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 7, 2021, 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 $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.

August 17, 2022
o8/10/22
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC008070
Case Name	STRAM, JASON v. SPAHN & ROSE LUMBER COMPANY
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Brad Reynolds
Respondent Attorney	Steven Getty

DATE FILED: 12/7/2021

THE INTEREST RATE FOR THE WEEK OF DECEMBER 7, 2021 0.10%

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JASON STRAM
Employee/Petitioner

v.

SPAHN & ROSE LUMBER COMPANY
Employer/Respondent

Case # **18** WC **008070**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Rockford**, on **9/8/21**. 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, **11-22-2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**13,393.55**; the average weekly wage was $**680**.

On the date of accident, Petitioner was **44** 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

Respondent to pay weekly temporary total disability benefits of $453.33/week from April 11, 2018 through May 14, 2018 and November 15, 2019 through June 23, 2021.

Respondent is liable for all causally related medical bills per the fee schedule.

Respondent shall authorize the additional hernia surgery recommended by Dr. Barnes.

See attached Findings of Fact and Conclusions of Law

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

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

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

/s/ Gerald W. Napleton

Signature of Arbitrator

DECEMBER 7, 2021

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JASON STRAM	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 18 WC 008070**
	)	
SPAHN & ROSE LUMBER COMPANY,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

Petitioner JASON STRAM commenced employment for Respondent SPAHN & ROSE LUMBER COMPANY in October 2017. Petitioner loaded lumber and other materials onto Respondent's semi-trailers and then drove the semis out to the job sites for the framers and construction workers to complete their projects. Petitioner held a CDL – Class A at the time he was hired by the Respondent. On November 22, 2017 Petitioner was working at the Respondent's location in a separate building behind the main building that housed all of the doors and windows. Petitioner testified there was a trailer located near the garage-like structure where the windows and doors were housed and employees were taking windows from inside the structure and loading them into the trailer. Petitioner described the windows that were being loading into the trailer were 8 to 8-1/2 feet tall and weighed 236 pounds per window. The doors weighed between 100 to 150 pounds depending on the material that was used to make the door. Steel doors were heavier. Petitioner testified that the whole crew was involved in loading windows and doors on November 22, 2017 which included himself, Tom (boss), Nate (foreman), Dirk (co-worker) and Clint (co-worker). .

Petitioner explained that the building was raised up off the ground so that a semi could-back into it. Petitioner described that when these windows were brought out of the garage door they had to be leaned down because of their height and that the doorway was not tall enough for the window. Next, the window was slid on its side underneath the header in the garage door to bring it out, and it was intended to drop down from there to the ground level. Two people were required to catch each window, hold it, brace it, and get it down before loading it into the trailer. Petitioner then described the incident on November 22, 2017 at work as follows:

> As we were doing so -- it was a little bit windy out and you got the angle of the window and were trying to pull it back, and I am 6' 6". Clint is only about 6'. You're talking about two different counterpoints now. I'm much taller. Now I'm out here (indicating) with the window first walking backwards. I've got my arm up bracing so it doesn't fall over, and Clint is about ready to grab it off the truck dock. As Clint does and goes to position himself like this (indicating) to bring the window to his carrying point, that weight of the window goes down, and it starts to push him towards the big rubber truck stop that you would back your semitrailer into. I did not want that. And so I went and got a hold of this window frame and tried to pull back and steady the window, and as I did, I felt kind of like a tear sensation. Trial Tr. pp. 8-9.

Petitioner indicated that the tearing sensation was in his stomach area near his abdomen by his belly button. Petitioner testified that he and Clint were able to secure the window and put it down to the ground where it was then slid over and into the trailer. Petitioner testified that the window at issue weighed somewhere between 234 to 236 pounds. After the window was secured and slid into the trailer, Petitioner told the workers present that he "felt that one".

Petitioner did not stop working at this time. Instead, the whole crew continued to remove and load windows from the outside structure into the trailer until an additional 15 to 16 windows were loaded. Petitioner testified that the incident happened in the evening around 5:00 p.m. and after the windows were all loaded up, he went home. Petitioner testified he went home that night and that he got undressed and removed the gear that he was wearing at work from that day because it was cold outside. Petitioner took a shower and while he was in the shower Petitioner could see a bulge near his belly button. Petitioner

testified that at no time prior to November 22, 2017 did he have a visible bulge on the right side near his belly button.

The following day at work, all the employees met in the big garage area to go over what the day was going to be like and what had to be loaded and the types of material that were coming to be put away. Petitioner told his co-workers that he slept poorly the night before and he referenced the window with Clint from the day before and then he lifted up his shirt and asked his coworkers whether they had ever seen a bulge like the one near his bellybutton. Tom, Clint, Nate, and Dirk were all present. Clint volunteered that he had an umbilical hernia and that it never bothered him. Clint further volunteered that doctors told him that if a hernia does not bother you they do not deal with it.

Petitioner testified that he reached out to his supervisor Tom to request approval to be seen by a doctor shortly after the November 22, 2017 incident. Petitioner testified he tried to show Tom his abdomen, but Tom refused to look at it. Petitioner testified that Tom kept walking away and he would not look at it. Once Petitioner pursued him into his office and insisted that Tom look at it. Trial Tr. p. 55. However, Tom would not look at it and told Petitioner that he had never seen a hernia and did not know what to do. Petitioner asked Tom if Respondent could limit the amount of his heavy lifting because of the bulge but Tom notified Petitioner that a couple of the guys were leaving for vacation and Petitioner was needed to perform his regular work duties. Petitioner testified that he did not want to let the entire crew down. Petitioner kept working at his regular heavy job and that he was hired to perform starting with the day after November 22, 2017 until he was seen in the emergency room for the first time on February 19, 2018.

Petitioner was seen at the emergency room two times on February 19, 2018. On that morning, Petitioner woke up and was trying to get ready for work. He was not feeling well. After leaving the ER upon first arrival, Petitioner began vomiting which included blood. Petitioner then returned to the ER a

second time the same day. Besides vomiting with blood, Petitioner testified that the bulge almost tripled in size between November 22, 2017 and when he was seen at the emergency room on February 19, 2018.

Upon initial presentation to the ER on 2-19-18, Petitioner gave a history to John Cook, APRN, that he noted an umbilical type hernia for the last two months. He stated it began bothering him in the past two weeks. The Arbitrator notes three addendums to this note by John Cook. The first addendum was added on May 9, 2018, nearly three months after the initial presentation, and included a history of the work accident as relayed to John Cook by the Petitioner. The second addendum was added February 13, 2019, where the Petitioner added, a year later, that he had some accompanying low back pain in the association with the umbilical pain. The third and final addendum was added on February 27, 2019, over a year after the initial visit. Again, the Petitioner requested that information be added regarding both his hernia and low back pain. John Cook noted that the hernia was the clinical focus of the visit.

Petitioner was referred by APRN John Cook to general surgeon Dr. Barry Barnes. Dr. Barnes recommended hernia surgery at the first visit with Petitioner on 2-23-2018. Dr. Barnes noted that the Petitioner complained of an umbilical hernia, which had never been repaired. Dr. Barnes noted in the records that the hernia is an incisional hernia rather than a true umbilical hernia and is most likely related to the previous surgery. Dr. Barnes planned to perform the hernia surgery for Petitioner.

Petitioner's hernia surgery was delayed due to issues with Petitioner's lower back. On March 26, 2018 Petitioner sought treatment with Dr. Braaksma for his low back. The record shows that Petitioner left a voicemail on May 23, 2018 with Dr. Braaksma asking that this March note reflect an abdominal hernia that could be work-related. As far as his low back is concerned, Petitioner reported his low back blew out while he was at home after standing up and going down a flight of stairs causing him to fall.

Petitioner underwent hernia surgery repair by Dr. Barnes on April 11, 2018. Petitioner did not return to work after his surgery. The medical note from Dr. Barnes dated 11/9/2019 noted Petitioner did

not return to work after surgery for "other medical issues." Petitioner testified that Dr. Barnes did not give him any specific work restrictions. Petitioner was released to return to work without restrictions by Dr. Barnes following hernia surgery as of May 14, 2018. Dr. Barnes May 14, 2018 note mention Petitioner did not return to work due to his back. This was confirmed by Petitioner's testimony. The Petitioner's low back issue is not a part of this claim.

Petitioner testified that he returned to Dr. Barnes in September 2019 because he noticed the right sided lump appear again. The bulge was near his bellybutton just slightly to the right. Initially it was the size of a knuckle sticking forward. After a physical exam on September 23, 2019, Dr. Barnes recommended an updated CT scan which was not authorized by the workers' compensation carrier. Petitioner returned to Dr. Barnes on November 1, 2019. Following updated physical exam the bulge was documented to be larger and Petitioner was excused off work.

Petitioner was seen again by Dr. Barnes in June 2020 reporting that the hernia had gotten bigger and it was no longer reducible (able to be pushed back inside). Petitioner testified the bulge was no longer soft but instead was very hard. Dr. Barnes in his June 17, 2020 note stated his initial hernia could have been related to his previous hernia surgery since it was at the same site. He further opined that he does not believe his job caused the hernia but the lifting of heavy objects at work "would certainly increase intra-abdominal pressure which may force bowel or other intra-abdominal contents into the hernia sac and could result in the hernia getting larger and also increased risk of more pain and incarceration. I do believe that was in fact the situation that happened when he initially presented to me." Dr. Barnes encouraged that the hernia be repaired again.

Petitioner did not work between November 15, 2019 through June 23, 2021. Dr. Barnes testified that Petitioner was unable to work for that period of time. On June 24, 2021 Petitioner began a job with Ingrown Farms in Freeport as a quality inspector. Petitioner described that he could sit and stand at his

option and he performs computer work. Petitioner testified that the only thing he lifts are cardboard boxes that weighs less than one pound. Petitioner testified that Dr. Barnes was notified about the nature of his job and that he was given permission by Dr. Barnes to do the type of work he was doing for Ingrown Farms until he can have surgery.

Petitioner had a two-level lumbar fusion from L4-L5 in either 2000 or 2001 by Dr. Avi Bernstein. Petitioner testified he had a good outcome following lumbar surgery by Dr. Bernstein and was able to get his life back at that time.

Petitioner has a history of hernia complaints reflected in his medical history. Petitioner sought treatment at Freeport Health Network on August 30, 2011 where the subjective assessment notes that the petitioner made complaints of an umbilical hernia. The objective physical examination revealed an umbilical hernia that was reproducible and non-strangulated. It was opined by Susan Korr, APN, this was likely secondary to a surgical procedure in which an abdominal incision was made.

Petitioner's primary care physician is Dr. McFadden at Pecatonica Family Healthcare Center through FHN. Petitioner testified Dr. McFadden has been his primary care physician for at least 12 years. On February 5, 2016 Dr. McFadden treated Petitioner for his low back symptoms but noted the existence of an umbilical hernia. On November 22, 2017 that Dr. McFadden documented a soft, small, reducible hernia on two occasions in his medical records in 2013 and in 2017. Documentation by Dr. McFadden at both these visits were doing routine physicals. According to Petitioner, he had no medical treatment for this small, reducible, soft hernia prior to November 22, 2017. The Arbitrator notes, however, that on August 19, 2013. Dr. McFadden noted that the Petitioner claimed the hernia was getting worse at that time. The physical examination noted a moderate sized umbilical hernia that was soft and reducible. The plan generated at the time was simply to monitor the hernia. No pain was noted. No further treatment was recommended.

On April 8, 2015, the Petitioner was seen by Dr. Andrew Vo. It was noted the Petitioner did not have abdominal pain, but a hernia was present in the ventral area. On November 22, 2015, the Petitioner was seen by Dr. Brian Michaelson who noted a diagnosis of umbilical hernia without obstruction and without gangrene. At the time, the Petitioner noted no abdominal pain. Petitioner's hernia is noted in several other visits but the Arbitrator notes that the visits note that the Petitioner did not complain of any pain.

Prior to his employment with Respondent, Petitioner was employed by Bay Valley Foods in early 2017. Bay Valley Foods was his employer immediately preceding his hire by Respondent. Petitioner testified that he passed a pre-employment physical at Bay Valley Foods in order to begin employment there and that he completed the physical at Physicians Immediate Care. Petitioner passed the physical for Bay Valley Foods conducted at Physicians Immediate Care and Dr. McFadden wrote him a letter before he began employment at Bay Valley Foods indicating that he had no work restrictions of any kind at the time he commenced employment with Bay Valley Foods.

At Bay Valley Foods Petitioner worked third shift in the powder dump where they make creamer. Petitioner described his primary job duties as operating a fork truck and running up two flights of stairs to this big bin which looks like a silo inside. Petitioner then opened the trap door, un-cranked two large doors with a lap wrench, dropped the powder into the container unit, and then run back down the stairs and jumped back in the fork truck. Petitioner repeated this process all night long. According to Petitioner, he did not miss any time while employed at Bay Valley Foods on account of any symptoms related to a hernia. Nor did Petitioner seek any medical treatment for a hernia while working at Bay Valley Foods.

Petitioner also underwent a DOT physical shortly after being hired by Respondent and before November 22, 2017. Dr. Jon Struenburg performed the physical. Tenderness was noted in the right lower

quadrant, periumbilical area, and left lower quadrant. A hernia was noted to be present. No complaints of pain were noted.

Petitioner testified that he did not miss any work for hernia symptoms while employed at Respondent prior to November 22, 2017 for his hernia. Nor did he have any medical treatment after being hired by the Respondent for a hernia prior to November 22, 2017.

Petitioner testified that he completed Pet. Ex. 3, S&R Incident Report on February 28, 2018 at the direction of his supervisor Tom who did not ask him to complete the report until the date that he signed it.

During the hearing, Petitioner lifted his shirt and exposed his abdomen so that it could be seen by the Arbitrator. North of Petitioner's belly button and to the right a visible bulge could be seen 4 to 5 inches from his belly button. The Arbitrator noted an obvious bulge on the record.

Petitioner testified that he continues to have symptoms associated with his hernia. Petitioner does not wear a seatbelt while he's operating a vehicle. Petitioner testified when he goes to the bathroom or if he eats certain foods his bulge will get bigger and he has to push on it to try to get it to go back inside. Petitioner testified laying down was difficult for him and that he also wears a support brace which he was wearing on the day of hearing. Petitioner testified at rest his pain is 2 out of 10 but with activity, especially lifting, his pain will increase significantly. On cross-examination, Petitioner testified that he played sand volleyball one time in June of 2021. Petitioner testified he experienced pain after the volleyball game.

Nathan Buser testified in Petitioner's case in chief. Mr. Buser was employed by the Respondent as a yard foreman commencing with the summer of 2012. Mr. Buser was Petitioner's supervisor on November 22, 2017. Mr. Buser testified that he came to know Petitioner through his employment by Respondent. As yard foreman, Mr. Buser oversaw the yard employees and drivers for Respondent. This

supervision included Petitioner. Mr. Buser testified that Respondent's windows varied in size from 5 to 12 feet long. Certain windows could be handled by a worker himself. Windows that were larger could weigh between 200 up to 700 pounds. Mr. Buser was employed as the yard foreman for the Respondent on November 22, 2017. When asked to describe what he happened to Petitioner on that day Mr. Buser testified as follows:

> I think all four of us yard people were back there that day unloading windows off of a semi-trailer. I was still in the trailer getting windows to the back of the truck, but I had seen Jason working with Clint. And the way the opening was set up, you had to lift the window out of the truck. The trailer was below the dock. So you had to lift the window and then tilt the window to get it through the doorway because the door was too small. And I had seen them going through the doorway, and then I saw Jason grab his stomach, and I saw him and Clint having a conversation about it, but I was still in the trailer so I couldn't necessarily hear the conversation. But I did see him when that happened. Trial Tr. pp. 66-67.

Mr. Buser testified that the window he observed Clint and Petitioner lift was at least 5 to 6 feet tall. It was one of the bigger windows which always had to be maneuvered awkwardly to get it in and out of the doorway and that the window weighed over 200 pounds. Mr. Buser testified that he voluntarily left the employ of Respondent sometime after November 22, 2017 to begin a similar job with ABC Supply. According to Mr. Buser, he left Respondent on good terms. On cross-examination, Petitioner testified that he has probably seen Nathan Buser five times in the last four years and that they text occasionally.

The respondent sought a records review under Section 12 from Dr. Mitsos related to this claim. After a review of the Petitioner's medical history, Dr. Mitsos opined that he did not consider this to be an aggravation of a pre-existing hernia, and that the documentation notes that the Petitioner has suffered from an umbilical hernia since August 30, 2011. The hernia was first documented on August 30, 2011 and was never repaired. Consistent with the opinion of Dr. Barnes, Dr. Mitsos noted that the natural progression of a hernia is to grow over time. Therefore, Dr. Mitsos testified that he did not find that the

Petitioner suffered an aggravation to a pre-existing hernia. Further, based on this reasoning, the hernia was not related in any way to the work duties as reported by the Petitioner in the records.

Petitioner's Exhibit 3 is Accident/Incident Investigation Report. The date and time of the injury are identified as November 22, 2017 at 4:00 p.m.ish. The Incident Investigation Report was completed by Petitioner and dated February 28, 2018. In the description of the injury, Petitioner noted that he was lifting and loading windows. Petitioner specifically described that Clint was on one end and he was on the other end of a window and that the window wanted to tip back on us and that the Petitioner felt a tug in his stomach. When asked to explain what he was doing at the time of the incident Petitioner noted that he was lifting windows form the truck dock. Petitioner further noted that the incident report was not completed within 24 hours because he did not know the injury was as bad as it is, and he further noted that he continued to work.

CONCLUSIONS OF LAW

Regarding issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

To claim compensation under the Act, 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 v. Industrial Commission,* 207 Ill. 2d 193, 203, 797 N.E. 2d 665, 671-672 (2003). An injury occurs within the course of an employee's employment if the injury occurs within the time and space boundaries of the employment. *Id.* An injury arises out of an employee's employment when the employee was performing acts he was instructed to perform by his employer, acts, which the employee might reasonably be expected to perform relating to his assigned duties. *Id.*

The Arbitrator notes that Petitioner's testimony at hearing was credible. Petitioner's testimony regarding his lifting a heavy window and the tearing sensation that followed was

credible. The medical records support Petitioner's claim that he experienced an accidental injury. The FHN hospital records note that Petitioner reported the presence of an umbilical-type hernia for approximately the past two months and further noted that he is quite active physically with both working out and at his job where he does a fair amount of heavy lifting.

Petitioner's unrebutted testimony is further corroborated by former coworker Nathan Buser. Nathan Buser, who no longer works for the employer, testified that he was present on November 22, 2017 and observed Petitioner and a co-worker lift a heavy window. Mr. Buser further observed the Petitioner was bent over holding his stomach following the lifting of one particular window which weighed over 200 pounds. The testimony Mr. Buser was unrebutted.

Accordingly, the Arbitrator finds that the record as a whole supports a finding that Petitioner sustained an accident while in the course and scope of his employment by Respondent on November 22, 2017

Regarding issue (F) whether Petitioner's current condition of ill-being is causally related to his injury, the Arbitrator finds as follows:

The Arbitrator notes that Dr. Barnes started seeing Petitioner in February 2018 and noted an umbilical hernia. Petitioner underwent laparoscopic assisted repair of incarcerated peri umbilical incisional hernia with placement of mesh completed on April 11, 2018. Petitioner recovered well from surgery and able to return to work concerning his hernia in May of 2018.

Petitioner returned to Dr. Barnes on September 9, 2019 where it was suspected his hernia had returned. It was reported that the patient noticed a bulge at the umbilicus about one month ago. The hernia was not felt by Dr. Barnes to be incarcerated at that time. Dr. Barnes diagnosed recurrent incisional hernia and recommended updated CT scanning. On September 23, 2019 physical exam continued to reveal a defect which was not incarcerated. Dr. Barnes testified that

the hernia was more likely than not related to the accident that he had on his job when he felt the tearing sensation. Dr. Barnes noted that the patient did not smoke, did not have any wound infections after the initial surgery, nor did he have diabetes or any history of collagen or vascular disorder which would be risk factors for a recurrence of a hernia. Dr. Barnes did acknowledge that the surgical technique from April 11, 2018 played a role in the development of a recurrent hernia and that this was a risk of surgery.

On November 4, 2019, Dr. Barnes noted that the hernia had gotten larger since previous exam and the area was somewhat tender although there was no acute incarceration at that time. Dr. Barnes no longer saw the need for CT scanning with the hernia quite obvious now and recommended repeat hernia repair on November 4, 2019. When last seen on June 17, 2020 by Dr. Barnes an updated physical exam revealed a palpable defect in the peri-umbilical area that was now not completely reducible. The diagnosis of recurrent incisional hernia remained in place as well as the recommendation for surgery.

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 accidental injury aggravated or accelerated the pre-existing 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 pre-existing condition. See *Caterpillar Tractor Co. v. Industrial Commission,* 92 Ill. 2d 30, 36-37 (1982).

It is axiomatic that employers take their employees as they find them. See *Baggett, v. Industrial Comm'n* 201 Ill. 2d at 199, 266 Ill. Dec. 836, 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. *Id.* Thus even though an employee has a pre-existing

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. *Caterpillar Tractor Co.,* at page 36. Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Id.*

The Arbitrator notes that Petitioner has a history of hernia issues. That said, the record suggests that Petitioner's pre-accident hernia issues were benign and fundamentally asymptomatic. Records from 2011 at Freeport Health Network along with records from 2013 and 2016 note the existence of a hernia but they also note that Petitioner did not require any medical treatment to address the hernia. The hernia is noted generally while Petitioner is there for a physical examination or for treatment for his lower back. The August 2013 record which mentions that his hernia was potentially "getting worse" is not persuasive enough evidence – this record predates the incident in question by four years and again notes that no pain or medical treatment is referenced. Further, Petitioner was able to pass DOT a physical on October 25, 2017. Again, a hernia was noted but there was nothing to suggest the hernia was symptomatic or posed any issue for Petitioner.

The Arbitrator finds the opinion of Dr. Barnes to be credible. Dr. Barnes is Board Certified in General Surgery whose practice is roughly 30% focused on hernia surgeries. He performs several hernia surgeries each month. He performed Petitioner's initial surgery and wishes for Petitioner to undergo a second surgical repair. The issue of the second repair appears to be the focus of this dispute.

Dr. Barnes testified that Petitioner currently suffers from an incisional hernia that he previously repaired. According to Dr. Barnes, recurrence of incisional hernias carries a much

higher risk (3 to 15%) of recurrence compared to inguinal hernias, or a true umbilical hernia or a ventral hernia. Dr. Barnes testified to a reasonable degree of medical and surgical certainty that Petitioner's lifting the heavy object aggravated his pre-existing hernia as the accident clearly resulted in pain and possible incarceration that he developed. He acknowledged that Petitioner's job did not cause the hernia however the lifting at his job resulted in the hernia getting larger along with increased pain and incarceration.

The Petitioner's credibility combined with that of Dr. Barnes are again noted by the Arbitrator. Respondent questions Petitioner's credibility through reference to various addendums requested by Petitioner at various points in his treatment. Frankly, the addendums provided minimal impact on the Arbitrator's analysis. Petitioner's testimony, his histories (imperfect as they may be) reflected in the records, the testimony of Dr. Barnes, and the record support the Arbitrator's findings. The Arbitrator is aware that Petitioners can be imperfect historians and does not find the addendums to reflect poorly on Petitioner's credibility.

Respondent offered the medical opinion of Dr. Albert Mitsos who is Board Certified in Forensic Medicine. Dr. Mitsos was asked by the Respondent to perform a records review and author a report regarding Petitioner. Dr. Mitsos testified that he reviewed medical records both before and after November 22, 2017. Dr. Mitsos testified Petitioner did not suffer a hernia as the result of the November 22, 2017 alleged injury because the medical records demonstrated the hernia existed prior to that date. Dr. Mitsos further opined that the November 22, 2017 incident was not an aggravation to a pre-existing hernia. According to Dr. Mitsos the natural progression of a hernia is to simply get worse and that the only treatment for hernia is surgery. Dr. Mitsos opines that one can't alter the natural course of a hernia as it is just going to get worse and surgery is the elective response once diagnosed. According to Dr. Mitsos, the only way to really aggravate

or alter the natural course is to convert an elective repair of the hernia to an emergency. In other words, if a hernia became incarcerated and strangulated where it became an emergency and the surgeon had to take him to the operating room this would be an aggravation. You now alter the natural course of that condition in its treatment plan.

On cross-examination Dr. Mitsos confirmed that he never performed an actual physical exam regarding the Petitioner. Dr. Mitsos has never been Board Certified in General Surgery. Dr. Mitsos testified on cross-examination that he had not seen a patient for a medical condition of a hernia since around 1990. Dr. Mitsos agreed that Petitioner's primary care physician documented the presence of an umbilical hernia on February 13, 2017 which was reducible. Dr. Mitsos further agreed that Dr. McFadden authored a note regarding the Petitioner which suggested that he had no work restrictions or activity restrictions as of February 13, 2017 and despite the presence of an umbilical hernia that was reducible. Dr. Mitsos agreed that Petitioner's pre-employment physical dated February 2, 2017 suggested that Petitioner's hernia was small and reducible at that time.

Dr. Mitsos further acknowledged, upon reviewing another physical dated October 25, 2017, that Petitioner meets standards and that this was shortly before November 22, 2017. It was noted by Dr. Mitsos that genito-urinary system including hernias was marked normal**.** Dr. Mitsos conceded again that at that time Petitioner's hernia was small and reducible. When asked on cross-examination whether Dr. Mitsos would expect Petitioner to pass a DOT physical on October 25, 2017 if he had an incarcerated hernia Dr. Mitsos responded "Hernias are something DOT looks for. It's on every DOT exam. . . so my answer is yes to everything you've asked as far as normal goes; and would it indicate to me that it was reducible, yes. It's reducible at that juncture. In size, can I just concur that it was probably small."

Dr. Mitsos reviewed Dr. Barnes' initial office visit of February 23, 2018 and further agreed that at that time Petitioner's abdominal/umbilical hernia was incarcerated**.** Dr. Mitsos acknowledged a difference between a soft reducible hernia and an incarcerated hernia. Dr. Mitsos testified that lifting a heavy object can cause a hernia and further testified that lifting a heavy object can cause a small reducible hernia to become incarcerated. Despite this opinion offered earlier on direct exam (and in his initial report) that a hernia could be aggravated under certain circumstances, Dr. Mitsos denied that lifting a heavy window permanently aggravated Petitioner's hernia condition. Dr. Mitsos again opined regarding hernias that surgery is necessarily indicated by their very existence. According to Dr. Mitsos, all small reducible hernias go on to include or involve surgery if the patient elects. Dr. Mitsos denied that when a hernia becomes incarcerated there's a greater need to perform surgery than if the hernia stays soft and reducible. The Arbitrator does not find the opinions of Dr. Mitsos to be as credible as the opinions of Dr. Barnes.

The Arbitrator finds that Petitioner's current condition of ill-being regarding his incisional hernia is causally related to the 11-22-2017 accident. There is no question that Petitioner had a pre-existing umbilical/incisional hernia before November 22, 2017. The Arbitrator finds it is clear from the medical records and record as a whole that Petitioner's injury aggravated and accelerated Petitioner's pre-existing hernia condition contributing to the need for surgery done by Dr. Barnes on 4-11-2018 and that the Petitioner suffered a recurrence of the hernia which requires further treatment.

Regarding issue (J) whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges, the Arbitrator finds as follows:

The Arbitrator finds all treatment rendered to date to Petitioner concerning his hernia to be reasonable and necessary and causally related to the November 22, 2017 injury. Respondent is

ordered to pay any outstanding medical bills or balance listed below in accordance with Section 8(a) and the medical Fee Schedule:

DOS	BILLED AMOUNT	BCBS PAYMENT	BALANCE DUE
2/19/2018	$121.00	BCBS adjustment $54.52, payment $0	$66.48.
2/19/2018	$2,697.00	BCBS adjustment $459.91, payment $1,856.60	$380.49
2/23/2018	$283.00	BCBS adjustment $194.78, payment $70.58	$17.64.
2/28/2018	$283.00	BCBS adjustment $208.01, payment $59.99	$15.00
4/4/2018	$283.00	BCBS adjustment $208.01, payment $59.99	$15.00.
4/11/2018	$4,713.00	BCBS adjustment $2,861.16, payment $1,851.84,	$0
4/11/18	$35,718.78	BCBS adjustment $58.85, payment $35,140.33,	$519.16.
4/19/2018	$0	Post op follow up visit	$0
4/27/2018	$0	Post op follow up visit	$0
9/9/2019	$283.00	No payments received.	$283.00.
9/23/2019	$97.00	No payments received.	$97.00
11/4/2019	$121.00	No payments received.	$121.00
6/27/2020	$283.00	No payments received.	$283.00

(See PX 4 Bates Stamp # 333-349 and PX 5 Bates Stamp #499-504).

Regarding issue (K) concerning Petitioner's entitlement to prospective medical care, the Arbitrator finds as follows:

Having found that Petitioner sustained his burden of proving both accident and medical causation, the Arbitrator orders Respondent to authorize prospective medical care in the form of the surgery recommended by Petitioner's treating surgeon, Dr. Barnes, consisting of laparoscopic incisional hernia repair with removal of the old mesh and placement of new mesh along with all related medical treatment associated with such surgery in accordance with Section 8(a) and the medical Fee Schedule.

Regarding issue (L) concerning temporary total disability benefits in dispute, the Arbitrator finds as follows:

Having found that Petitioner sustained his burden of proving accident and medical causation, the Arbitrator finds that Petitioner is entitled to an award of TTD benefits. TTD is

awarded for the post-surgical period of April 11, 2018 through May 14, 2018 and again from November 15, 2019 through June 23, 2021. The Arbitrator finds that the record supports a finding that Petitioner was temporarily totally disabled for those periods of time due to his recurrent hernia and the records and testimony of Dr. Barnes.

The dispositive inquiry in determining TTD benefits remains whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n,* 236 Ill.2d 132 (2010). The Arbitrator notes that Dr. Barnes excused Petitioner off work as of November 15, 2019 because the recurrent incisional hernia was documented to be incarcerated as of that date. Dr. Barnes excused Petitioner off work effective November 15, 2019 until repeat hernia surgery could be performed. Repeat hernia surgery has not been authorized. The Arbitrator finds Dr. Barnes' testimony to be persuasive. Petitioner has not reached maximum medical improvement and is entitled to TTD benefits as a result.

Petitioner was able to secure a job as a quality inspector with a different employer on June 24, 2021 which provided him with the option of sitting or standing at his determination along with no lifting greater than 1/2 pound. Accordingly, since Petitioner found a position that did not require lifting (such as was required while in employ of Respondent) and accommodated his injury his entitlement to temporary total disability ends on June 24, 2021 when he was able to work again.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC027638
Case Name	Michelle Maher v. Spirit Airlines, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0312
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Martin Spiegel

DATE FILED: 8/17/2022

/s/ Deborah Simpson, Commissioner

Signature

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 Maher,
Petitioner,

vs. NO: 19 WC 27638

Spirit Airlines, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of 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 23, 2021, 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 $15,000.00. 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.

August 17, 2022
o8/10/22
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC027638
Case Name	MAHER, MICHELLE v. SPIRIT AIRLINES, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Martin Spiegel

DATE FILED: 11/23/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/ Rachael Sinnen, Arbitrator

Signature

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 MAHER
Employee/Petitioner

v.

SPIRIT AIRLINES, INC.
Employer/Respondent

Case # **19** WC **27638**

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 **Rachael Sinnen,** Arbitrator of the Commission, in the city of **Chicago**, on **August 24, 2021**. 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. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **November 25, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**45049.68**; the average weekly wage was $**866.34**.

On the date of accident, Petitioner was **45** 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 $**6023.13** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6023.13**.

Respondent is entitled to a credit of $**224.63** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits in the amount of **$577.56**/week for **10-3/7** weeks, for the period of **11/27/2018** through **2/7/2019**, which is the period of temporary total disability for which compensation is due.

Respondent shall pay to Petitioner directly out of pocket medical/maintenance expenses of $312.89, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $224.63 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 the sum of **$519.80**/week for a further period of **30** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained to the right ear caused a **6%** loss of use to the person as a whole.

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

NOVEMBER 23, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelle Maher	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC027638
Spirit Airlines, Inc.	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on August 24, 2021 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include the nature and extent of the injury. Respondent agreed to liability for Petitioner's out of pocket expenses in the amount of $312.89 under Section 8(a). (Arbitrator's Exhibit "AX" 1).

Work History and Background

Petitioner testified via evidence deposition on August 2, 2021. The Arbitrator reviewed the transcript of the evidence deposition. Petitioner was employed by Respondent as a flight attendant on November 25, 2018. (Petitioner's Exhibit "PX" 1 at 6). She had been employed by Respondent for approximately 2.5 years prior to November 25, 2018. (PX 1 at 6). Petitioner was based in Chicago. (PX 1 at 6). Petitioner testified regarding her job duties for Respondent as a flight attendant. (PX 1 at 6). Petitioner assisted passengers with boarding. (PX 1 at 6). She also checked emergency equipment. (PX 1 at 6).

Prior Medical Treatment

Petitioner testified that prior to November 25, 2018 she had never received any medical treatment for her right or left ear. (PX 1 at 6). She also never sustained any accidents involving her left or right ear prior to November 25, 2018. (PX 1 at 7). Prior to November 25, 2018, Petitioner had never undergone a hearing test for either ear. (PX 1 at 7). Petitioner testified that prior to November 25, 2018 she did not have anything wrong with her hearing and never had any issues with her ears. (PX 1 at 7). She testified that prior to November 25, 2018, she never had any issues with noises in her ears. (PX 1 at 7). Petitioner did not have any complaints in connection with her right ear prior to November 25, 2018. (PX 1 at 33). Petitioner had never had an ear infection before. (PX 1 at 33).

Accident of November 25, 2018

Petitioner testified that on November 25, 2018 she was working on a flight originating in Chicago and flying to Newark, New Jersey. (PX 1 at 7). It was an evening flight. (PX 1 at 7). Towards the end of the final descent, Petitioner was standing in the middle of the cabin. (PX 1 at 8). The plane did a quick abort. (PX 1 at 8). Petitioner explained that a quick abort was when there was a sudden change in altitude where the plane went from descending to immediately ascending. (PX 1 at 9). The ascent was about a minute. (PX 1 at 9). Almost immediately after the ascent, Petitioner felt a pop in her right ear. (PX 1 at 9). Petitioner stated that the pop sounded like when balloon is popped with a pin or an explosion. (PX 1 at 9). After the pop, Petitioner felt pain in her right ear. (PX 1 at 9). The pain in Petitioner's ear was in the inside of her ear down through the canal. (PX 1 at 10). The plane landed at Newark airport about 15 to 20 minutes after the quick abort. (PX 1 at 10). The injury occurred at approximately 10:40 pm. (PX 1 at 11). After the plane landed, Petitioner went to her hotel. (PX 1 at 11).

Medical Treatment

Petitioner testified that the next morning, she felt pain in her right ear. (PX 1 at 11). The pain eventually became unbearable. (PX 1 at 11). Petitioner sought medical care. (PX 1 at 12). Petitioner was initially examined at Trinitas Regional Medical Center on November 26, 2018. (PX 2). The medical records document loss of hearing and pain in the right ear. (PX 2). The diagnosis was hemotympanum and barotrauma. (PX 2). Petitioner was advised to follow up with an ENT. (PX 2).

Petitioner was examined at Concentra on November 27, 2018. (PX 3). The assessment was otic barotrauma. (PX 3). Petitioner was referred to an otolaryngologist due to the decreased hearing at high pitch level due to trauma. (PX 3). Petitioner was placed on modified duty with ground level work only, no travel above sea level, no working in pressurized rooms and no working in close to loud noises. (PX 3).

Petitioner was examined at Eiseman Plastic Surgery Center on December 3, 2018. (PX 4). Petitioner had tympanic membrane that reacted on the right and was poorly mobile. (PX 4). The Weber tuning test localized to the right ear and Petitioner had bone conduction greater on the left than the right. (PX 4). An audiogram demonstrated a significant drop of hearing at the 4000-cps level in the right ear. (PX 4). The impression was barotrauma in the right ear with conductive hearing loss. (PX 4). Dr. Eiseman recommended that Petitioner undergo an audiogram and tympanogram. (PX 4).

Petitioner was examined at UT Physicians on December 7, 2018. (PX 5). An otoscopy of the tympanic membranes was performed. (PX 5). She was found to have a conductive component in the right ear at 250 hz and 4000 hz. (Px. 5, p. 1-2). Petitioner had clear intact canals and normal hearing sloping to moderate mixed hearing loss. (PX 5). Petitioner was instructed to follow up with the ENT, have repeat testing and wear appropriate hearing protection when exposed to loud noises. (PX 5). The physician set forth that Petitioner was at risk for fluctuating hearing loss. (PX 5).

Petitioner was examined by Dr. Wardlow at Amita Health Medical Group on January 10, 2019. (PX 6). An audiogram was performed and found hearing to be normal. (PX 6). At that time, she gave a history of a right ear injury during a flight on November 25, 2018. She advised that she saw a doctor and that they did not believe she had ruptured the tympanic membrane. Petitioner was noted to be feeling good with no concerns about her hearing. On examination, Dr. Wardlow noted that the bilateral tympanic membranes looked normal with no visible fluid or infection. (Px. 6, p. 11-26). Dr. Wardlow documented that Petitioner had asymmetrical sensorineural hearing loss, dysfunction of the Eustachian tube with right ear popping, hearing loss and mixed conductive and sensorineural hearing loss. (PX 6). Petitioner was advised to remain off work while her right ear was popping. (PX 6).

Petitioner had a follow up examination with Dr. Wardlow on February 7, 2019. (PX 6). He set forth an assessment of right conductive hearing loss. (PX 6). He referred Petitioner to Dr. Sidiqqui. (PX 6). Dr. Wardlow set forth that Petitioner had right ear popping and crackling since the work-related accident of November 25, 2018 with complaints of pain and hearing loss. (PX 6). The doctor noted that Petitioner was symptom free and able to return to work. (PX 6). Petitioner testified that she did not tell the doctor she was symptom free. (PX 1 at 30). Dr. Wardlow released Petitioner from his care. (PX 6). He noted that Petitioner had asymmetrical sensorineural hearing loss. (PX 6). He noted that Petitioner's hearing was baseline. (PX 6). Petitioner testified that she did not tell him her hearing was baseline. (PX 1 at 30). Dr. Wardlow noted that there was no way to determine when the sensorineural hearing loss occurred and that it may have predated the flight. (PX 6). Dr. Wardlow recommended an MRI of the brain. (PX 6).

Petitioner underwent the MRI of the brain on October 2, 2019 at Adventist LaGrange Memorial Hospital. (PX 7). The MRI was unremarkable. (PX 7).

Petitioner was last examined by Dr. Wardlow on November 1, 2019. (PX 6). Dr. Wardlow documented that Petitioner did not have any hearing loss. (PX 6). Petitioner denied telling Dr. Wardlow that she did not have any hearing loss. (PX 1 at 30). He set forth a diagnosis of unspecified sensorineural hearing loss. (PX 6). He recommended that Petitioner undergo yearly hearing tests. (PX 6).

Since 2019, Petitioner has not received any medical treatment for her right ear. (PX 1 at 25). Petitioner has not scheduled any appointments for her right ear condition. (PX 1 at 31).

Medical Opinions of Dr. Coe

Petitioner was evaluated by Dr. Coe on December 9, 2020 via Zoom. (PX 8). Dr. Coe reviewed the medical records in connection with the care and treatment provided to Petitioner. (PX 8). He documented the history of accident and summarized the medical treatment provided to Petitioner. (PX 8). Dr. Coe documented that when Petitioner was released from care by Dr. Wardlow, she experienced abnormal sound sensations in her right ear, including popping and crackling. (PX 8).

Dr. Coe reviewed the audiogram performed on December 7, 2018. (PX 8). The audiogram revealed significant right ear hearing loss across the spectrum tested, which was 250 through 8000 Hz. (PX 8). He noted that the hearing loss at the higher frequencies was consistent with sensorineural hearing loss and was not related to the barotrauma. (PX 8). However, the lower frequency hearing loss in the right ear was consistent with right ear conductive hearing loss caused by the barotrauma at work on November 25, 2018. (PX 8).

Dr. Coe documented Petitioner's current subjective complaints. (PX 8). Petitioner complained of popping and crackling in her right ear. (PX 8). Petitioner experienced the sensation in her ear during flights and on the ground. (PX 8). Petitioner denied noticing hearing loss in her right ear; however, her husband stated that Petitioner had difficulty in hearing speech-frequency sounds with the right ear. (PX 8).

Dr. Coe set forth that Petitioner sustained right ear barotrauma during a work accident with rapid airplane cabin pressure change on November 25, 2018. (PX 8). The accident caused hemorrhage into the right middle ear, or hemotympanum, with symptoms of right ear pain, sound muffling and pressure. (PX 8). Petitioner had clinical findings of middle ear blood and conductive, or middle ear, hearing loss documented on the audiogram of December 7, 2018. (PX 8). Petitioner's condition improved with medical treatment; however, the conductive hearing loss and chronic middle ear effusion symptoms, such as crackling and popping, persisted. (PX 8).

Dr. Coe opined that there was a causal connection between the work accident and current right ear symptoms and state of impairment. (PX 8). He stated that the right ear trauma caused permanent disability to the person as a whole due to chronic right middle ear scaring and conductive, or speech-frequency, hearing loss. (PX 8). Dr. Coe set forth that the continued right ear symptoms were consistent with the objective finding and diagnostic tests. (PX 8). Dr. Coe recommended that Petitioner continue treatment with an ear specialist for annual audiometric testing. (PX 8). He also set forth that if the hearing loss persisted, he would recommend use of a hearing aid in the future. (PX 8).

Petitioner's Current Condition

Petitioner is currently working as a flight attendant for Respondent. (PX 1 at 25). She does not have any restrictions regarding work. (PX 1 at 25). Petitioner is still able to perform her job duties. (PX 1 at 30). Due to COVID, Petitioner's flights were canceled from April 2020 to December 2020. (PX 1 at 18). She has resumed to flying as of January 2021. (PX 1 at 18). Petitioner has not sustained any new accidents involving her right ear. (PX 1 at 18). Petitioner's last flight was August 1, 2021. (PX 1 at 19).

Petitioner testified regarding her subjective complaints. (PX 1 at 19). Petitioner is currently working as a flight attendant for Respondent. (PX 1 at 25). She does not have any restrictions regarding work. (PX 1 at 25). Petitioner is still able to perform her job duties. (PX 1 at 30). Petitioner has not sustained a loss in pay as a result of the accident. (PX 1 at 31). Due to COVID, Petitioner's flights were canceled from April 2020 to December 2020. (PX 1 at 18). She has resumed to flying as of January 2021. (PX 1 at 18). Petitioner has not sustained any new accidents involving her right ear. (PX 1 at 18). Petitioner's last flight was August 1, 2021. (PX 1 at 19).

On average, Petitioner has flown six trips a month in 2021. (PX 1 at 21). The trips were usually four-day trips. (PX 1 at 21). Petitioner averages approximately 21 to 22 days of flying per month or 12 flights per month. (PX 1 at 22). Petitioner has been on 120 flights in 2021. (PX 1 at 23). Petitioner has not sustained a loss in pay as a result of the accident. (PX 1 at 31).

Petitioner testified that during her trips, her right ear will "crackle" and pop. (PX 1 at 19). Her ear also gets "stuffy." (PX 1 at 19). She explained that her ear sounds like the snap, crackle and pop of a bowl of Rice Krispies. (PX 1 at 19). Petitioner experiences the noise every trip. (PX 1 at 19). The crackling can happen at any time during the flight, including take off, during the cruise and with descent. (PX 1 at 20). The crackling only happens in the right ear. (PX 1 at 20). Petitioner testified that when her ear gets stuffy, she will plug her nose, close her mouth, and try to push air towards her ear. (PX 1 at 20). Petitioner does not push hard because she is scared to puncture her eardrum again. (PX 1 at 20). She will push the air softly to open her ear up a little. (PX 1 at 21). Petitioner testified that of the 120 flights she took in 2021, she experienced popping and crackling in about 80 to 90 percent of them and on 75 percent of the legs of the flights. (PX 1 at 23). Petitioner acknowledged that the right ear condition had not interfered with her ability to do her job and that it has not resulted in any loss of income (Px. 1, p. 30-31).

Petitioner further testified that she is not able to hear as well as she could before the accident. (PX 1 at 23). Petitioner has to wear ear buds in both her ears because she cannot hear as well in the right ear. (PX 1 at 23). At work, Petitioner has a hard time distinguishing what people are saying. (PX 1 at 34). On flights, passengers' voices are muffled to Petitioner. (PX 1 at 34). Further, she has to have people repeat things to her and she has to turn her head towards them to hear. (PX 1 at 24). Petitioner explained that when she talks to someone on the aircraft, a coworker, or her husband, she does not catch everything that they say. (PX 1 at 24). It sounds like they are mumbling. (PX 1 at 24). Petitioner makes them repeat what they are saying, and she turns her head towards them. (PX 1 at 24). Prior to November 25, 2018, Petitioner did not have any problems with her right ear. (PX 1 at 24).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial

Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator reviewed the transcript of the evidence deposition and compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(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." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was employed as a flight attendant. The job required her to fly frequently. On average, Petitioner has flown six trips a month in 2021. The trips are usually four-day trips. Petitioner averages approximately 21 to 22 days of flying per month or 12 flights per month. Petitioner has been on 120 flights in 2021. Petitioner experiences ongoing fullness, popping and crackling during her flights. Petitioner experienced problems with her right ear during every trip that she work on in 2021. Based on Petitioner's unrebutted and credible testimony, the Arbitrator finds that Petitioner's employment as a flight attendant requires her to fly frequently, which causes symptoms in her right ear. Accordingly, the Arbitrator accords this factor great weight.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that, at the time of the accident, Petitioner was 45. At the time of the hearing, Petitioner was 48 years old and presumably has many years left in the work force dealing with her hearing issues. See Flexible Staffing Services v. Illinois Workers' Compensation Commission, 2016 IL App (1st) 151300WC (1st Dist. 2016) (holding that the Commission can make reasonable inferences from the medical evidence as it relates to how the claimant's age affects his disability). Accordingly, the Arbitrator accords this factor great weight.

Under Section 8.1b(b)(iv), the employee's future earning capacity, Petitioner testified that she did not sustained any wage loss as a result of the work-related accident. Petitioner remains employed by Respondent and is working as a flight attendant. Accordingly, the Arbitrator accords this factor little weight.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor. The medical records established that Petitioner sustained barotrauma with chronic right middle ear scaring and conductive, or speech-frequency, hearing loss. The diagnosis was confirmed by the medical records and audiogram. The Arbitrator notes that the diagnosis of sensorineural hearing loss was not causally connected to the work-related accident of November 25, 2018. The Arbitrator does not consider that diagnosis in her findings regarding permanent partial disability. The Arbitrator does rely on the diagnosis of barotrauma with chronic right middle ear scaring and conductive, or speech-frequency, hearing loss with regard to her award of permanent partial disability benefits.

The medical records and report of Dr. Coe document Petitioner's subjective complaints. Dr. Wardlow set forth that Petitioner had right ear popping and crackling since the work-related accident of November 25, 2018 with complaints of pain and hearing loss. Dr. Coe documented that Petitioner complained of popping and crackling in her right ear. Petitioner experienced the sensation in her ear during flights and on the ground. Dr. Coe further documented that Petitioner's husband stated that Petitioner appeared to have difficulty in hearing speech-frequency sounds with the right ear.

Petitioner testimony regarding her subjective complaints was consistent with the medical records. Petitioner testified that during her trips, her right ear will "crackle" and pop. Her ear also gets "stuffy." Petitioner experiences the noise every trip. Petitioner testified that of the 120 flights she took in 2021, she experienced popping and crackling in about 80 to 90 percent of them and on 75 percent of the legs of the flights. Petitioner further testified that she is not able to hear as well as she could before the accident. Further, she has to have people repeat things to her and she has to turn her head towards them to hear. Petitioner explained that when she talks to someone on the aircraft, a coworker, or her husband, she does not catch everything that they say. It sounds like they are mumbling.

While there is no hearing loss in excess of the statutory level, the Arbitrator may award a percentage loss of the person as a whole especially when the claimant experiences tinnitus or similar auditory impairments. See Lind v. Consolidated Coal Company, 09 IWCC 0573, 2009 WL 2175094 (IWCC June 8, 2009); see also Gavin v. State of Illinois, Department of Corrections, 94 WC 9557, 97 IIC 0934 (IIC Sept. 1997); Cantrell v. Hunt Super Services, Inc., 88 WC 41515, 94 IIC 0236 (IIC Feb. 1994).

Based on the medical evidence and considering the above factors, the Arbitrator finds that Petitioner sustained the permanent and partial disability to the extent of 6% loss of use of the person as a whole.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC000124
Case Name	Danny Wunschel v. Cicero School District 99
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0313
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Rolenc
Respondent Attorney	Robert Luedke

DATE FILED: 8/18/2022

/s/ Deborah Baker, Commissioner

Signature

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 WUNSCHEL,

Petitioner,

vs. NO: 21 WC 00124

CICERO SCHOOL DISTRICT 99,

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 whether Petitioner sustained an accidental injury arising out of his employment on September 25, 2020, whether Petitioner's current condition of ill-being is causally related to the work injury, entitlement to temporary disability benefits, and entitlement to prospective medical care, and being advised of the facts and law, provides additional analysis as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

CONCLUSIONS OF LAW

Causal Connection

The Arbitrator concluded Petitioner proved he sustained a repetitive trauma injury manifesting on September 25, 2020, and his condition of ill-being is causally related to his work activities. Our review of the evidence yields the same result. We write separately to detail our reasoning: while the Commission agrees with the Arbitrator and finds Dr. Chudik's opinion is persuasive and more credible than Dr. Neal's opinion, we further find Dr. Chudik's opinion is supported by a chain of events analysis.

It is well established that an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)),

and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). Having found the "manner and method" of Petitioner's job duties are sufficiently repetitive to establish a repetitive trauma injury manifesting on September 25, 2020 (*Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 210-211 (1st Dist. 1993)), we consider what effect, if any, the repetitive activities had on his pre-existing degenerative rotator cuff tears, and were those activities a factor in aggravating or accelerating his need for surgery. Upon analyzing the conflicting medical opinions, the Commission relies on Dr. Chudik over Dr. Neal.

With respect to the conflicting expert opinions, Dr. Neal opined Petitioner had long-standing bilateral shoulder pain secondary to his chronic degenerative condition and his pre-existing rotator cuff condition was not aggravated by his work activities. The Commission is not persuaded by Dr. Neal's opinion. Initially, we note Dr. Neal believes an aggravation only occurs when the underlying pathology is altered; we emphasize that the legal definition of aggravation in the context of a workers' compensation claim does not require an objective change in pathology and instead, "where an accident *accelerates* the need for surgery, a claimant may recover under the Act." *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, ¶ 32 (Emphasis in original). Furthermore, we note Dr. Neal's opinion is predicated on his belief that Petitioner was already symptomatic and had equal pain complaints whenever he used his arms wherever he was, and this is contrary to Petitioner's testimony, which the Commission finds credible. We note Petitioner testified as a layman without specialized knowledge as to repetitive trauma injuries, and while there were obvious moments of confusion, we find nothing to suggest dishonesty.

Dr. Chudik, in turn, concluded Petitioner's symptoms were related to his work activities. In his October 23, 2020 office note, Dr. Chudik memorialized that he and Petitioner "discussed the incident of his bilateral shoulder injuries," with Petitioner informing Dr. Chudik that he had to move 100 desks and computers and "since moving the desks and computers last month, the pain has stayed and it has increased and is limiting him more each day." Pet.'s Ex. 1. Based on this more detailed history, Dr. Chudik's impression was "Right shoulder full thickness supraspintatus [*sic*] and infraspinatus tear, and Left shoulder less severe full thickness infraspinatus tear contributed and aggravated by work activities." Pet.'s Ex. 1 (Emphasis added). The Commission finds Dr. Chudik's conclusion is persuasive and we rely on the doctor's expert medical opinion.

We also observe Dr. Chudik's conclusion is further supported by the chain of events theory. "The rationale justifying the use of the 'chain of events' analysis to demonstrate the existence of an injury would also support its use to demonstrate an aggravation of a preexisting injury." *Price v. Industrial Commission*, 278 Ill. App. 3d 848, 854 (4th Dist. 1996). As the Appellate Court held in *Schroeder*, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> 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* at ¶ 28.

Here, the evidence establishes that Petitioner was essentially asymptomatic, with occasional episodic soreness that resolved on its own, until he performed three days of repetitive heavy lifting overhead, reaching to stack and unstack 40-pound desks, during which he developed significant pain and

restricted range of motion that has yet to resolve or return to baseline. The Commission finds this is clear evidence of a "deterioration" in Petitioner's condition.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 18, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $422.52 per week for a period of 13 1/7 weeks, representing April 21, 2021 through July 21, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for left shoulder surgery as recommended by Dr. Chudik, including but not limited to any necessary pre-operative clearance and post-operative rehabilitative treatment, as provided in §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 the Petitioner on account of said accidental injury.

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

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.

August 18, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 6/29/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC000124
Case Name	WUNSCHEL, DANNY v. CICERO SCHOOL DISTRICT 99
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Michael Rolenc
Respondent Attorney	Robert Luedke

DATE FILED: 10/18/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 13, 2021 0.05%

/s/ Rachael Sinnen, Arbitrator

Signature

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)

Danny Wunschel
Employee/Petitioner

Case # 21WC000124

Consolidated Cases _____

v.

Cicero School District 99
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 Rachael Sinnen, Arbitrator of the Illinois Workers' Compensation Commission, in the city of Chicago, on July 21, 2021. 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, September 25, 2020, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $32,956.56; the average weekly wage was $ 633.78.

On the date of accident, Petitioner was **70** 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 is entitled to a credit of $**TBD** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $422.52/week for 13 1/7 weeks, commencing April 21, 2021 through July 21, 2021, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for Petitioner's left shoulder surgery and all reasonable and related pre-operative clearance and follow up treatment that is being recommended by Dr. Chudik.

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 18, 2021

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Danny Wunschel	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21WC000124
Cicero School District 99	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on July 21, 2021 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's motion pursuant to 19(b)/8(a) of the Illinois Workers' Compensation Act "Act." Issues in dispute include accident, casual connection, medical bills, temporary total disability "TTD," and prospective medical (Arbitrator's Exhibit "AX" 1).

Petitioner testified that on September 25, 2020 he was employed by Respondent as a full-time custodian. He had been so employed for approximately 10 years. His job duties included cleaning classrooms and buildings, general maintenance, and other custodial duties. Petitioner testified he used his arms and shoulders for all of these activities on a daily basis. Petitioner admitted he has worked in labor intense jobs his whole life but most of that was 40 years ago.

Petitioner testified that during the course of his career, he has had on and off bilateral shoulder pain, but he never had the need for any medical treatment prior to October 2, 2020. He testified that the pain would come and go but it never reached the point where he had to obtain medical treatment. Petitioner also testified that prior to September 2020, he was not engaged in any type of sporting activities such as tennis, racquetball, or baseball.

Petitioner testified that on or about September 23, 2020, he was moving 150 to 200 school desks so he could mop and wax classroom floors. He testified he would place the first desk on top of a shelf, followed by a second desk placed upside down on top of the first desk, and followed by a third desk between the legs of the other two. He testified the desks weighed approximately 40 lbs. and that he would use his arms and shoulders to do this task. Petitioner testified he then mopped and waxed the classroom floors. After cleaning, he brought back some of the desks into the classrooms. He testified that some of the desks would be put in storage which meant carrying them into another room that was not being used because of the COVID19 pandemic. Petitioner noticed his arms and shoulders were getting really sore while performing this task.

Petitioner testified he also did this job on September 24, 2020 and September 25, 2020. He testified that as he was doing this job on September 25th, his arms and shoulders became so sore he could no longer function. Petitioner stated that September 25, 2020 was the date on which the pain became so unbearable that he needed to call for medical treatment. He testified he completed the workday, went home, and called to make an appointment with Dr. Steven Chudik. Petitioner testified the earliest appointment he could get was October 2, 2020.

Petitioner further testified that during the week of September 28, 2020, he worked for the Respondent but was performing a lighter duty type of work. He testified that the Respondent accommodated him with modified work.

Petitioner's Treatment with Dr. Chudik

On October 2, 2020, Petitioner came under the care of Dr. Steven Chudik of Hinsdale Orthopedics. Petitioner was complaining of bilateral shoulder pain which he has had for 8 months with no known injury. He related working as a custodian and having pain when lifting overhead and reaching in front of him. He further informed Dr. Chudik that he has worked in labor intense jobs his whole life that have been tough on his shoulders. He was planning on retiring in January and wanted to have his shoulders evaluated before then. He also related having weakness and a decrease in shoulder endurance during his everyday activities.

Dr. Chudik examined Petitioner and also took x-rays of both shoulders which were normal except for degenerative changes of the AC joint GH joint space narrowing and changes consistent with concern for RCT (Petitioner's Exhibit "PX" 1, p.4).

Dr. Chudik diagnosed Petitioner with bilateral shoulder pain and arthritis with concern for RCT. Dr. Chudik recommended an MRI on both shoulders. He also advised Petitioner to return for the purpose of reviewing the MRIs and to consider conservative versus surgical intervention (PX1, p.4-5).

On October 8, 2020, Petitioner returned to Hinsdale Orthopedics where he underwent MRIs of both shoulders. The left shoulder MRI revealed a tiny focal full-thickness and retracted tear along the anterior aspect of the infraspinatus tendon at the greater tuberosity and mild to moderate tendinosis of the remaining intact infraspinatus. There was also mild AC joint degenerative changes of the acromion and the MRI was also suspicious for a SLAP tear with extension into the biceps anchor (PX1, p.6).

The right shoulder MRI revealed supraspinatus and infraspinous tendon full-thickness tears with retraction. There was also mild supraspinatus and infraspinatus muscle atrophy and mild AC joint degenerative changes. The MRI also revealed an intracapsular long head biceps tendinosis and diffuse labral degeneration complex tearing of the posterior labrum (PX1, p.8).

Petitioner returned to Dr. Chudik on October 16, 2020 at which time the MRI findings were reviewed with him. Dr. Chudik opined that based on Petitioner's history, physical examination, and imaging available, surgery would be in order (PX1, p.12).

On October 23, 2020, Petitioner returned to Dr. Chudik for a recheck of both shoulders. Petitioner informed Dr. Chudik his shoulders were still sore and wanted to discuss surgery. Petitioner also mentioned to Dr. Chudik that he was at work at the end of September and had to move 100 metal desks and load computers onto carts and push them into storage. Petitioner related that both of his shoulders were very sore afterwards and since then he has had trouble lifting and using his arms. Petitioner also mentioned he has had shoulder pain at work before, but it has always just been soreness and has gone away on its own. He related that ever since moving the desks and computers last month, the pain has stayed, increased, and is limiting him more each day (PX1, p.13). On cross examination, Petitioner admitted that this was the visit with Dr. Chudik where he mentioned moving desks and loading computers.

Dr. Chudik diagnosed Petitioner with right shoulder full-thickness supraspinatus and infraspinatus tear with the left shoulder having a less severe full-thickness infraspinatus tear contributed and aggravated by work activities. Dr. Chudik then recommended Petitioner undergo right shoulder arthroscopic rotator cuff repair (PX1, p.14).

Petitioner returned to Dr. Chudik on November 11, 2020 advising that he obtained a second opinion on his shoulders. He also informed Dr. Chudik that on September 23, 2020 he was told he needed to move a large amount of student desks by the end of the day and as he was moving them his shoulders began to hurt more and more. By the end of the day they were extremely painful. Petitioner then reported an injury on September 25, 2020 because he just thought he was sore and that it would resolve but it got worse and worse. Petitioner further related the pain has continued but not improved at all (PX1, p.16).

Again, Dr. Chudik diagnosed Petitioner with right shoulder full-thickness supraspinatus and infraspinatus tears with the left shoulder having a less severe full-thickness infraspinatus tear contributed and aggravated by work activities. Dr. Chudik recommended bilateral rotator cuff repairs with doing the right shoulder first (PX1, p.17).

On April 21, 2021, Petitioner underwent a right shoulder arthroscopy, right labral debridement, right synovectomy, right biceps tenodesis, right rotator cuff repair, infraspinatus and right subacromial decompression (PX1, p.29).

On May 3, 2021, Petitioner returned to Dr. Chudik advising he was doing okay. Dr. Chudik recommended a STAT doppler to rule out a blood clot and recommended Petitioner continue with his physical therapy (PX1, p.21-22). Petitioner testified he underwent the doppler and there was no blood clot.

Petitioner testified his last visit with Dr. Chudik was on June 16, 2021. The record reflects Petitioner was doing well and had little pain in his right shoulder. Dr. Chudik recommended he continue with his physical therapy and home exercise program (PX1, p.24-25).

Petitioner testified that during the time he was treating with Dr. Chudik since the surgery, he was authorized off work. He confirmed that he did not receive any benefits such as unemployment compensation or Social Security during that time.

Respondent's Section 12 Examiner, Dr. Neal

On March 24, 2021 Petitioner was examined at the request of the Respondent by Dr. M. Bryan Neal. Dr. Neal's deposition was taken by the parties on June 1, 2021. Dr. Neal testified he is board certified in orthopedic surgery. Dr. Neal testified he examined the Petitioner and reviewed medical records of Dr. Chudik as well as the MRI imaging reports. He also reviewed a medical record of Dr. Garrigues. Dr. Neal testified that Petitioner could not identify to him which shoulder started bothering him first. Petitioner simply cited repetitious type work activities over time as the etiology of his shoulder. Dr. Neal testified that Petitioner did not put forth any acute injury or event to be the precipitating cause of either shoulder complaint (Respondent's Exhibit "RX" 1, p.10). Petitioner confirmed in his testimony that he could not give a specific date to Dr. Neal regarding when the accident occurred as it happened over time.

Dr. Neal physically examined the Petitioner and noted some limitation in shoulder warmup maneuvers. He also noted some rotator cuff weakness (RX1, p.12). Dr. Neal agreed that Petitioner had bilateral shoulder rotator cuff tearing and concurred that bilateral rotator cuff surgery would be a reasonable option for Petitioner. (RX1, pp.10-11).

Dr. Neal opined that Petitioner's employment duties as a janitor did not cause, aggravate, or bring about sooner Petitioner's preexisting condition in his left and right shoulders. Dr. Neal stated that Petitioner's work of a custodian was not an overhead type job. Dr. Neal testified that Petitioner's work more of a lower level, intermittent occupation, not in provocative positions for the shoulder (RX1, pp.23-25).

Dr. Neal explained that Petitioner had a high riding humeral head which would be evidence of a chronic or long-standing degenerative condition. A high riding humeral head indicates that the rotator cuff is not covering the humeral head allowing the head to go up. Dr. Neal stated this is a chronic condition (RX1, p.13). Dr. Neal also testified that Petitioner had AC joint arthritis bilaterally which would be degeneration solely related to age (RX1, p.17).

Dr. Neal attributed Petitioner's current condition of ill-being to his AC joint arthritis. Dr. Neal explained that AC joint arthritis causes the impingement in the shoulder which causes the rotator cuff to tear. Dr. Neal testified that Petitioner's limited shoulder range of motion and shoulder weakness developed over a relatively long period of time and not secondary to any instant event on any one day. (RX1, pp.20-21). Dr. Neal confirmed that repetitive activities can aggravate a condition of AC joint arthritis (RX1, p.39).

Dr. Neal did not believe there was any event on September 25, 2020 which caused or permanently aggravated Petitioner's preexisting condition in his left or right shoulder (RX1, pp.22-23). Dr. Neal testified that Petitioner's arthritis may have caused the rotator cuff tear and that it was Petitioner's rotator cuff condition that drove him to seek treatment (RX1, pp.53-55). Dr. Neal explained that Petitioner needs surgery in both shoulders because of his preexisting arthritis (which wears away the cartilage). Dr. Neal opined that moving 100 desks would not increase the loss of cartilage, cause an increase in spurring, or permanently aggravate preexisting arthritis. (RX1, p.51). Dr. Neal stated that a rotator cuff tear can result from overhead lifting and rotator cuff tears can be asymptomatic (RX1, p.45).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, ¶ 34. A compensable injury occurs 'in the course of' employment when it is sustained while he performs reasonable activities in conjunction with his employment. Id.

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at ¶ 36. To determine whether a claimant's injury arose out of his employment, the risks to which the claimant was exposed must be categorized. Id. The three categories of risks are "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." Id. at ¶ 38. "A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." Id. at ¶ 46.

An employee who alleges an injury based on a repetitive trauma theory must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process. Peoria County

Belwood Nursing Home v. Industrial Com., 115 Ill. 2d 524, 530, 505 N.E.2d 1026, 1028 (1987). The claimant need only prove that some act or phase of employment was a causative factor of the resulting injury. Three "D" Discount Store v. Industrial Com., 198 Ill. App. 3d 43, 49, 556 N.E.2d 261, 265 (4th Dist. 1989).

The date of injury in a repetitive trauma claim is the date in which the injury manifests itself, meaning the date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. Durand v. Industrial Comm'n (RLI Insurance Co.), 224 Ill. 2d 53, 65, 862 N.E.2d 918, 924 (2006). Courts have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. Id. at 929.

The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted. The Arbitrator has taken into consideration that Dr. Chudik's October 2, 2020 note documents 8 months of bilateral shoulder pain with no known injury. The Arbitrator also considers that fact that Dr. Chudik didn't document anything about moving desks until October 23, 2020. The Arbitrator notes that at the IME examination Dr. Neal wasn't able to elicit from Petitioner a history of an acute injury or confirm which shoulder bothered Petitioner first. Given the nature of repetitive traumas, the Arbitrator does not find any material contradictions within the medical records or with Petitioner's testimony that would deem the witness unreliable.

Petitioner credibly testified that his job duties over 10 years as a custodian required repetitive use of his arms and shoulders, which at times included overhead work. Petitioner admitted to on and off again shoulder soreness for years but never sought medical treatment until September 25, 2020. Following a few days of increased labor involving stacked school desks, it was on September 25, 2020 that Petitioner was no longer able to work and called to make an appointment with Dr. Chudik. As such, Petitioner's manifestation date is September 25, 2020. See Durand, 862 N.E.2d at 929.

The Arbitrator finds that Petitioner has met his burden in proving that an accident arose out of and in the course of his employment.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. 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. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "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. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Dr. Chudik diagnosed Petitioner with bilateral rotator cuff tears contributed and aggravated by work activities (See PX1, p. 14). The Arbitrator finds Dr. Chudik's opinions to be more credible than those of Dr. Neal. Dr. Chudik's documentation of Petitioner work duties as well as his increased work towards the end of September is consistent with Petitioner's testimony. Dr. Neal opined that Petitioner's job did not require overhead work but no persuasive basis for such an opinion was provided. Petitioner's testimony regarding his work duties was unrebutted. Dr. Neal confirmed that repetitive activities can aggravate a condition of AC joint arthritis and Dr. Neal further stated that a rotator cuff tear can result from overhead lifting (See RX1 p.39, 45).

For these reasons, the Arbitrator finds that Petitioner's current condition of ill-being involving both shoulders is causally related to his accident of September 25, 2020.

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 as follows:

The Arbitrator finds Petitioner's treatment to be reasonable and necessary. Having found Dr. Chudik's opinions to be more credible than those of Dr. Neal, the Arbitrator notes that Respondent's Section 12 examiner did not dispute treatment, but rather disagreed on causation. No medical bills were submitted as the parties agreed to reserve admission of such evidence (including any credit for Respondent under 8j of the Act) for a later date.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator notes that Respondent's Section 12 examiner, Dr. Neal, was not in disagreement with Dr. Chudik's treatment plan. Having found causal connection in this case as well as the reasonableness and necessity of Petitioner's past medical treatment, the Arbitrator further finds that Petitioner is entitled to prospective medical care. The Arbitrator finds that Petitioner is entitled to surgery of the left shoulder as recommended by Dr. Chudik (including necessary and reasonable pre-operative clearance and post-operative care) and that the Respondent shall be liable for the medical expenses associated with that treatment.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he is capable of a return to the workforce. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236

Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

Based on Petitioner's credible testimony and the medical records (including Dr. Chudik's unchallenged treatment), the Arbitrator finds the Petitioner is entitled to TTD for 13 1/7 weeks (April 21, 2021 – July 21, 2021) at an agreed TTD rate of $422.52 per week.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC032207
Case Name	Sejfudin Subasic v. Swissport Cargo Services
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0314
Number of Pages of Decision	18
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Brian Thomas
Respondent Attorney	Joseph R. Needham

DATE FILED: 8/18/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SEJFUDIN SUBASIC,

Petitioner,

vs. NO: 18 WC 32207

SWISSPORT CARGO SERVICES,

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 whether Petitioner's current condition of ill-being is causally related to the undisputed October 12, 2016 work accident, entitlement to temporary disability benefits, and entitlement to prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

PROLOGUE

The Commission observes both Respondent's Statement of Exceptions and Petitioner's Response Brief vastly exceeded the page/word limit set forth in the Rules. The Commission cautions Counsel to adhere to Commission Rule 9040.70. *50 Ill. Adm. Code 9040.70(c)*.

CONCLUSIONS OF LAW

Temporary Disability

On the Request for Hearing, Petitioner alleged he was temporarily and totally disabled from February 27, 2020 through April 29, 2021, the date of hearing; Respondent disputed Petitioner's entitlement to temporary total disability ("TTD") benefits for that period. Arb.'s Ex. 1. Respondent in turn alleged it paid $93,491.20 in TTD benefits, for which it was due credit; Petitioner agreed

Respondent had paid TTD benefits incurred through February 27, 2020 but disputed the amount. Arb.'s Ex. 1. The Arbitrator found Petitioner established entitlement to TTD benefits and further found Respondent entitled to a $93,491.20 credit for TTD benefits previously paid. The Commission agrees that Petitioner proved he is entitled to TTD benefits, however we find the award must be modified to conform to the Request for Hearing.

The Commission first observes the credible medical opinions demonstrate that Petitioner is not able to return to his pre-accident job. Specifically, Dr. Saper testified that Petitioner is not capable of performing his full-duty job and his specific restrictions are per the FCE (Pet.'s Ex. B, p. 21, 31, 62), and while Dr. Holmes indicated Petitioner would be able to function at a higher level from an orthopedic standpoint, the doctor did not endorse returning Petitioner to full duty and instead Dr. Holmes confirmed that as of March 2019, his opinion was Petitioner should either be off work completely or limited to sedentary duty because of his neurologic issues (Resp.'s Ex. 2, p. 46-47). Regarding the availability of accommodated duty, the Commission disagrees with Respondent's claim that Ms. Jongleux-Trausch provided "definitive evidence" that Respondent would have accommodated Petitioner's FCE restrictions. While Ms. Jongleux-Trausch described Respondent's process for determining whether accommodated duty is available, she could not speak to whether that process had been followed when Petitioner was released to restricted duty because she did not work for Respondent at that time. T. 122, 127, 137-138. Rather, Ms. Jongleux-Trausch testified that in February or March of 2021, she attempted to get information about what had occurred, "but nobody seemed to have the knowledge." T. 130. Ms. Jongleux-Trausch explained the conversations were "to get a history of what happened regarding the accident and then any accommodations, if they were able to provide them or not, and if people knew if he had the work restrictions." T. 130. From those conversations, she was advised that "[n]ot a lot of people had any information at all regarding it because it was again handled by the person who managed the work comp claims." T. 131. To be clear, Ms. Jongleux-Trausch was unable to determine whether or not Petitioner provided his restrictions to Respondent, is unaware whether or not there was an accommodation for Petitioner, and never spoke to Petitioner's supervisor about accommodated duty. T. 138-139, 131, 133, 135-136. The Commission does not find the conversations Ms. Jongleux-Trausch had approximately one year after benefits were terminated and which garnered no concrete information as to Petitioner are sufficient to establish that accommodated duty would have been provided. As such, the Commission finds Petitioner is entitled to TTD benefits.

The Arbitrator awarded TTD benefits from October 13, 2016 through April 29, 2021. The Commission observes, however, the Request for Hearing reflects the only TTD period at issue was February 27, 2020 through April 29, 2021. Arb.'s Ex. 1. As Petitioner did not allege he was temporarily and totally disabled from October 13, 2016 through February 26, 2020, the award of TTD benefits for that period was improper and is hereby vacated. The Commission disagrees, however, with Respondent's assertion that Petitioner's silence as to this period is equivalent to an affirmative stipulation by Petitioner that he is not entitled to TTD benefits for that period. The Commission emphasizes that entitlement to TTD prior to February 27, 2020 was not raised as an issue at trial and as it remains un-litigated, Petitioner is not precluded from raising that benefit period at a subsequent hearing. Respondent has, however, established its credit of $93,491.20 for TTD benefits previously paid to Petitioner through February 26, 2020.

The Commission modifies the award of TTD benefits as follows:

- the award of TTD benefits from October 13, 2016 through February 26, 2020 is vacated;

- Petitioner is entitled to TTD benefits from February 27, 2020 through April 29, 2021.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 8, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $531.20 per week for a period of 61 1/7 weeks, representing February 27, 2020 through April 29, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have a credit of $93,491.20 for TTD benefits already paid to Petitioner through February 26, 2020.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of Temporary Total Disability benefits from October 13, 2016 through February 26, 2020 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for pain management for Petitioner's left foot/ankle as provided in §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 the Petitioner on account of said accidental injury.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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.

August 18, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 6/29/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC032207
Case Name	SUBASIC, SEJFUDIN v. SWISSPORT CARGO SERVICES
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Brian Thomas
Respondent Attorney	Joseph R. Needham

DATE FILED: 9/8/2021

INTEREST RATE FOR THE WEEK OF SEPTEMBER 8, 2021 0.05%

/s/ Rachael Sinnen, Arbitrator

Signature

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)

Sejfudin Subasic
Employee/Petitioner

v.

Swissport Cargo Services
Employer/Respondent

Case # **18** WC **032207**

Consolidated cases: **-0-**

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 Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **April 29, 2021**. 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 **October 12, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,433.60**; the average weekly wage was **$796.80**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**93,491.20** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**93,491.20**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $531.20/week for 237 weeks, commencing October 13, 2016 through April 29, 2021, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $93,491.20 for temporary total disability benefits already paid.

Respondent shall approve and pay for pain management for Petitioner's left foot/ankle as provided in Section 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

SEPTEMBER 8, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sejfudin Subasic	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 18 WC 32207
	)	
	)	
Swissport Cargo Services,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on April 29, 2021 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request For Hearing under Sections 8(a) and 19(b) of the Illinois Workers' Compensation Act ("Act"). Issues in dispute include causal connection, temporary total disability ("TTD"), prospective medical treatment and Respondent's credit. Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties

Petitioner testified with the use of a Bosnian interpreter. Petitioner is an employee of Respondent, Swissport Cargo Services. Petitioner has worked for Respondent for at least 20 years where he works as a lead agent in the transport department. Transcript "Tr." 12. As a lead agent, Petitioner organizes freight coming into the warehouse and repackages that cargo. In repackaging it, he breaks down or builds large pallets weighing up to one and a half tons to be transported away from the airport by truck or plane. Tr. 12,14-15, 49. Petitioner testified that his job requires him to regularly lift up to 120 pounds while working on his feet all day. Tr. 13-15. Petitioner has been married 33 years and has two adult sons 33 and 24. Tr. 10. He was born in Bosnia, came to the United States in 1996, and his English skills are limited. Tr. 11.

Accident of October 12, 2016

On October 12, 2016, Petitioner was transporting dollies by forklift when the forklift hit a hole and he was thrown from it, breaking his ankle, and injuring his knee. Tr. 18-29. Accident and notice are not in dispute. See Ax 1.

Summary of Medical Records

Petitioner submitted very few treatment records into evidence, relying instead on the evidence deposition of Dr. David Saper. Respondent's Section 12 examiners, Dr. George Homes and Dr.

Joseph Belmont were deposed as well.

Evidence Deposition of Dr. David Saper

By evidence deposition August 27, 2020 Dr. Saper testified to his orthopedic surgery practice, identified his curriculum vitae and identified his educational background from undergraduate school through his medical fellowship, and his practice of four and a half years, in which he performs roughly 500 surgeries per year. Petitioner's Exhibit "Px" B, p4-7. Dr. Saper became licensed to practice medicine in Illinois in 2015 and completed board certification in orthopedic surgery in 2018. Px B, p88-89. He began treating Petitioner in 2016. Id. at 89.

Dr. Saper identified a report he drafted at the request of Petitioner's attorney, addressing Petitioner's treatment and need for continued medical intervention. Px B3. Dr. He testified Petitioner sustained a blunt force impact at work, causing his leg injuries. Px B, p8-10; Px B3. Surgery was required because the bones would not heal, a condition called non-union, performed January 16, 2017, May 10, 2017, and July 19, 2017, all of which were necessitated by the blunt impact work injury. Id. at 11-12. The second surgery was performed to remove surgically implanted hardware to improve function and comfort. The third surgery removed implanted hardware to aid Petitioner's comfort. Id. at 53-54, 65. The surgeries Dr. Saper performed were successful in repairing Petitioner's fractured ankle. Petitioner required no additional orthopedic treatment and had reached maximum medical improvement "MMI" for the condition Dr. Saper treated. Id. at 27-28.

Dr. Saper first suspected complex regional pain syndrome "CRPS" September 14, 2017 and was the first physician to raise the issue. Px B, p32. He suspected CRPS because of Petitioner's pain and numbness at the plantar and dorsum on the foot without swelling over the ankle at the area of the surgery. Id. at 35. Pain and numbness at the plantar and dorsum on the foot can exist without CRPS, (Id. at 35) but he suspected CRPS because A) the pain was from a nonanatomical source not involving the superficial peroneal nerve (the nerve at Petitioner's injury site) and B) because Petitioner's pain did not match the specific anatomic region of the nerve most likely to be injured. Id.

Dr. Saper ordered an EMG which was negative. Px B, p44. The purpose of the EMG was not to diagnose CRPS but to help ensure there was no injury to the superficial peroneal nerve. Id. The negative EMG ruled out injury to the superficial peroneal nerve, but the peroneal nerve still could be a contributor to CRPS. Id. Petitioner's negative Tinel's sign was not an indication in favor of CRPS but ruled out injury to the superficial peroneal nerve. Id. p40

Dr. Saper's September 14, 2017 report identified Petitioner's left ankle was well-healed with much less swelling and redness than before the operation, had full sensation with brisk capillary refill and negative Tinel's sign, but with limited dorsiflexion. Id. at 36-37. His October 10, 2017 report of treatment recorded Petitioner complained of coldness and numbness in the foot and leg. Id. at 38-39. His November 21, 2017 report of treatment reflected dorsiflexion improvement related to healing of the ankle fracture, (Id. at 43) and he stated with a diagnosis of CRPS he expected more midfoot motion or inversion than Petitioner exhibited. Id. at 43. His June 15, 2018 report documented the same physical exam findings as September 14, 2017. Id. at 55-56. His August 10,

2018 and September 21, 2018 reports confirmed Petitioner's surgical wound was well-healed with much less swelling and redness than prior to the surgery, with sensation to light touch, brisk capillary refill and a negative Tinel's. Id. at 57-58. Dr. Saper testified those treatment records document an absence of significant dysesthesias or coolness, but that numbness over the medial and dorsal foot raised his suspicion for CRPS. Id. at 47-48. He testified to the contents of Dr. Vo's January 24, 2018 report on Petitioner documenting no allodynia, no color change or atrophy, and normal skin temperature. Id. at 49. Dr. Saper documented Dr. Vo's findings in his own February 16, 2018 report diagnosing Petitioner without CRPS and not meeting the criteria, relying on and deferring to Dr. Vo's expertise to render his own diagnosis. Id. at 49, 51. On March 30, 2018 Dr. Saper agreed Petitioner did not meet the criteria for CRPS. Id. at 52. None of Dr. Saper's treatment records on or after September 14, 2017 document allodynia, skin mottling, hair growth discrepancies or swelling outside his post-operative expectations. Id. p64. Petitioner's condition had not worsened over time. Id. at 32.

Dr. Saper reviewed Petitioner's June 29, 2018 Functional Capacity Evaluation ("FCE")[1], confirmed the report identified Petitioner was capable of Medium Duty work, and confirmed the report states the FCE was invalid because Petitioner did not give a consistent effort. Px B, p56-57, 61. Dr. Saper acknowledged the FCE placed Petitioner at a 40lb work duty level. Id. at 31. With knowledge the FCE identified Petitioner capable of Medium Duty with an inconsistent effort, Dr. Saper restricted Petitioner to 5lb lifting. Id. p61.

Dr. Saper last saw Petitioner in August 2019. Px B, p29-20. Petitioner was relying on a cane at this point. Petitioner was MMI for the condition Dr. Saper treated, and his surgical repair was successful. Id. at 28. Petitioner was "MMI from a bone healing standpoint" but was not MMI from an orthopedic standpoint. Id. at 26-27. Petitioner could achieve greater medical improvement with pain management treatment but required no orthopedic treatment. Id. As of Dr. Saper's last assessment, Petitioner remained painful at 4/10, was incapable of performing his regular duties due to the use of a cane and hypersensitivity of the foot, and remained restricted to five pounds lifting, for 10 hours per week. Id. at 21. Dr. Saper anticipated treatment would involve a trial of injections into the nerve roots, then spinal cord stimulator implant, but deferred to Dr. Murtaza for exact treatment protocol. Id. at 23.

An August 23, 2019 report of Dr. Murtaza states Petitioner reported hypersensitivity throughout the dorsal foot, making wearing a sock difficult, with numbness and tingling in the entire plantar foot, swelling, decreased hair growth and ankle weakness. Dr. Murtaza diagnosed the beginning stages of CRPS Type I for which diagnostic treatment was warranted. Px B, p29-20.

Dr. Saper disputed the prospect Petitioner may have musculoskeletal issues including calf sprain, plantar fasciitis, and Achilles tendinitis, as those diagnoses did not explain the constellation of Petitioner's symptoms. Petitioner had pain on the dorsum of his foot, anteriorly and posteriorly, and evidence of neuropathic pain. Id at 13-14. His main problem was hypersensitivity on the dorsum, medial, and terror aspect of his foot, midfoot and ankle with neuropathic pain. Id. at 14. his complaints of diminished quality of life, reliance on a cane, and trouble wearing socks due to hypersensitivity. Id. at 17. Dr. Saper found treatment recommended by Dr. Murtaza was necessitated by Petitioner's blunt force injury. Id. at 17-19.

[1] The Arbitrator notes that neither party moved to admit the June 29, 2018 FCE into evidence.

Dr. Saper reviewed the IME report of pain management specialist Dr. Joseph Belmonte but was unaware of any photographs taken and had seen none from either Dr. Belmonte or Dr. Murtaza. Px B, p77-78. His main disagreement with Dr. Belmonte was his suggestion Petitioner's symptoms resulted from a musculoskeletal condition such as Achilles tendinitis or plantar fasciitis and his discount of neuropathic pain. Id. at 81-82.

Evidence Deposition of Dr. George Holmes

Respondent's Section 12 examiner, Dr. George Holmes, testified by evidence deposition September 29, 2020, identified his practice as an orthopedic surgeon specializing in foot and ankle surgery, and identified his curriculum vitae as Deposition Exhibit 1 reflecting he became licensed to practice medicine in 1985, and gained Board Certification in Orthopedic surgery in 1989. Respondent's Exhibit "Rx" 2, p1-3. Dr. Holmes examined Petitioner pursuant to Section 12 September 12, 2018, and had no difficulty communicating with him at the time. Id. at 6. Dr. Holmes identified Deposition Exhibit 2 to be his Section 12 report and testified to its contents. On exam Petitioner complained of pain in several portions of the foot, with a burning sensation. Pain would awaken him at night; massage and medications provided relief. Id. at 9. Examination revealed calf atrophy consistent with his prior surgeries but did not demonstrate any swelling of the ankle or foot. The ankle was stable, the skin color, turgor, tone, and temperature were normal, but he had a possible positive Tinel's sign over the posterior tibial nerve and complained of numbness in the bottom of his foot. Dr. Holmes stated positive Tinel's could have suggested injury to the tibial nerve, and a posterior tibial nerve injury could account for numbness at the bottom of the foot. Id. at 10-11. To investigate to possibility of posterior tibial nerve injury, so he recommended EMG. Id. at 11. X-rays of Petitioner's ankle performed by Dr. Holmes revealed a healed fracture with re-established ankle orientation and a healed fibula. Dr. Holmes diagnosed Petitioner status post open reduction and internal fixation of the fibula fracture, with a possible neurologic pain component. Id. at 11-12.

Dr. Holmes examined Petitioner a second time March 6, 2019 and identified as Deposition Exhibit 3 the report he drafted pursuant to his second examination of Petitioner. Rx 2, p13. Petitioner had received no additional treatment since the September 12, 2018 examination, and he was aware of no treatment plan set by Petitioner's physicians. Id. at 15. His second report outlines the treatment records he assessed for the sake of his examination, covering treatment between October 12, 2016 and September 21, 2018, including Petitioner's normal January 18, 2018 EMG and normal nerve conduction study. Rx 2, Deposition Exhibit 3, p1-3. Examination of the foot and ankle revealed no swelling (Id. at 19) normal skin color, turgor, tone, and temperature, and again the ankle was stable. Id. at 10. Tinel's test was no longer positive over any of the superficial nerves of the foot and ankle. Petitioner complained of numbness on the bottom of his foot, with pain on the top and bottom of his foot and the medial and lateral aspect of the ankle. Dr. Holmes could identify no anatomic dermatomal outline or consistency of Petitioner's pain (Id. at 16-17) and found the "spotty area of pain" inconsistent both with a regional pain syndrome and with the known anatomic expectations of pain stemming from a specific nerve injury. Id. at 18. The only area of pain that was specifically consistent with the injury is pain over the lateral ankle where surgery was performed. Id. He had x-rays of the ankle repeated March 6, 2019, which he described as essentially normal for a healed fibula fracture, without evidence for arthritis, fracture, dislocation,

or other gross abnormality. Id. at 18-19. Petitioner was taking Gabapentin, which Dr. Holmes found unnecessary to treat the orthopedic condition. Id. at 19. He diagnosed Petitioner MMI for his orthopedic condition and considered the surgical repair successful. Id. at 20. He diagnosed Petitioner with a left ankle fibula fracture requiring three surgeries in addition to a single knee surgery. On re-examination September 12, 2018 Petitioner no longer exhibited the deep pain exhibited on prior examination. Id. at 35. Petitioner could perform no work greater than the sedentary level from a neurologic basis, (Id. at P40) and was orthopedically MMI, but pain management intervention be reasonable due to complaints of chronic pain. He clarified from an orthopedic standpoint Petitioner requires no restriction, and from a nervous system standpoint everything is functioning properly, but sedentary restriction would be reasonable, as would be repeating Petitioner's FCE based on the prior inconsistent effort. Id. at 47.

Dr. Holmes noted pain is subjective but measured against patients who require pain management for reflex sympathetic dystrophy "RSD" of CRPS, he didn't believe Petitioner possessed the condition but wasn't ruling out potential benefits from treatment. Id. at 41. Petitioner's pain did not relate to the fibular fracture, and it remained undetermined whether the pain stemmed from the surgical repair. Id. at 42. Dr. Holmes took no issue with the pain medication Petitioner was receiving (Id. at 37) and voiced no disagreement with Petitioner pursuing pain management treatment, but clarified it was not his recommendation and he did not endorse its need, but did not oppose it because pain management is not an orthopedic issue for him to address. Id. at 20. From an orthopedic standpoint Petitioner required no activity restrictions and no cane or other assistive devices. Id. at 21. Dr. Holmes deferred to pain management physicians on the propriety of pain management protocol, but as an orthopedic surgeon who treats and sees patients with RSD and works in conjunction with a pain management team for such patients, it was Dr. Holmes' opinion Petitioner did not possess RSD or CRPS. Id. at 24-25. Dr. Holmes testified he "took detailed photographs of the foot, documented the way the foot looked, the temperature of the foot, the location of the pain, and to me no one seeing that would plug that into being CRPS." Id. at 25.

Evidence Deposition of Dr. Joseph Belmonte

Respondent's Section 12 examiner, Dr. Joseph Belmonte, testified by evidence deposition September 15, 2020, identified his practice as an anesthesiologist and pain management specialist, and identified his curriculum vitae as Deposition Exhibit 1, reflecting he has been licensed to practice medicine in August 2002. Rx 1, Deposition Ex A. Dr. Belmonte gained board certification in anesthesiology in 2011, and in pain management in 2012, and has been treating patients since 2011. As a pain specialist treats various conditions of spinal pain as well and neurotic types of pain, musculoskeletal pain, chronic migraine, and CRPS. Rx 1, p4-5. Roughly 60% of his practice involves conditions of the lower extremities, with 20-30% specific to orthopedic injury to the foot and ankle. Id. at 40.

Dr. Belmonte examined Petitioner pursuant to Section 12 July 24, 2019, and had no difficulty communicating with him at the time. Rx 1, p6-7. He identified Deposition Exhibit B to be the August 24, 2019 report he drafted pursuant to his July 24, 2019 examination, and testified to its contents including the records of Petitioner's treatment he reviewed. Id at 8-11. Petitioner informed Dr. Belmonte on October 12, 2016 he was transporting dollies when one of them fell onto his left ankle and was taken to an urgent care facility by his manager. He reported to Dr. Belmonte

symptoms of 3-6/10 sharp and burning pain in the left foot from the superior aspect of the ankle to the superior half of the foot, with numbness and shooting pain over the bottom of the foot. Id. at 11-12. Pain was constant, worse at night and in the morning, and with weather changes, prolonged standing, walking, and sleeping, but improved with daytime activity. Epsom salt baths, massage, medication, and ice provided relief. To Dr. Belmonte Petitioner denied experiencing color or temperature changes or changes in skin texture, hair or nail growth or increased sweating. Id. at 13.

Dr. Belmonte testified that in typical CRPS patients, movement of the affected area increases pain, and massage or any type of tactile stimulation would worsen the condition. Id. at 14. Petitioner was limited to short walks requiring frequent rests. Visual inspection revealed no visible swelling of the foot, ankle, calf, or knee; he could dorsiflex and plantar flex the foot without reservation, and the skin was not erythematous, shiny, or crusted. Hair growth appeared normal throughout the left lower extremity, there was no increased sweating, the nails of the foot were normal and there was no contracture or allodynia. Petitioner was hypoactive to pinprick, cold and wet sensations and to light touch over the bottom of the foot, was tender over the medial heel at the plantar fascia, the lateral calf and shin, and along the Achilles tendon, with grinding with dorsiflexion or plantar flexion. Id. at 15-17. Muscle tone was similar to the right leg, and strength was normal at five out of five. Range of motion was grossly normal without apparent difficulties with plantar and dorsiflexion. Dr. Belmonte explained allodynia is a symptom common is CRPS patients and refers to pain with touch ordinarily too light to produce pain. Petitioner was mildly hypoactive to sensation, which meant there was a slight nerve response over the dorsum of the foot, likely numbness, with the left foot and ankle slightly cooler than the right. Id. at 17-18.

Dr. Belmonte determined Petitioner did not meet the Budapest criteria for a diagnosis of CRPS. Id. at 19, 25. For a diagnosis of CRPS Petitioner would require an injury producing subjective reporting in at least three of four categories; sensory findings such as allodynia, vasomotor symptoms including color changes and temperature changes, motor or trophic changes such as skin crusting or calcification of the nails, and the fourth being pseudomotor changes such as increased swelling or sweating in the affected area. Normally acute CRPS will produce reddening of the skin which in later stages alters to pale or even blue. Generally, there would be increased sweating or changes in hair or nail growth over time. Id. at 19-20. Dr. Belmonte took photographs of Petitioner's bilateral lower extremities. Id. at 21. Dr. Belmonte stated the treatment records of Dr. Saper document redness and edema anticipated with Petitioner's surgical injury, not abnormal skin color, texture, or turgor. Id. at 22.

Dr. Saper did not document skin eruptions or anything else that would indicate CRPS, while documenting Petitioner's normal sensory exam and normal EMG. Id. at 23-24. Dr. Belmonte said the EMG was of no benefit in diagnosing CRPS but did rule out peripheral neuropathy or entrapment neuropathy as the cause for Petitioner's symptoms. Id. at 24. Had Petitioner possessed CRPS, it likely would have advanced and worsened over the years to include significant sensory alterations including burning pain, color changes, vasoconstrictions, swelling in the area and possibly increased sweating, motor trophic symptoms including tremors, weakness, increased hair growth of the nails of the foot. Id. at 25-27. Dr. Belmonte did not think pain management was warranted, and suspected possible musculoskeletal contributors to Petitioner's pain. Petitioner exhibited tenderness and spasm in the calf, and pain and inflammation in the Achilles tendon and

plantar fascia, inconsistent with a diagnosis of CRPS. Id. at 27. Had Petitioner's injury produced CRPS, symptoms would originate at the site of the surgical repair. Id. at 28, 34. Petitioner's pain at the top and bottom of the foot distal to the surgical site was inconsistent with CRPS. Id. at 28-29, 34-35. CRPS does not account for Petitioner's various symptoms, but his initial injury and its surgical repair does.

Dr. Belmonte believed Petitioner does not require pain management treatment, and that his condition may represent Achilles tendinitis, plantar fasciitis and calf strain warranting home therapy. Id. at 29-30, 51. From a pain management perspective Petitioner required no medical restriction or the assistance of a cane. Id. at 30. Dr. Belmonte identified photographs taken as part of his examination of Petitioner, used for comparison and to document CRPS' visible criteria including skin color changes, edema, changes in hair and nail growth, and possibly increased sweating. Dr. Belmonte stated the photographs of Petitioner's feet showed none of the visual criteria for CRPS. Id. at 32-33. The color photographs were admitted into evidence as Deposition Exhibit C to Respondent's Exhibit 1. Dr. Belmonte defined chronic pain as pain lasting longer than six months. Id. p40. Petitioner appeared honest in his complaints and without symptom magnification; his pain is real and dates back to the October 12, 2016 injury. Id. at 44-45, 52. Dr. Belmonte could not address the propriety of pain medications issued by Dr. Saper but agreed with Petitioner's use of anti-inflammatory medication. Id. at 47-48. Injuries such as Petitioner sustained could lead to the use of a cane in a man of Petitioner's age, but often the use of a cane worsens the condition by preventing strengthening of the muscles. Id. at 49.

Petitioner's current condition

Petitioner testified his left foot and ankle remain in constant pain that is burning and feels like a screwdriver poking at him. He also suffers from numbness in his toes, left leg and at the bottom of his foot. Tr. 21. Although his level of pain changes, it never falls below 3/10 and can reach 8/10. Tr. 23-25. Before the October 12, 2016 workplace incident, Petitioner stated he could jog, play tennis, and ride a bike. Following the accident, he states that he can no longer do these things. Tr. 23-24. Petitioner testified that he uses a cane, mostly outside of his home, for stability. Tr. 25. Petitioner's son, Elvis Subasic, testified on his father's behalf. Elvis stated that he sees his father regularly. He usually visits his father up to four times a week prior to the COVID19 pandemic, at which point he reduced his visits to once a week. Tr. 50. Prior to the accident, Petitioner played tennis, biked, went on hiking trip, worked on cars, and was handy around the house. Since the accident, Elvis has not witnessed his father do such activities. Tr. 59-60. Elvis testified that, since the accident, he has witnessed his father wince and cry out in pain as well as wobble at times when he walks. Tr. 50-54.

Surveillance

Investigator, Kenya Pope, testified to surveillance conducted by G4S, a subsidiary of the Gallagher Bassett Services insurance company, on June 24, 2020, June 25, 2020, and September 1, 2020. Tr. 77-78; 85. Mr. Pope identified three surveillance reports and a video contained in Respondent's Exhibit 6 documenting Petitioner on June 25, 2020 and September 1, 2020. Tr. 100-102. Video was not obtained on June 24, 2020. Tr. 78-79.

The June 24, 2020 report documents surveillance efforts for six hours (6am to noon). Petitioner was seen walking briefly in the alleyway near his home, using a cane while doing so (Rx 4). The June 25, 2020 report documents surveillance efforts for eight hours (9:30am to 5:30pm). Petitioner was observed retrieving something from the trunk of his car and return to his apartment, shortly after which he was discovered standing with another male in front of the hood of a parked car. A cane or supportive device was not seen. Petitioner was seen "kneeling down on both knees while working under the hood of the unknown man's vehicle." Rx 4 p. 10. The June 25, 2020 video is approximately 5 minutes long and shows Petitioner reaching overhead closing the trunk of his car manually with his left upper extremity at the 00:32 min mark and again at the 04:33 min mark. Rx 6. While Petitioner is seen talking to an unknown man next to a vehicle in the video, views of Petitioner are often obstructed or blurry. Petitioner is not seen kneeling down on both knees in the video as described in the June 25, 2020 report. Rx 4, 6.

The September 1, 2020 report documents eight hours of investigative efforts between 6:03am and 2:03pm. Rx 5 p. 9. Petitioner was seen walking with a cane but "barely using it." Rx 5 p. 10. The September 1, 2020 video is approximately 17 minutes long and the majority of footage depicts Petitioner driving his automobile through traffic. However, at the 09:45 mark, Petitioner is seen at a street parking meter holding a cane with his left hand. He is also seen leaning into his vehicle to place the paid meter receipt onto the dashboard at the 13:02 mark. He returns to his vehicle at the 14:12 mark and is still holding a cane while he gets into the driver seat. At the 16:49 mark, he is seen again momentarily ascending stairs at home with his cane. Rx 6.

Testimony of Denise Jongleux-Trausch

Quality Health Safety Environmental "QHSE" Manager Denise Jongleux-Trausch testified to Respondent's ability to provide work to Petitioner within his medical restriction, and the availability of work accommodating his level of restriction. As QHSE Manager, Ms. Jongleux-Trausch is responsible for matching injured worker with positions accommodating their level of restriction. Tr. 121. She outlined the process undertaken when an employee presents for work requiring limited duty due to medical restriction, including determining the work available and ensuring the employee is matched with work that falls within the restriction. Tr. 122, 138. Ms. Jongleux-Trausch identified by name five of Respondent's cargo employees performing duties similar to Petitioner's, all of whom were limited to work at 40lb or less and all of whom were provided accommodated work duties between June 2018 and February 2020. Tr. 124-126. According to Ms. Jongleux-Trausch, Petitioner's seniority and experience made him an appealable candidate for accommodated work assignment had he presented for work under a 40lb restriction. Tr. 123-124. Ms. Jongleux-Trausch admitted that she did not speak with Petitioner's supervisor about accommodating Petitioner. Tr. 136. Ms. Jongleux-Trausch did not know if anyone communicated with Petitioner regarding whether he could work with a 40-pound weight restriction. Tr. 129, 137. She also did not know whether a five-pound accommodation was made or offered to Petitioner. Tr. 137-138.

Petitioner testified Respondent has never called him to offer him any sort of modified work and that he would go back to work if he were able to do so. Tr. 27-29, 31-32.

CONCLUSIONS OF LAW

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

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has met his burden in proving that his current condition of ill-being is causally related to his work injury of October 12, 2016.

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. 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. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "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. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Arbitrator finds that Petitioner's condition of ill-being is related to the workplace incident of October 12, 2016. In so finding, the Arbitrator relies on the credible testimony of Petitioner, the opinions of Dr. Saper and the opinions of Respondent's IME, Dr. Holmes.

Dr. Saper states that Petitioner needs pain management treatment for his pain and numbness that is related to the work accident. See Px B, p. 17-19. Dr. Saper explains that Petitioner developed neuropathic pain as a result of the initial trauma requiring ongoing medical treatment. See Px B, p. 22.

Petitioner credibly testified about his left foot pain and described numbness in his toes and on the bottom of his foot. See Tr. 21. There is no evidence that Petitioner struggled with left foot/ankle issues prior to his work accident. Both Petitioner and his son testified to activities that Petitioner was able to perform prior to his work accident that he is no longer able to perform. The Arbitrator observed Petitioner during the hearing. Petitioner ambulated with the use of a cane and the Arbitrator watched him ambulate with a significant limp. Although there is testimony that an FCE report came back invalid, there is no expert testimony to suggest Petitioner was malingering or magnifying his symptoms. The Arbitrator considered the surveillance footage and did not find any material contradictions that would deem Petitioner unreliable.

Respondent's IME physician, Dr. Holmes related Petitioner's left calf atrophy to his previous surgery. He also found on exam a positive Tinel's test that suggests tingling over the posterior

tibial nerve. Dr. Holmes stated that if there was an injury to posterior tibial nerve, then "one of the manifestations of that injury could be numbness in the bottom of the foot." See Rx C, p. 137-138. Dr. Holmes opined that Petitioner was limited to sedentary work. Dr. Holmes opined that Petitioner suffered from chronic pain (Px C, p. 163-164) and that his chronic pain is causally related to the workplace injury. Px C, p. 164. Further, Dr. Holmes testified Petitioner requires pain management to treat his pain (as Dr. Saper recommended) even though Dr. Holmes opined Petitioner does not have RSP or CRPS. See Px C, p. 168, 170.

While the Arbitrator takes into consideration the opinions of Respondent's IME physician, Dr. Belmonte, the Arbitrator finds him to be the least credible. Dr. Belmonte related Petitioner's pain to musculoskeletal contributors and he stands alone in his opinion.

Taking all of the evidence together, the Arbitrator concludes that Petitioner has proven, by a preponderance of the evidence, that his condition of ill being to the left foot and ankle are related to the October 12, 2016, work incident.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found that Petitioner's condition of ill-being is causally related to his work accident of October 12, 2016, the Arbitrator finds that Petitioner is entitled to prospective medical care.

Both Dr. Saper and Respondent's IME, Dr. Holmes, opined that Petitioner requires pain management for his current complaints of left foot pain and numbness. Dr. Saper referred Petitioner to Dr. Murtaza who diagnosed Petitioner with the beginning stages of CRPS and recommended that Petitioner continue gabapentin, undergo a left L5-S1 selective nerve root block (for both diagnostic and therapeutic purpose), and if temporary relief is achieved, a spinal cord stimulation trial See Px B4, p.124. However, Respondent's IMEs and Dr. Saper all ultimately opine that Petitioner does not have CRPS or RSD. The Arbitrator finds Dr. Belmonte's opinions to be less credible as he stands alone in believing Petitioner suffers from musculoskeletal issues and thus finds that pain management is not warranted. While Dr. Homes and Dr. Saper join in their opinions that Petitioner needs pain management, neither specify any particular treatment plan.

The Arbitrator finds that Petitioner is entitled to pain management, which is contemplated as compensable treatment under Section 8(a) of the Act, and therefore Respondent is responsible for authorizing and paying for said treatment.

Issue L, whether Petitioner is entitled to any temporary total disability benefits, the Arbitrator finds as follows:

Having found causation and the need for prospective medical treatment, the Arbitrator finds that Petitioner is entitled to TTD benefits. Petitioner claims unpaid TTD benefits from February 27, 2020 (when Respondent ceased benefits) through the date of hearing, April 29, 2021. See Ax 1; See Rx 3. The Arbitrator relies on the credible testimony of Petitioner along with the testimony of Dr. Saper, Petitioner's treating physician, and Respondent's IME physician, Dr. Holmes.

The Arbitrator considers the testimony of Respondent's QHSE manager, Denise Jongleux-Trausch but she was unable to confirm whether Petitioner was offered any accommodated work. She testified that Respondent *could have* accommodated a 40-pound lifting restriction but (regardless of what Petitioner's restrictions actually were) there was no evidence that *any* job was offered to Petitioner. Petitioner testified that no one contacted him about returning to work. Petitioner has not been returned back to work full duty by Dr. Saper and Dr. Holmes concluded that Petitioner was limited to sedentary work.

Respondent's Exhibit 3 confirms that TTD benefits were paid through February 27, 2020. See Rx 3. Therefore, Petitioner is entitled to an additional 61 weeks of TTD from February 27, 2020 through April 29, 2021.

Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:

Respondent claims a credit of $93,491.20 for paid TTD benefits, which is consistent with Respondent's Exhibit 3 itemizing TTD payments made from October 13, 2016 through February 27, 2020. See Ax 1, Rx 3. As such, Respondent shall be awarded a credit of $93,491.20 for TTD benefits paid.

RACHAEL SINNEN, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC013611
Case Name	Keith King v. Premier Transportation Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0315
Number of Pages of Decision	8
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jason Briski
Respondent Attorney	Patrick Martin

DATE FILED: 8/19/2022

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEITH KING,

Petitioner,

vs. NO: 21 WC 013611

PREMIER TRANSPORTATION, 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 accident, causal connection, temporary disability, and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 22, 2021, 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 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 $27,318.00. 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.

August 19, 2022

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

KAD/bsd
0081622
42

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

/s/*Maria E. Portela*
Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC013611
Case Name	KING, KEITH v. PREMIER TRANSPORTATION INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Kirk Moyer
Respondent Attorney	Patrick Martin

DATE FILED: 12/22/2021

/s/Frank Soto, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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)

KEITH KING,
Employee/Petitioner
v.
PREMIER TRANSPORTATION, INC.,
Employer/Respondent

Case # **21** WC **13611**

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 **October 29, 2021** 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 the alleged date of accident***, May 6, 2021***, 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 her employment.
- Timely notice of this accident ***was*** given to Respondent.
- Petitioner's current condition of ill-being ***is*** causally related to the accident.
- In the year preceding the injury, Petitioner earned $***36,893.92***; the average weekly wage was $***1,426.84.***
- On the date of accident, Petitioner was ***57*** years of age, with ***2*** dependent children.
- Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.
- The parties have stipulated that respondent has paid $***0*** in TTD benefits.
- Respondent is entitled to a credit of $***0*** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary outstanding medical expenses totaling $3,303.21, as identified in Petitioner's Exhibits 1,2, and 3, pursuant to Sections 8.2 and 8(a) of the Act, as set forth in the Conclusions of Law attached hereto and incorporated herein.

Respondent shall pay Petitioner temporary total disability benefits of $951.23/ week for 25 1/7 weeks, commencing May 7, 2021 through October 29, 2021, the date of trial, as provided in Section 8(b) of the Act, as set forth in the Conclusions of Law attached hereto and incorporated herein.

Respondent shall pay for the surgery recommended by Dr. Tu as well as any reasonably related medical care including reasonable and necessary imaging and/or testing needed to prepare for the surgery as well as treatment subsequent to that procedure, pursuant to Sections 8(a) and 8.2 of the Act, as set forth in the Conclusions of Law attached hereto and incorporated herein.

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

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

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

By: /o/ Frank J. Soto

Arbitrator **December 22, 2021**

Procedural History

This case proceeded to trial on October 29, 2021 pursuant to Sections 19(b) and 8(a) of the Act. The disputed issues are whether Petitioner sustained an accidental injury that arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and prospective medical care. (Arb. Ex. 1).

Prior to trial, Petitioner filed a Motion in Limine to Bar Any Evidence of Prior Injury. (Arb. Ex. 2). Petitioner filed the motion seeking to bar evidence of Petitioner's prior right shoulder injury and surgery since Respondent did not have an expert opinion relating the prior condition to the instant case. Petitioner also sought to bar from evidence a Post Offer Medical Questionnaire and Medical Examination Report Form, completed by Petitioner at the time of hire, which failed to disclose prior injuries. 1 Respondent filed a Response to the Motion in Limine. (Arb. Ex. 2). The Arbitrator denied Petitioner's Motion in Limine stating the Act does not permit such motions. (TR. 8). The Arbitrator further stated that Petitioner may raise his objections during trial and, at that time, the Arbitrator would rule upon the objections. (TR. 8). The Motion in Limine and Response were retained with the record as a rejected exhibits. (TR. 8).

At the conclusion of the trial, Petitioner objected to introduction of Respondent's Exhibits 4 and 5 based upon relevance. Respondent's Exhibits 4 and 5 were copies of prior Workers' Compensation settlements. *(i.e.* Case #08 WC 027088 involved an injury to Petitioner's right shoulder and Case #19 WC 28501 involved an injury to Petitioner's low back. The Arbitrator overruled Petitioner's relevance objection and admitted the documents into evidence. (TR. 97).

Finding of Facts

Keith King (hereafter referred to as "Petitioner") testified he worked at Premier Transportation, Inc., (hereafter referred to as "Respondent") as a truck driver and that his job was very physical involving a large amount of kneeling, bending, lifting, pushing and pulling. (TR 11-16, 21-25). He testified that on May 6, 2021, he was injured while unloading a pallet of merchandise off his truck. (TR 24-26). Petitioner testified a pallet he was unloading containing boxes of merchandise was leaning to the left. Petitioner testified he used a pallet jack to move

1 The information Respondent sought to offer into evidence involved a Post Offer Medical Questioner Petitioner completed at the time of hire which failed to disclose prior injuries. (Rx 1).

the pallet slightly, to gain access to the pallet, and then he thrusted his body, leading with his right shoulder, into the leaning boxes attempting to straighten the boxes. (TR 26-28, 73-74). Petitioner testified he immediately felt severe pain in his right shoulder and he reported the accident to his supervisor. (TR 26, 29-31). Petitioner testified he took a photo of the pallet he attempting to straighten after being injured. (PX 9). Petitioner testified the photo reasonably and accurately reflects how the pallet looked just before his injury. (TR 27-29).

Petitioner testified Respondent sent him to Riverside Workforce Health. (TR 32). The records from Riverside Workforce Health include correspondence from Respondent requesting Petitioner be seen there that same day for a work injury to the shoulder. (PX. 1, Bates stamp 000005). The "Supplemental Charting Notes" indicate Petitioner had right shoulder pain, right hand swelling and could not lift his right arm. (PX 1, Bates Stamp 000006). Petitioner rated his pain level as "10/10" and the duration states "today". (PX. 1, Bates Stamp 000006). At that time, the doctor noted a loss of sensation in the affected extremity and the "right shoulder droops lower than left". (PX 1, Bates Stamp 000007). The diagnosis was "shoulder – injury – right – initial, acute" (PX 1, Bates Stamp 000007). The doctor ordered Petitioner off work and advised him to go to the ER. (PX 1, Bates Stamp 000008-000009).

Upon being released from Riverside Workforce Health, Petitioner was seen at Advocate South Suburban Hospital and, at that time, Petitioner's right shoulder was examined, x-rays were taken and he was given a sling. (TR 32-34). Petitioner reported injuring his right shoulder at work, that same day, while moving a pallet. (PX 2, Bates Stamp 000017). The ER doctor included a rotator cuff tear in his differential diagnosis stating: "suspicious for rotator cuff strain versus tear". (PX 2, Bates Stamp 000021). Petitioner was taken off work and provided an orthopedic referral. (PX 2, Bates Stamp 000021).

On May 10, 2021, Petitioner was seen at Midwest Orthopedics. The Quick Report indicates right shoulder pain with a provisional diagnosis of a rotator cuff tear. (PX 3, Bates Stamp 000063). Dr. Yanke, in his Quick Report, stated Petitioner is "off work pending MRI and follow-up". (PX 3, Bates Stamp 000063). That MRI, taken on May 20, 2021, showed a full thickness tear of the supraspinatus tendon. (PX 3, Bates Stamp 000064). Petitioner testified that follow-up care was not received until October 7, 2021, with Dr. Tu, because in May 2021 workers' comp stated they would no longer provide coverage for the claim. (TR 36-37).

On October 7, 2021, Petitioner saw Dr. Tu and providing Dr. Tu the CD containing his May 20, 2021 MRI. (TR 37-38). Dr. Tu reviewed the MRI and noted a complete rotator cuff tear. Dr. Tu recommended arthroscopic right shoulder surgery. (TR 38; PX 4, Bates Stamp 000142). Dr. Tu placed Petitioner on work restrictions consisting of no lifting over 10 pounds and no overhead activity with the right arm. (PX 4, Bates Stamp 000142). Petitioner testified his work restrictions were contrary to his job duties. (TR 12-16, 23-25, 38-39, 79-80).

Petitioner testified since the accident, he has not returned to work and that he has not received any TTD benefits. (TR 35-36, 38). During cross-examination, Petitioner acknowledged filling out a document titled Post-Offer Medical Questionnaire. (TR 54). Petitioner admitted to failing to disclose injuring his right shoulder in 2007 and undergoing rotator cuff surgery. (TR. 55-57). Petitioner testified he did not disclose the prior injury because he did not think it was relevant since it happened so long ago and he was not having any problems with it. (TR. 59). Petitioner also acknowledged not disclosing a prior ankle fracture in 2015, a left shoulder injury in 1993, and a back injury in 2019. (TR. 59-61). Petitioner acknowledging not disclosing his prior injuries on another hiring related document entitled Medical Examination Report Form. (TR. 69, RX 3). Both documents were part of the employment hiring process.

The Arbitrator found Petitioner's testimony to be credible and the Arbitrator notes that Petitioner acknowledged not listing past injuries on documents completed during the employment hiring process.

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 his claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill.App.3d 706, 714 (Ill. App. 5th Dist. 1992).

With Respect to Issue (C), Whether an accident occur that arose out of and in the course of Petitioner's employment, the Arbitrator Finds as follows:

The claimant has the burden of establishing by a preponderance of the evidence that her injury arose out of and in the course of her employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980); *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 654, 801 N.E.2d 18, 279 Ill. Dec. 726 (2003). The phrase "in the course of

employment" refers to the time, place, and circumstances of the injury. *Scheffler Greenhouses, Inc., v. Industrial Comm'n,* 66 Ill. 2d 361, 366-67 (1977). "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise, v. Industrial Comm'n*, 54 Ill. 2d 138, 142 (1973). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003) Citing Caterpillar Tractor, 129 Ill. 2d at 58.

An injury "arises out of one's" employment if it originates from a risk connected with, or incidental to the employment, involving a causal connection between the employment and the accidental injury. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 (1987). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini,* 117 Ill. 2d at 45. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *Steak 'n Shake*, 2016 IL App.(3d), 150500WC, Par. 34. A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform or (3) acts that the employee might be reasonable be expected to perform incident o her or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58, see also *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n,* 2013 IL 115728, Par 18, *Sisbro*, 207 Ill. 2d. at 204. Risk incident to employment are those acts the employer might reasonably expect the employee to perform in fulfilling is assigned job duties. *McAllister v. v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (2020), citing *Orsini,* 117 Ill. App. 2d. at 45, *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 388 (1965). The Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n,* 236 Ill. 2d 132, 149 (2010).

The Arbitrator finds Petitioner proved by the preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment. Petitioner testified

he injured his right shoulder while repositioning product on a pallet that had shifted during transportation. At the time of the incident, Petitioner was at work performing an act his employer might reasonably expect him to perform incident to his assigned job duties. Petitioner immediately reported the accident and shoulder injury to his employer and was seen at the employer's occupational clinic and an emergency room the same day. They note a history of Petitioner having pushed a pallet with his right shoulder earlier that day at work and sustaining injury. The employer's occupational clinic, Workforce Health, noted that Petitioner could not lift his right arm and had right shoulder pain as well as right hand swelling. Significantly, the provider noted that Petitioner's right shoulder injury is "***acute***". An MRI taken just two weeks after the May 6, 2021, accident, revealed that Petitioner sustained a right torn rotator cuff.

Petitioner's testimony was unrebutted. Respondent argues since Petitioner failed to disclose prior injuries during the hiring process than Petitioner must have lied while testifying and lied to his supervisor, when reporting the accident, and lied to his doctors, when provided information to his doctors who were assess his condition. The Arbitrator notes that Respondent failed to proffer any witnesses who rebutted Petitioner's trial testimony or any evidence that Petitioner lied to his treating physicians or supervisor. The Arbitrator also notes Respondent failed to proffer any Section 12 examiner opinions that Petitioner's torn rotator cuff was not caused by his work accident or that Petitioner was injured elsewhere.

It appears Respondent seeks the Commission to hold that when an employee fails to disclose prior injuries, during the hiring process, a presumption is created that the employee is deemed not credible for any and all matters involving a subsequent work accident and/or not is not entitled to the rights created under the Illinois Workers' Compensation Act. The Arbitrator affords no weight to Petitioner's failure to disclose prior injuries during the hiring process and finds that no inference involving the lack of credibility is created. The Arbitrator notes that this is not a situation where the employer, who just hired the employee, claims the alleged injury occurred prior to employment and has medical records showing that condition existed just prior to being hired which is supported by the opinion of a Section 12 examiner.

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:

In pre-existing condition cases, recovery will depend on the employee's ability to show

that a work-related accidental injury aggravated or accelerated the pre-existing 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 a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). 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. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Furthermore, it has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982). "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id*. at 64.

The Arbitrator finds Petitioner proved by the preponderance of the evidence his current condition of ill-being is causally related to his work injury. Respondent did not offer any medical opinion to refute causation. Respondent contested this case claiming Petitioner did not sustain an accident that arose out of and in the course of his employment. For the reasons set forth herein set forth above, the Arbitrator concluded Petitioner sustained an accident that arose out of and in the course of his employment. Petitioner testified and records support that he injured his right shoulder while moving a pallet. He testified that he struck his right shoulder on material stacked on the pallet with force and that he had immediate right shoulder pain thereafter that dropped him to the ground. He testified he was in good health prior to being injured at work

and he had no problems with his right shoulder for the past 5 to 10 years. While there was testimony concerning a prior 2007 right shoulder rotator cuff tear with surgery in 2007, the testimony was that Petitioner had made a full recovery from that injury. Of significance, no records were introduced into evidence of treatment for the 2007 injury or reflecting any complaints of right shoulder pain by Petitioner prior to the May 6, 2021, work injury.

With Respect to Issue "J", Whether Respondent is liable for Medical Expenses, the Arbitrator Finds as Follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds Petitioner proved by the preponderance of the evidence the medical treatment rendered was reasonable and necessary to cure and alleviate Petitioner's condition. The records submitted into evidence shows that Petitioner was seen at Workforce Health, the same day at Respondent's request, and he was referred to the emergency room. On discharge from the emergency room Petitioner was directed to follow-up with an orthopedic surgeon. The sum of the outstanding medical bills total $3,303.21, as identified in Petitioner's Exhibits 1, 2, and 3. As such, the Arbitrator finds that Respondent shall pay reasonable and necessary medical expenses in the amount of $3,303.21, as identified in Petitioner's Exhibits 1,2, and 3, pursuant to Sections 8(a) and 8.2 of the Act.

With respect to issue "K" whether Petitioner is entitled to TTD benefits, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial*

Comm'n, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The Arbitrator finds Petitioner proved by the preponderance of the evidence he is entitled to TTD benefits from May 7, 2021 through October 29, 2021, the date of trial, or 25 1/7 weeks at a TTD rate of $951.23. The Arbitrator finds that Petitioner's condition has not stabilized. The treating physicians at Workforce Health and the Advocate emergency room initially ordered Petitioner off work. Dr. Yanke ordered Petitioner off work until the MRI and a follow-up exam. The MRI was taken on May 20, 2021. Petitioner testified workers' compensation refused to approve further treatment causing Petitioner to be unable to follow up with his doctor until October 7, 2021. At that time, Dr. Tu issued work restrictions which precluded Petitioner from returning to work for Respondent. Surgery has been recommended which Petitioner has yet to undergo.

With Respect to Issue (O), Prospective Medical Treatment, the Arbitrator Finds as Follows:

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Procedures or treatment that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill.App.3d 705, 710 (Ill. App. 2nd Dist. 1997).

Petitioner seeks prospective medical care consisting arthroscopic right shoulder surgery recommended by Dr. Tu. The Arbitrator finds Petitioner proved by the preponderance of the evidence that he is entitled to surgery recommended by Dr. Tu. Respondent did not proffer an expert opinion the recommended surgery was not reasonable or necessary. As such, Respondent shall pay for the surgery recommended by Dr. Tu as well as any reasonably related medical care including reasonable and necessary imaging and/or testing needed to prepare for the surgery as well as treatment subsequent to that procedure, pursuant to Sections 8(a) and 8.2 of the Act.

By: /o/ Frank J. Soto
Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC022078
Case Name	Maria Lopez Martinez v. Swissport Cargo
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0316
Number of Pages of Decision	47
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Joseph R. Needham

DATE FILED: 8/19/2022

/s/Christopher Harris, Commissioner

Signature

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

MARIA LOPEZ MARTINEZ,

Petitioner,

vs. NO: 19 WC 22078

SWISSPORT CARGO

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, medical transportation costs, temporary total disability (TTD) benefits, prospective medical treatment, and penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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, 2021 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 $48,300.00. 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.

August 19, 2022

/s/ *Christopher A. Harris*
Christopher A. Harris

CAH/tdm
O: 8/18/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC022078
Case Name	MARTINEZ, MARIA LOPEZ v. SWISSPORT CARGO
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	44
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Joseph R. Needham

DATE FILED: 10/1/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/ Joseph Amarilio, Arbitrator

Signature

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)

MARIA LOPEZ MARTINEZ Case # **19 WC 022078**
Employee/Petitioner

v.

SWISSPORT CARGO
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 Joseph Amarilio, Arbitrator of the Commission, in the city of Chicago, on 7/19/2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, 6/13/19, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,599.80**; the average weekly wage was $**646.15**.

On the date of accident, Petitioner was 45 years of age, ***single*** with 2 dependent children.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $646.15/week for 94-2/7 weeks, commencing 09/29/1209 through 07/19/2201, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $19,580.26 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as outlined in the amount of $6,830.92, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for the partial knee replacement surgery recommended by Dr. Levi, including supporting preoperative and postoperative treatment and transportation costs to and from the office of Dr. Levi to complete that treatment.

Respondent is not liable for penalties or attorney fees as provided in Section 16 of the Act; as provided in Section 19(k) of the Act; and, 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.

Joseph D. Amarilio

Signature of Arbitrator Joseph D. Amarilio

OCTOBER 1, 2021

THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Lopez-Martinez
Employee/Petitioner

v.

Swissport Cargo
Employer/Respondent

Case # 2019 WC 022078

19(b) Decision

ATTACHMENT TO ARBITRATION DECISION

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

PROCEDURAL HISTORY

Ms. Maria Lopez-Martinez (Petitioner), by and through her attorney, filed an Application for Claim for benefits under the Illinois Workers' Compensation Act. Petitioner alleged that she sustained an injury arising out of and in the course of her employment with Swissport Cargo (Respondent).

This matter was heard on July 19, 2021 before the Arbitrator in the City of Chicago and County of Cook in accordance with Section 19(b) of the Act. Petitioner testified in support of her claim. No witness testified on behalf of the Respondent at the hearing. Respondent's Section 12 examiner, however, testified on three separate occasions by evidence disposition Petitioner objected to the testimony of Respondent's expert elicited in third deposition session. The submitted exhibits and the trial transcript of the hearing were examined by the Arbitrator.

In addition to the evidentiary issues raised the evidence deposition, the parties proceeded to hearing on eight disputed issues: (1) whether Petitioner's current claimed conditions of ill-being are causally connected to the work accident, (2) medical bills, (3) temporary total disability, (4) average weekly wage, (5) prospective medical, (6) Penalties and Fees, (7) Credit, and, Transportation costs. (Arb. Ex. 1STATEMENT OF FACTS

Petitioner testified through a Spanish speaking interpreter. On June 13, 2019 she injured her left leg, left knee and her right shoulder, (Tr. 11-12, 25) (Px 1, Px 2) Accident is not in dispute.

Her shoulder rotator cuff strain and left leg contusion appear to be resolved with conservative care. The left knee injury has not.

Petitioner initially returned to work in a restricted capacity, however, Respondent terminated light duty accommodations after 90 days. Tr. 25-26. She then received temporary total disability benefits and medical benefits, including authorized arthroscopic left knee surgery, until June 21, 2020. Before undergoing left knee surgery on October 10, 2019, she received conservative care at the company clinic from June 19, 2019 through August 14, 2019 when the company physician referred her to an orthopedic surgeon for further care.

All benefits were terminated based on the findings and opinions of Respondent's Section 12 examiner report of May 28, 2020. Respondent has refused to authorize a second left knee surgery as recommended by Petitioner's orthopedic surgeon.

After Petitioner tripped over a printer at work on June 13, 2019, injuring her left leg, left knee and right shoulder, she went to the company clinic, Physicians Immediate Care on June 19, 2021, (Px 1, p.14) She received conservative care at the company clinic from June 19, 2019 through August 14, 2019 when was discharged and advised to follow up with Dr. Levi, an orthoperiodic surgeon .(Px 1, p 90, 94)

After prescribing additional conservative care, Dr. Levi ultimately performed and arthroscopic debridement and microfracture procedure. (T.12) The surgery was performed on October 10, 2019 consisting of: 1) debridement of a partial ACL tear; 2) partial medical meniscectomy; 3) microfracture of the medial femoral condyle grade 4 defect; 4) removal of loose bodies in the joint space; 5) a PRP injection to stimulate healing of microfracture and the osteochondral fracture; and 6) synovectomy of the patellofemoral joint along the medial and lateral

joints. (PX3 p.301) Petitioner obtained some improvement with the arthroscopic procedure, but she experienced a 30% reduction in joint space after the surgery.

Respondent requested Petitioner appear before Brian Forsythe for a Section 12 examination on May 28, 2020. Dr. Forsythe attributed the accelerated breakdown of the joint space to the cartilage lesion and the debridement procedure. (RX1b p.25, 26) Respondent terminated TTD and medical treatment when it received Forsythe's evaluation. (T.15) As a result, Petitioner could no longer pay her rent when Respondent cut her off and she was forced to move to Wisconsin to live with her brother's family. (T.13-15) Dr. Levi had not released her to work in any capacity. (T.15) Dr. Levi also recommended a partial knee replacement to address the deteriorating joint space problem and authorized her off work until surgery proceeded. (T.21-22)

Dr. Forsythe also disagreed with this treatment plan and offered other options. His recommendation for ongoing care was home exercise, hyaluronic viscosupplementation injections to lubricate the knee joint, and weight loss would help most; he found no indication for joint replacement, and stated those treatments should be pursued as a consequence of the microfracture procedure and Petitioner's obese state, and were unrelated to the condition of Petitioner's ACL or MCL. Res. Ex 1a, p33, 38.

The treatment records of Physicians Immediate Care records reflect Petitioner presented June 19, 2019 for treatment of left knee pain 8/10 following injury at work when she tripped over a printer and struck her shin and twisted her knee. Pet. Ex 1, p14. Her chief complaints were left knee pain, swelling, lower leg bruising and difficulty walking. X-rays were negative with good joint space , she was diagnosed with left knee sprain and leg contusion, was provided a knee brace and was to avoid kneeling and prolonged squatting. Id, p16. She was dispensed acetaminophen

and naproxen sodium June 19, 2019, (Id, p21) and prednisone June 26, 2019 (Id, p37) at which time her diagnosis was altered to specify sprain of the ACL with lower leg contusion. (Id, p41)

Following the left knee MRI, Petitioner's diagnosis remained left knee ACL sprain but sprain of the MCL was added to the diagnosis, and her restrictions remained to avoid kneeling and prolonged squatting. Id, p52. The July 2, 2019 left knee MRI reported a thickened ACL with abnormal signals representing partial thickness tear with mild PCL buckling, mild fluid along the MCL representing a sprain, unremarkable lateral and medial menisci, normal bone marrow signal in the distal femur, medial and lateral femoral condyles, tibial plateau and proximal tibia and fibula, with the absence of bone marrow edema, bruise or contusion. Pet. Ex 1, p59, 61, 63. The Radiologist's reported impression was partial thickness tear of the ACL, Grade I injury to the MCL, a small Baler's cyst and moderate joint effusion. Id, p60, 62, 64. The radiologist's diagnosis was adopted by the company physician. Neither the company clinic physician nor the radiologist noted loss of joint space. Pain reported July 10, 2019 was unchanged at 6/10. Id, p75.

On July 31, 2019, Petitioner's diagnosis remained unchanged but was described as worsening (Id, p86) with 4/10 pain (Id, p87) and she was referred for orthopedic consultation with Dr. Levi. Id, p 90, 94. Her reported pain level August 7, 2019 was 3/10, and leg weakness was reported. Id, p96. Her diagnosis remained ACL and MCL sprains, (Id, p99, 102) improved on August 7, 2019, (Id, p102) but worsening on August 14, 2019. Petitioner was discharged August 14, 2019 to the care of her orthopedic surgeon, Dr. Gabriel Levi. Id, pp. 110, 112, 117.

The records of Dr. Gabriel Levi reflect that he is a clinical assistant professor at the University of Illinois in Chicago. He is also the Director of Sports Medicine and the Director of Joint Replacement and Reconstruction. (PX 3, p. 2)

Dr. Levi first treated Petitioner August 7, 2019 for knee pain sustained after an injury at work. Petitioner initially felt no knee pain due to a large bruise but noticed pain after the knee "popped." Pet. Ex 3, p364. Left knee physical examination revealed no bruising, swelling or infection and was stable under stress testing, but showed mild lateral joint line tenderness and significant pain with flexion past 115 degrees. McMurray's test suggested medial meniscus tear. X-rays were unremarkable, the diagnosis was diagnosed tear of the medial and lateral menisci and sprain of the ACL, and MRI was ordered. Id, p365-366. Petitioner was restricted to work free from kneeling and squatting and was to wear a knee brace. Id, p22. Left knee pain on August 12, 2019 was 5/10, 7/10 with prolonged walking; MRI was said to reveal partial ACL tear and Grade I MCL injury, with Baker's cyst and joint effusion for which Dr. Levi recommended arthroscopic surgery and ACL reconstruction. Id, p360-362 Work restrictions remained unchanged for a diagnosis of medical meniscus tear, lateral meniscus tear and ACL sprain. Id, p20.

On September 11, 2019, Dr. Levi restricted Petitioner from all work due to knee instability, at which time she registered 4/10 pain. (357) Physical examination revealed stability under stress testing and a positive McMurray's test; the diagnosis remained ACL and MCL sprain. (358) Petitioner's restrictions and diagnoses remained unchanged with restricted to work free from kneeling and squatting and was to wear a knee brace for a diagnosis of medical meniscus tear, lateral meniscus tear and ACL sprain. Id, p19.

On October 10, 2019, Dr. Levi performed arthroscopy surgery consisting of an ACL debridement, partial medial meniscectomy, medial femoral condyle microfracture for Grade IV defect, loose body removal, plasma injection and patellofemoral synovectomy, for a preoperative diagnosis of left knee ACL tear and a postoperative diagnosis of left knee acute osteochondral

fracture of the medial femoral condyle Grade IV 2 cm in length, loose bodies greater than 1cm, and complex tear of the medial meniscus posterior horn. Pet. Ex 2, p18; Pet. Ex 3, p301.

Petitioner remained fully restricted from all work thereafter. Pet. Ex 3, p2-15. The North Shore Surgical Suites in Pleasant Prairie, Wisconsin records include Dr. Levi's operative report, preoperative diagnosis of left knee ACL tear, and a postoperative diagnosis of left knee acute osteochondral fracture of the medial femoral condyle Grade IV 2cm in length, loose bodies greater than 1cm, and complex tear of the medial meniscus posterior horn. Pet. Ex 2, p18. Included is a $0 bill for treatment rendered October 10, 2019 in Pleasant Prairie, Wisconsin (Id, p2-3) and 18 intraoperative films. Id, p63-65.

At two-week post-surgery, on October 23, 2019, Petitioner related 7/10 pain with a maximum 10/10. She was walking with crutches and reported benefit with physical therapy. Id, p353-354. On September 20, 2019 pain had reduced to 4-5/10 with a maximum 7/10 in cold temperatures, for which she used topical analgesics. The post-operative diagnosis remained ACL and MCL sprain. PX 3, pp. 350-351. Dr. Levi's addendum office notes of November 6, 2019, rolls over the diagnosis but reflects an assessment that 2 weeks post left knee arthroscopy, she has a 2 cm osteochondral fracture of the medial femoral condyle that was treated with microfracture. She had a partial tear of the ACL that did not necessitate reconstruction at the time of surgery. Dr Levi noted that her main problem is the osteochondral fracture and the medial meniscus tear. If the pain persists, she may need a future surgery with osteochondral allograft. PX 3, pp.353-355,

Between January 8, 2020 and April 1, 2020 pain levels remained stable at 3/10; (Id, p339-349) Dr. Levi's February 19, 2020 examination revealed Petitioner's pain was to be expected after microfracture procedure and Petitioner was to continue physical therapy and full work restriction. Id, p343-344. Petitioner's February 19, 2020 diagnosis was sprain of the MCL and ACL. Pet. Ex

3, p15. On April 1, 2020 Dr. Levi recommended partial knee replacement for a new diagnosis of unilateral primary osteoarthritis of the left knee. Id, p340. Following increase to 6/10 pain July 6, 2020, (Id, p14, 333) Petitioner's pain level was documented between 4 and 5/10 through May 21, 2021. Id, p307-329. On May 12, 2021 Dr. Levi recorded Petitioner to be improved over her condition prior to surgery, but with 9/10 pain when manipulating stairs, and awaiting approval for partial knee replacement (Pet. Ex 3, p307) for a diagnosis of left knee unilateral primary osteoarthritis. Id, p2, 308.

Between July 11, 2019 and September 25, 2019 physical therapy was carried out at ATI Physical Therapy. Pet. Ex 4. A July 11, 2019 knee survey reflects constant pain, then currently 8/10 pain, was "very" swollen but she could perform extreme activity before significant swelling. She had moderate difficulty with stairs and was unable to squat or kneel. Id, p108. The July 3, 2019 record of Physician's Immediate Care reflect their referral of Petitioner for therapy (Id, p136) with MRI confirmation of a partial thickness tear of the ACL and Grade I injury to the MCL characterized as a knee sprain and lower extremity contusion. Id, p134. On August 28, 2019 she had regained 85% of her prior function, (Pet. Ex 4, p118) and on September 23, 2019 she reported gradual decrease of her knee pain, but with increased pain and stiffness when standing at work, interfering with her ability to squat. Id, p115. On September 25, 2019 Petitioner is recorded to have made significant gains in functional mobility in strength and range of motion. Pet. Ex 4, p33. She remained limited to five second squatting due to 5/10 pain, (Id, p43) but had met her long-term return to work goal of squatting and lifting 50lb and had done so five times with good body mechanics and without upper extremity assistance. Pet. Ex 4, p43-44. Her discharge summary states Petitioner reported decreased knee pain and the ability to negotiate stairs with a reciprocal

gait and without upper extremity assistance. She also reported an inability to squat to inspect freight at work. Pet. Ex 4, p43.

Petitioner's medical bills exhibit identified three groups of unpaid bills. A June 3, 2021 statement of Orthopaedic and Rehabilitation Centers reflects 62 pages of services rendered August 7, 2019 through April 26, 2021. Pet. Ex 5, p1-62. The statement reflects an unpaid balance of $2,171.06, apparently for dispensed medication, which Petitioner alleges reduces to $1,397.12 under section 8.2, Id, p1. The document does reflect $180.00 under "current" with an additional $180.00 balance owed for 31-60 days, additional $180.00 balance owed for 61-90 days, and $1,631.06 owed for more than 90 days as of June 3, 2021. Id. A June 24, 2021 statement of Persistent Medical for services rendered January 10, 2020 reflects charges of $6,615.86 (Pet. Ex 5, no page) which Petitioner alleges reduces to $3,519.64 under section 8.2, apparently for dispensed medication. Id. A July 13, 2021 statement of Persistent Technologies / Pacific Toxicology Laboratories for drug testing services rendered that day reflects charges of $3,905.00, which Petitioner alleges reduces to $1,914.16 under section 8.2, apparently for dispensed medication. Id.

Dr. Brian Forsythe testified by evidence deposition was initiated December 8, 2020, (Res. Ex 1a) and his testimony resumed on February 16, 2021, (Res. Ex 1b) .His testimony was completed on April 27, 2021. Res. Ex 1c. The first two deposition dates where terminated to accommodate Dr. Forsythe's schedule.

Dr. Forsythe testified to his practice as orthopedic surgeon since 2008, which he characterized as very busy, with 50% of his practice focused on knee conditions, (Res. Ex. 1a) and identified his curriculum vitae as Exhibit No. 1 reflecting his full medical credentials. Id, p5. Dr. Forsythe examined Petitioner pursuant to Section 12 on May 28, 2020. He identified his written

report of that examination as Exhibits No. 2. Id, p6-8. He estimated the extent a busy Section 12 examination practice, mainly retained by Respondents. (Id. p43-45). He described his examination process and identified records he assessed in conjunction with his examination, including the July 2, 2019 MRI images and report. Id, p 9-10. Dr. Forsythe agreed with the radiologist's interpretation the MRI revealed partial tear of the ACL and Grade I injury to the MCL, and a small Baker's cyst but no fracture of any bone. Id. p10. He stated physical examination and not MRI was the best measure for testing the need for ACL reconstruction. Id. Grade I, used to describe the MCL injury, referred to a stress or tension injury, meaning on a microscopic level there was fluid bleeding within the ligament tissue but without tearing of the ligament fibers, (Id, p11) and differed from a Grade II or Grade III in that it involves a thickening of the ligament with fluid, but without disruption of the ligament fibers greater than micro tearing too modest to visualize even by Dr. Levi's visual inspection. Id, p11, 61-62. The characterization of MCL sprain used by the radiologist in the MRI report was accurate, was consistent with the diagnosis of sprains to the ACL an MCL recorded by Physicians Immediate Care, and likely represented the acute injury sustained by Petitioner on June 13, 2019. Id, p11-12, 15. Dr. Forsythe stated the MCL sprain did not warrant surgery. The July 2, 2019 MRI visualized the entire medial femoral condyle without revealing any fracture to any area of the medial femoral bone. MRI testing was sensitive enough to identify an osteo condyle fracture to the medial femoral bone if present Id, p12-13. Assessing Dr. Levi's operative report, the ACL exhibited a small, partial tear; the entire posterior bundle and most of the rest of the ACL was intact without displacement and with good tension, so surgical correction was limited to ACL debridement. Id, p13-14, 63. Dr. Levi's operative report recounting his visual inspection was the only evidence of injury to the medial femoral condyle, and Dr. Levi's intraoperative photos would be the only evidence to show the existence of acute injury amenable

to microfracture prior to performing the procedure. Id, p15, 45-46, 53, 76. Without the viewing the intraoperative photographs he did not have an opinion whether the ACL required debridement. Id, p65.

Petitioner informed Dr. Forsythe she was no better at the time of his examination of her than she was prior to Dr. Levi's surgery. Id, p16, 30. Petitioner's description of injury to Dr. Forsythe was inconsistent with a mechanism of injury necessary for fracture to the medial femoral condyle. She recounted to Dr. Forsythe a tripping occurrence without alleging a fall onto or twisting of the knee, while her treatment records include a description of twisting the knee at the time of injury. Id, p16-17, 71.

Dr. Forsythe's physical examination revealed Petitioner to stand 5-foot 5-inches and weighed 306 pounds with a BMI of 50. She had difficulty moving and arising from a chair, pushing on the arms of the chair to stand. Her nerve examination was normal, ROM was symmetrical with one degree hyperextension but with pain, to 115 degrees flexion, with left knee tenderness. Petitioner's guarded prevented Dr. Forsythe from performing internal-external rotation testing, but Lachman testing showed the ACL to be stable while valgus stress testing showed the MCL to be stable. She could squat only to 30 degrees and had an exaggerated gait with heel/toe walking. Res. Ex 1a, p18-19. Strength testing revealed 4-/5 quadriceps strength bilaterally with give-way effort, but with secondary testing the right knee showed normal 5/5 strength while the left knee strength remained 4-/5.

Dr. Forsythe opined that Petitioner exhibited moderate to severe symptom magnification, with an exaggerated limp and inconsistent strength testing despite normal patellar and distal femur testing. Ex 1a, p20-21; Res. Ex 1b, p32. X-rays taken during Dr. Forsythe's exam revealed a one-half to one-and-one-half millimeter loss of joint space in the left knee he attributed to the

microfracture surgery. Id, p21-22. He diagnosed Petitioner status post left knee microfracture to the medial femoral condyle, noted the ACL to be stable, asymptomatic and without concern. Id, p22. He also diagnosed pre-existing cartilage thinning, which he presumed based on Dr. Levi's operative report, the MRI and Petitioner's clinical history. His pre-operative diagnosis was left knee MCL sprain and possible partial tear of the ACL. Dr. Forsythe was uncertain what was entailed in Dr. Levi's debridement of the ACL, finding uncommon the need to debride ACL tissue. Id, p22-23. Dr. Forsythe disagreed with performing microfracture procedure, stating it wasn't warranted, and the correct course of care for a cartilage lesion or thinning would have been to leave it alone. He identified the microfracture procedure, and not the condition of the ACL or MCL, as the cause for Petitioner's continued pain. Id, p24. Dr. Forsythe was unclear why Dr. Levi's operative report did not document a thorough evaluation of the ACL stability, performed under anesthesia, prior to surgical repair, and noted his preoperative notes made no allusion to medial femoral condyle lesion. Id, p25-26.

Dr. Forsythe described as "suboptimal" Dr. Levi's decision to perform microfracture without greater evidence of cartilage defect, (Res Ex 1a, p45) stated Petitioner's age and BMI provided additional contraindications, for which Dr. Forsythe cited orthopedic medical literature, (Res Ex 1a, p47-48, 52-53; Res Ex 1b, p18) and found the surgery not recommended. Res Ex 1a, p50. He stated Dr. Levi's description of a 2 cm defect was inconsistent with the pre-op MRI, with MRI the ideal imaging modality for cartilage, (Id, p53-54) noting bone damage would "light up like a Christmas tree on an MRI." Id, p76-77. Dr. Forsythe stated Dr. Levi's description of a 2cm by 2cm cartilage exceeded ODG guidelines for microfracture, which limited the procedure to defects no greater than 2cm. A defect no greater than 2cm may be amenable to microfracture, but a 2cmx2cm defect is greater than 2cm and therefore too large for microfracture. At 2cm,

consideration is given for osteochondral transplant in lieu of microfracture. Res. Ex 1b, p14-17. Microfracture also is contraindicated because it accelerates the loss of joint space. Id, p26.

Dr. Forsythe agreed Petitioner suffered a mild ligament injury for which conservative care would have been appropriate, (Res. Ex 1a, p59) and believed the work injury produced a strain superimposed on preexisting chondrosis as a result of the work injury. Res. Ex 1b, 21, 29. Grade I injury to the MCL would heal in two to four weeks and would not contribute to the cartilage damage found by Dr. Levi. Res. Ex 1a, p60. Dr. Forsythe agreed Dr. Levi reported visualizing and excising a complex tear of the medial meniscus not seen on MRI, (Id, p67-70) but on inspecting the intra-operative images Dr. Forsythe saw no meniscal tear for debridement. Res. Ex 1b p26. He found the suggestion of a medial meniscus tear inconsistent with an MCL tear, noting both could exist hypothetically, but usually one or the other is sustained, not both. Id, p70. He found it unlikely a medial meniscus tear was sustained at the time of the MCL sprain and found Grade I MCL sprain most consistent with Petitioner's mechanism of injury. Id, p73 Petitioner's medial joint line pain was attributable to the overload suffered by the medial compartment due to her morbid obesity, for which there was evidence in the contralateral knee. Id, p74. The microfracture remained the cause for Petitioner's persistent complaints Id, p75.

Had Dr. Forsythe performed the surgical repair, he would have examined the knee under anesthesia for ACL stability, and would have performed no surgery if the knee was stable. Res. Ex 1a, p27; Res. Ex 1b, p30-31. He found the initial surgical inspection reasonable but unnecessary for the purpose of addressing the ACL and took issue with performing the microfracture. Res. Ex 1b, p31-32. He would never consider surgery for a Grade I MCL injury. Res. Ex 1a, p27. On the assumption Dr. Levi was correct that visual inspection revealed an osteochondral fracture not seen on MRI, Dr. Forsythe stated microfracture procedure had fallen out of favor generally and was

contraindicated for morbidly obese patients over the age of 40, including Petitioner. Id, p27-29; Res. Ex 1b, p15. He disagreed with Petitioner's assertion 60 was the age at which the medical community disfavored microfracture procedure, reasserting the cut-off age to be 40 and the BMI to be 30 and noting Petitioner's information to be outdated by 10 years. Res. Ex 1b, p10-12. Had Petitioner exhibited osteochondral fracture of the medial femoral condyle, Dr. Forsythe believed abrasion chondroplasty to smooth frayed cartilage would have produced a better result. Res. Ex 1a, p29. He was unaware utilization review had been performed prior to the October 2019 surgery, and stated he "would think twice" before performing surgery for which utilization review certification had been denied. Id, p30-32.

Upon viewing 18 intraoperative images of the October 10, 2019 surgery Dr. Levi performed for the first time immediately prior the third deposition session and electronically sometime after the first disposition session, (Res. Ex 1c, p7) Dr. Forsythe testified, over Petitioner's objection he observed the ACL to be grossly intact without any torn fibers; (Id, p11) the medial femoral condyle showed a small area of Grade II wearing without evidence of a lesion measuring 2x2cm or any full-thickness Grade IV lesion. Id, p11-12. The surgical photos showed no evidence of pathology not identified by the July 2, 2019 MRI of Petitioner's knee other than a small amount of degenerative wear of the medial and lateral menisci not deemed contributory to Petitioner's symptoms. Id, p12-13. He saw no significant lesion or other condition within the images warranting surgical repair, (Id, p13-14) and no clinically relevant lesion warranting microfracture or other cartilage repair. Id, p16, 17. Dr. Forsythe changed none of his opinions upon viewing the surgical images, (Id, p18, 29) and he maintained his opinion microfracture is inappropriate for patients over 40, certainly not with a BMI over 50. Id, p33, 36, 37.

Dr. Forsythe recommended Petitioner return to unrestricted full duty despite the microfracture, (Res. Ex 1b, 21-22, 32) or undergo Functional Capacity Evaluation with validity testing at a non-treating facility, (Res. Ex 1a, p34-35; Res. Ex 1b, p34-35) but found no reason she could not perform her pre-injury duties inspecting freight. Res. Ex 1a, p36. He did not know whether any other physician agreed with his recommendation for unrestricted work duties but presumed Dr. Levi did not. Res. Ex 1b, p36-37. He believed MMI had been reached as of June 10, 2020 at roughly six months following the arthroscopic surgery. Res. Ex 1a, p35; Res. Ex 1b, p38. Addressing the surgery currently recommended by Dr. Levi, Dr. Forsythe described it as a resurfacing of the boned of the knee in that the femoral condyle is resurfaced or replaced with a metal cap and the top of the tibia is fitted with an artificial base. Res. Ex 1a, p18. His recommendation for ongoing care was home exercise, hyaluronic viscosupplementation injections to lubricate the knee joint, and weight loss would help most; he found no indication for joint replacement, and stated those treatments should be pursued as a consequence of the microfracture procedure and Petitioner's obese state, and were unrelated to the condition of Petitioner's ACL or MCL. Res. Ex 1a, p33, 38. The potential benefit of injection treatment did not postpone MMI in that her knee had reached a quiescent state and in Petitioner's words was about the same as prior to surgery, showing neither worsening nor improvement since the surgery. Id. Dr. Forsythe could not comment on the degree of joins space reduction between the time of the injury and the time he took x-rays of Petitioner's knee, but if there existed a 30% reduction in joint space it would be attributable to the cartilage lesion and the meniscal debridement. Res Ex 1b, p25-26. Dr. Forsythe provided an AMA disability rating of 8% of the lower extremity, equal to 3% of the whole person, and found no basis to increase that rating among her age or her post-operative condition (Res. Ex 1a, p38) and explained the ratings process in cross-examination. Res. Ex 1b, p42-53.

Respondent submitted 18 intraoperative photographic images identified as Dr. Levi's October 10, 2019 left knee arthroscopy performed on Petitioner at North Shore Surgical Suite. Res. Ex 3 over the objection of Petitioner's attorney.

Respondent's payroll exhibit documents Petitioner's earnings over 58 weeks between June 8, 2018 and July 18, 2019, and reflects gross earnings of $35,526.41, of which $1,926.51 was paid as overtime during the 52 weeks prior to injury. Res. Ex 4. Petitioner identified Res. Ex 4 to be accurate. Tr. 24-25.

Respondent's Temporary Total Disability payment exhibit reflects 38 weeks of benefits paid September 29, 2019 through June 21, 2020. Res. Ex 5. Benefits were paid at the rate of $466.67 for three weeks September 29, 2019 through October 19, 2019, (Id, p 14-15) a $148.80 payment of October 24, 2019 is identified as a TTD underpayment for the period September 29, 2019 through October 19, 2019, (Id, p13) and an additional 35 weeks benefits were paid at the rate of $515.27 October 20, 2019 through June 21, 2020. Id, p1-13.

Respondent's medical payment ledger reflects 199 separate billing statements, for treatment rendered to Petitioner. Respondent issued 191 payments through September 22, 2020 for treatment rendered through June 19, 2020, (Id, p7) with eight statements indicating $0 paid for treatment rendered by Orthopedic and Rehabilitation Specialist treatment rendered September 25, 2000 through May 12, 2021 (Id, p2-4) and Priority Care Solutions treatment rendered October 10, 2019 Id, p1.

Dr. Quing-Min Chen testified by evidence deposition December 15, 2020. He identified his profession as orthopedic surgeon with over 10 years treating patients, and identified his curriculum vitae as Deposition Exhibit 1 reflecting he became licensed to practice medicine. (Res.

Ex 2, p5-6) Dr. Chen testified he performed utilization management or utilization review assessments as part of his profession and performed one concerning surgery proposed by Dr. Gabriel Levi for his patient Maria Lopez-Martinez. Id, p6. Dr. Chen authored a UR report in conjunction with Dane Street, the reviewing company that sent him the case for review. Id, p7. Dr. Chen was provided the review 'blind' in that he was unaware of any level 1 determination reached by any other reviewer, and to avoid bias is not provided the Level 1 information. Id, p10. Dr. Chen was assessed the diagnosis of ACL tear, cartilage defects, meniscus tear and the need for surgery to address those conditions. Id, p12-13. He was asked to assess Petitioner's entire left knee condition without providing him a specific diagnosis to assess. Id, p13-14. Dr. Chen testified Petitioner's ACL and meniscal tears were seen on MRI, so he approved ACL surgery including reconstruction as well as meniscal debridement or repair, which would be left to Dr. Levi's discretion, but denied cartilage reconstruction or microfracture procedure on the basis the MRI. Dr. Chen provided that information and rationale to the referring facility, who drafted the report with his findings. Id, p16-17. Because there was no evidence of cartilage defect, Dr. Chen denied recommendation for microfracture procedure. Id, p18 Dr. Chen did not review the left knee MRI films but only the report; he stated he could not diagnose the absence of cartilage injury based on just the MRI report or trust its accuracy for that purpose, but had no basis to suspect the MRI failed to visualize cartilage damage that did exist, or that the report was inaccurate. Id, p18-19.

On September 25, 2019 Dr. Chen performed a "peer to peer" or a "peer conversation" which he identified was he and Dr. Levi discussing Dr. Levi's rationale for recommending microfracture repair, and Dr. Chen's rationale against it. Dr. Chen's recommendation against microfracture remained unchanged following his conversation with Dr. Levi. Id, p19-21. Dr.

Chen's decision was less a matter of following utilization protocol than the obvious determination against performing microfracture where there existed no cartilage damage. Id, p22. Dr. Chen agreed arthroscopic surgery would provide a better visualization of a Grade 4 cartilage defect, and conceded he had not seen the operative report's determination there existed a 2, full tear cartilage defect but did not agree that the existence of such a defect would warrant performing microfracture. Id, p24-25. Dr. Chen identified other means of cartilage restoration, including abrasion chondroplasty, cartilage culturing or harvesting for fiber implantation, or even doing nothing, noting the existence of pain in the cartilage for a defect too small to visualize on MRI is evidence of self-healing. Cartilage defects often are asymptomatic, but the "art of medicine" is to know what symptomatic conditions not to treat. Id, p26-27. Dr. Chen found controversial the issue of a patient's weight being a factor in performing microfracture, with opinions varying by orthopedic surgeon and literature, but is not found in the Official Disability Guidelines. Id, p29. Informed by Petitioner's attorney the operative findings included a 2-centimeter cartilage defect, Dr. Chen agreed that was larger than the 2-millimeter cut-off for recommending microfracture. Petitioner's age of 45 fit within Dr. Chen's protocol for microfracture. Id, p30. Given the scenario where Petitioner possessed a 2-centimeter full thickness cartilage defect, ODG would have given the surgeon leeway in performing the microfracture. Id, p31.

On July 14, 2020, Dr. Levi opined Petitioner currently has significant medial compartment osteochondral defect which did not improve with microfracture. He opined that she needs a partial knee replacement to improve her condition of ill-being for which he has not received Respondent's authorization for surgery. (Px 3, p. 334)

Dr. Levi upon review of Dr. Forsythe May 28, 2020 report noted that Dr. Forsythe agreed that the work injury was the cause of Petitioner's knee pain and current condition. He agreed that Petitioner has continued pain due to the work injury and the cartilage injury caused by the work accident. (Px 3, p. 334) Dr. Levi noted that Petitioner still has pain from her medical compartment osteochondral defect and that the only way to treat this is by medial compartment knee replacement due to the failure of the microfracture. (Px 3, p. 334)

Dr. Levi disagrees with Dr. Forsythe's statements that the Petitioner does not need a partial knee replacement. Dr. Levi noted that Dr. Forsythe does not provide any reasonable way to improve the Petitioner's condition and does not provide a reasonable medica solution for this young woman to try to return to work in light of her current knee injury. (Px 3, p. 334) Dr. Levi opined that providing injections every 6 months is not a good solution as she will ultimately no improver her condition and she may ultimately develop infection with lifelong injections every 6 months or other complications from persistent injections every 6 months. (Px 3, p. 334)

Dr. Levi continues to recommend a partial knee replacement as the Petitioner deserves the opportunity to improve her pain and function which is not limited due to the cartilage injury she sustained at work. (Px 3, p. 334)

Petitioner still experienced symptoms in the knee at the time of the hearing. Her knee buckled on her if she stood or sat too long. (T.16) She would start limping when walking to the end of the block. (T.16, 19) She would not use narcotics as she needed to be there for her children, instead using Aleve and Ibuprofen. (T.17) She had numbness in the center of the knee which she never had before the accident. (T.17) In fact, Petitioner had never experienced problems with the knee before the accident or injured that knee. (T.17) She had also modified the way she traversed stairs, using the right leg to push up to the next step and to move her body down when descending

stairs. (T.18) She used railings to assist in the movement on stairs, and if there were no railings, she leaned against the wall. (T.18) Petitioner had no driver's license and no car to get around in. (T.20, 39) If she had to go to Chicago, she used an UBER to get to the train station and rode the train into the city. (T.20)

Petitioner had not worked since her surgery. (T.15) She had not reinjured herself. (T.15) She was forced to seek food stamps through public aid. (T.20) Petitioner is a single mother with two children. (T.14) Petitioner wishes to have the partial knee replacement surgery as well as her TTD payments. (T.22) Petitioner testified that when Petitioner's benefits were terminated, she could no longer pay rent and moved to Silver Lake Wisconsin with her brother and his wife. Tr. 11-15. Petitioner was not evicted from her rented home but was asked to leave, sought no forbearance or legal assistance to remain in the home. Tr. 37. October 1, 2020 Petitioner moved from her home on Springfield Avenue in Chicago but keeps her formal address in Chicago for the sake of keeping her nine- and twelve-year-old children in Chicago schools. Tr. 14, 36. Petitioner did receive health insurance from Respondent (Tr. 27) She testified that "long before" her employment with Respondent has received healthcare through Cook County's County Care program. Tr. 30. She continued to receive Illinois Public Assistance benefits and continued to possess a public assistance medical card as of the date of trial. Id.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she

has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). It is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. Every injury sustained in the course of the employee's employment, which causes a loss to the employee, should be compensable. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

Petitioner testified in open hearing before the Arbitrator who had opportunity to view Petitioner's demeanor under direct examination and under cross-examination. The Arbitrator evaluated the testimony of the Petitioner in consideration of all the evidence in the record. The Arbitrator finds that Petitioner was a credible witness. The Arbitrator notes that Petitioner's testimony was corroborated by and consistent with the medical records and objective findings.

WITH REGARD TO PETITIONER'S MOTION TO STRIKE DR. FORSYTHE'S TESTIMONY IN THE THIRD EVIDENCE SESSION ON APRIL 27, 2021, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

Respondent's Section 12 examiner, Dr. Brian Forsythe testified under oath by evidence deposition- on three separate occasions. His testimony was initiated December 8, 2020, (Res. Ex 1a) His evidence deposition testimony resumed on February 16, 2021, (Res. Ex 1b) and was

completed April 27, 2021. Res. Ex 1c. The first and second deposition were suspended to accommodate Dr. Forsyth's schedule.

The Arbitrator addresses Petitioner's Motion to strike testimony of Dr. Forsythe in the third evidence deposition session on April 27, 2021. Petitioner raised three objections. First, Respondent's attorney commenced his redirect of the Dr. Forsythe when Petitioner's attorney had not completed his cross examination in the second session. Second, Petitioner raised a *Ghere* objection after Respondent's attorney introduced photographs taken by Dr. Levi during the arthroscopic procedure. Photographs that were first received and viewed by Dr. Forsythe before the start of the third deposition session. And, lastly, that Dr. Forsythe and Respondent's attorney engaged in an *ex parte* communication while the witness was still under oath.

As to the first objection, at the start of the third evidence deposition session, Petitioner's attorney believed that he had not completed his cross examination and wanted to continue with cross examination. Although the record is not crystal clear on this issue, it appears that Petitioner's attorney did rest. The deposition ended because of time limits imposed by the witness. (Rx 1b, p. 55) Respondent's attorney commenced his redirect of the Dr. Forsythe at the third deposition session. It does appear that Petitioner's attorney wished to redact his release of the witness but did not explicitly state so. (Rx 3, pp. 5-6) Accordingly, Petitioner's objection is overruled.

As to the second objection, Petitioner raised a *Ghere* objection pursuant to *Ghere v. Industrial Comm'n* 278 Ill. App. 3d 840 (Ill. App. Ct. 1996). At the start of the deposition, Dr. Forsythe disclosed on redirect that he had reviewed images of the surgery performed by Dr. Levi on the Petitioner on October 10, 2019. Images that were not seen by him at the time of his Section 12 examination in May nor at the time of his initial evidence deposition. The images were

presented to him by for the first time the morning of this deposition although he apparently reviewed electronic copies earlier. (RX 1 c, p. 25) He denied discussing the images with defense counsel. (Rx 3, pp.5-20).

The record reflects that during the initial evidence disposition of Dr. Forsythe on December 14, 2021, Petitioner attorney posed a series of questions confirming that Dr. Forsythe had not reviewed and, thus, did not have the benefit of, the intraoperative images taken during the October 19, 2021 surgery. The evidence deposition was suspended to accommodate Dr. Forsythe's schedule. (see e.g., Px 1a, pp. 66). After the deposition, Respondent's attorney issued a subpoena to Dr. Levi for the intraoperative images relating to the October 19, 2019 with a return date of January 7, 2021. (Rx. 3). Respondent attorney did not disclose to Petitioner's attorney that he obtained the images before or during the second deposition of February 16, 2021, nor before the third deposition of April 27, 2021. Respondent first disclosed that he had obtained the images for Dr. Forsythe's review after Petitioner's attorney completed his cross examination and at the start of Respondent attorney's redirect.

It is well settled that the purpose of the 48-hour rule of Section 12 and *Ghere* is to prevent the employer from springing surprise medical testimony on the employee and *vice versa*. This is exactly what happened in the instant case. "[W]hen a party objects to the admission of medical testimony on section 12 grounds, the proponent of the medical testimony has the burden to prove compliance with the requirements of section 12 of the Act." *Mulligan v. Illinois Workers' Compensation Comm'n*, 408 Ill. App. 3d 205, 220 (2011). At no time after the initial evidence deposition did Respondent attorney notify Petitioner that he intended to have his expert review the images. He did not do so before the second deposition session nor before the third.

Accordingly, he Arbitrator finds that Respondent has not satisfied its burden in proving compliance with Section 12 of the Act. The Arbitrator finds that Respondent violated *Ghere.* The *Ghere* violation is compounded because defense counsel engaged in a private communication with the witness, on one occasion and possibly two occasions by electronic delivery of the images and hand delivery just before his redirect on the third session.

It is well settled that once a witness is sworn under oath and his testimony commences, the witness should be on his own. A private conference is not proper during the course of the witness's testimony. This is also true during the course of an evidence deposition taken pursuant to Illinois Supreme Court Rule 206 (c) (2) (eff. Feb. 16, 2011). The Supreme Court rule requires that "[i]n an evidence deposition the examination and cross-examination shall be the same as though the deponent were testifying at the trial." Evidence depositions are part of the truth-seeking process and should not be altered or subject to the appearance of being altered through private communications between the witness and the attorney. A private communication, however intended, of a witness still under oath creates the appearance of impropriety.

This principle has been aptly explained by the federal courts in interpreting their rules of procedure. See, *e.g. Hunt v. DaVito, Inc. ,* 680 F.3d 775, 780 (2012); *Hall v. Clifton Precision* , 150 F.R.D., 525, 528 (E.D. Pa., 1993) (private conferences are barred during the deposition and the fortuitous break, and a clever lawyer or witness who finds that the deposition is going in an undesired or unanticipated direction may not insist on a recess to discuss the unanticipated questions). Although every deposition taken pursuant to the federal rules of procedure is the equivalent of an Illinois evidence deposition, the philosophy behind the rule should be the same-

no coaching of the witness to modify the presentation of the truth. A private conference is a communication that creates the appearance of impropriety.

In this case, it is not practicable to know whether the conversation between the expert witness and defense counsel impacted the outcome of the case, The Arbitrator was not present during the evidence deposition and, thus, did not have the Arbitrator's discretionary opportunity to inquire into the substance of the conversation between the defendant and his counsel. The Arbitrator, however, does not find any unethical motive on the part of Respondent's attorney.

Nevertheless, considering the circumstances this case, it appears to this Arbitrator that is unnecessary to reach a conclusion whether the testimony in the third deposition session should be stricken on this basis as the Arbitrator finds that Dr. Forsythe's testimony is neither persuasive nor credible. The preponderance of the evidence is that the findings and the opinions of Dr. Forsythe would not prevail, no matter what extent of coaching occurred, if any. Additionally, there no evidence that defense counsel coached the witness. Furthermore, Dr. Forsythe stated that reviewing the images did not change is his previously stated opinions. If the Arbitrator was unclear as to Dr. Forsythe's lack of persuasiveness, the violations would not be viewed as harmless violations.

WITH REGARD TO ISSUES (F), WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS.

The Arbitrator finds that Petitioner's current condition of ill-being in his left knee is causally related to her work injury. It has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting

in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. Id. at 64. It is also 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 v Industrial Commission*, 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth Hospital v Worker's Compensation Comm'n*, 371 Ill. App 3d 882, 888 (2007). A claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v Industrial Commission*, 92 Ill.2d 30, 36 (1982). That Petitioner had a pre-existing condition does not preclude the use of a chain of events analysis. *Schroeder v Illinois Worker's Compensation Commission*, 2017 Ill. App.(4th) 160192 WC (2017); *Corn Belt Energy Corp. v Illinois Worker's Compensation Commission,* 2016 Ill. App (3d) 150311 WC. The Arbitrator finds based on the weight of the credible evidence in this record, Petitioner's current condition of ill-being is causally related to the work accident based on the chain of events

In this claim, the Petitioner provided unrebutted testimony that, prior to her work accident, she never sought treatment for his left knee. Prior to her work accident she did not experience pain which required her to seek medical attention. As a result, the Petitioner established that his left knee was asymptomatic prior to her work accident; accordingly, she established that she was in a "previous condition of good health". Thus, Petitioner also established that she suffered an injury to his left knee on June 13, 2019 while performing her job duties.

In in addition to proving by a preponderance of the evidence that her current condition of ill-being to her left knee is causally related to her work injury of June 13, 2019 under the chain of

events, Petitioner's medical providers opined that she sustained a work related injury. In addition to the company clinic physician opining her left knee injury was work related, Dr. Levi opined that her condition of ill-being, her medical treatment and her need for a partial knee replacement are causal related to her work injury.

Petitioner's accident is not in dispute. The parties stipulated that Petitioner sustained an accident arising out of and in the course of her employment with the Respondent of June 13, 2019. Dr. Levi opined that Petitioner's injury and current condition of ill-being is work related. Dr. Levi opined Petitioner currently has significant medial compartment osteochondral defect which did not improve with microfracture. Dr. Levi opined that she needs a partial knee replacement to improve her condition of ill-being. A surgery for which she has not received Respondent's authorization for surgery. (Px 3, p. 334)

Dr. Levi upon review of Dr. Forsythe May 28, 2020 report noted that Dr. Forsythe agreed that the work injury was the cause Petitioner's knee pain and current condition. He agreed that Petitioner has continued pain due to the work injury and the cartilage injury caused by the work accident. (Px 3, p. 334) Dr. Levi noted that Petitioner still has pain from her medical compartment osteochondral defect and that the only way to treat this is by medial compartment knee replacement due to the failure of the microfracture. (Px 3, p. 334)

Dr. Levi disagrees with Dr. Forsythe's statements that the Petitioner does not need a partial knee replacement. Dr. Levi noted that Dr. Forsythe does not provide any reasonable way to improve the Petitioner's condition and does not provide a reasonable medical solution for this young woman to try to return to work in light of her current knee injury. (Px 3, p. 334) Dr. Levi opined that providing injections every 6 months is not a good solution as she will ultimately not

improver her condition and she may ultimately develop infection with lifelong injections every 6 months or other complications from persistent injections every 6 months. (Px 3, p. 334)

Dr. Levi continues to recommend a partial knee replacement as the Petitioner deserves the opportunity to improve her pain and function which is not limited due to the cartilage injury she sustained at work. (Px 3, p. 334)

Petitioner had no injuries, symptoms or problems with this knee before the accident. She began treatment for the knee immediately after the accident, she underwent surgery and therapy. She also did not reinjure the knee after surgery.

Respondent's dispute centers around a claim that the arthroscopic procedure was "suboptimal" for Petitioner, a contention which Respondent claims overrides Petitioner's showing on causation. A dispute over optimal treatment choices does not defeat Petitioner's showing on causation and the dispute is frankly not a valid legal defense against a worker's §8(a) rights.

First, suboptimal treatment is no defense to 802 ILCS 305/8(a) rights. Respondent essentially asks the Commission to deny the Petitioner benefits and medical care to cure and relieve her from a work injury for what Respondent's expert claims are less than optimal treatment decisions made by her surgeon. Respondent certainly used this contention to cut off medical treatment and TTD benefits. However, the Act was created to protect the health and survival of workers injured in their jobs. See *Peoria County Bellwood v. IC*, 115 Ill.2d 524, 529 (1987); *O'Brien v. Rautenbush*, 10 Ill.2d 167, 174 (1956). The Act does not punish workers for treatment choices of their surgeons. As explored in the rest of this section, Dr. Forsythe is hardly a persuasive source for what the standards are for a microfracture procedure. Respondent's expert testified that there was no deviation from the standard of care. Even where the surgeon commits malpractice in attempting to cure a work-related injury, a situation which has absolutely nothing to do with this

case, Respondents are not excused from their §8(a) obligations. There is no suboptimal treatment defense to §8(a) rights.

The recent case of *Steve Lewis v. Illinois Workers' Compensation Comm'n,* 2021 IL App (5th) 200302WC-U (09/24/2021) is instructive and factually like the instant case. It was published after the 19b hearing in this case. As in *Lewis*, Respondent asserts that an employer cannot be liable for any condition caused by treatment rendered by a claimant's chosen physicians that was not reasonable and necessary. The Appellate Court in *Lewis* not only disagreed but reversed the Commission. The court held that the Commission's agreement with Respondent's assertion was against the manifest weight of the evidence.

The *Lewis* court held that *Zick v. Industrial Comm'n*, 93 Ill. 2d 353 (1982), and *Reynolds v. Danz*, 172 Ill. App. 3d 907 (1988), are not dispositive of the disputed issue in *Lewis*. In *Zick*, the Supreme Court held that where the claimant voluntarily submitted to treatment by a physician of her choice, where treatment results in a disability *unrelated* to an injury sustained during employment, it would be unjust to hold the respondent liable. *Lewis* at ¶ 133 [*emphasis added*) In *Zick*, although the employer presented evidence of possible mistreatment of the claimant's condition, the question presented was "whether [the claimant's] disability resulted from trauma [sustained in the forklift accident], or whether it was due to a congenital anomaly aggravated by medical mistreatment." Id. at 359. The Commission found, and the *Zick* court later affirmed, that the claimant's current condition of ill-being resulted from medically improper and unnecessary surgeries that were unrelated to the accidental injury. Id. at 360

In contrast here, and like *Lewis,* there is no question that Petitioner's treatment in the form of knee surgery was for purported symptoms related to her condition of ill-being in her knee—a condition of ill-being which the company clinic physician, Dr. Levi, and, even Dr. Forsythe opined

her was caused by her work accident of June 13, 2019 and the suboptimal surgery. Here, the treatment administered by Petitioner's treating orthopedic surgeon was directly related to Petitioner's symptoms from her condition of ill-being in her left knee. The record demonstrates that Petitioner was in good health prior to injuring her knee. It is undeniable and undisputed that Dr. Levi performed the surgery to alleviate Petitioner's subjective complaints of pain stemming from her left knee injury. Consequently, it is clear from the record that, absent these complaints, Petitioner would not have undergone surgery.

Here, Petitioner's work-related accident was a causative factor in her condition of ill-being. It need not be the sole or primary cause. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Here, the knee surgery was natural consequence that flowed from Petitioner's injury that arose out of and in the course of her employment is compensable. It was not caused by an independent intervening accident that broke the chain of causation between a work-related injury and an ensuing disability or injury. *See, Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786 (2005)

Consider Dr. Forsythe's contentions about what practice guidelines applied to the microfracture procedure. He testified that Petitioner did not meet the standards due to her weight, her age and the lack of a cartilage lesion in the knee. As the deposition rolled on however, it was clear that Dr. Forsythe did not provide a coherent narrative as to what practice standards really applied to the procedure. He had to look up the guidelines during his testimony (RX1a p.53), but never produced any document verifying what he was claiming. And , Dr. Forsythe's opinions changed through cross examinaiton. He initially claimed that the microfracture procedure was not indicated. But then Petitioner confronted him with practice guidelines which did not match his claims as well as testimony from Respondent's UR doctor who said petitioner met the ODG

guidelines for the procedure (discussed below). Dr. Forsythe then retreated to a complaint that a microfracture was a suboptimal choice for petitioner, but not a violation of the standard of care for treating petitioner. (RX1b p.18, 27) Dr. Forsythe knew that Dr. Levi did the microfracture to address Petitioner's symptoms from the accident. (RX1b p.21) Dr. Forsythe conceded that Levi's procedure accelerated the breakdown of the joint space and Petitioner's post-surgical reduction in joint space was attributable to the cartilage lesion and the debridement procedure. (RX1b p.25, 26) Dr. Forsythe admitted that if Dr. Levi was addressing damage he thought was related to the accident, the breakdown of the joint and future treatment needs would be causally related to the accident, mostly as a sequelae of the surgery. (RX1b p.27) Dr. Forsythe granted that orthopedic surgeons differ in their treatment decisions. (RX1b p.27) Dr. Forsythe opined that it was reasonable for the arthroscopic procedure being done or the debridement being done but opined it was not necessary. (RX1b p.31) Moreover, given that the knee symptoms started with the accident and persisted to the date of his evaluation a year later, Dr. Forsythe admitted there was a causal relationship between future treatment needs and the accident. (RX1b p.41) Dr. Forsythe conceded causation. He admitted that there is a causal relationship between his recommendations for future medical care (viscosupplementation injections, physical therapy and weight loss) and the accident. Dr. Forsythe testified that within a reasonable degree of medical and orthopedic certainty "[t]he causal relationship is based on the fact that a knee arthroscopy was approved. And she underwent a knee arthroscopy. And she underwent a procedure that did not help her condition at all, per her report. And by my interpretation of what was done as well. So, it is reasonable to do supportive treatment going forward as related to the injury and treatment that was rendered." (RX1b pp.41-42)

Dr. Forsythe also revealed himself to be unpersuasive in matters beyond what guidelines applied to the microfracture procedure. He first testified that Dr. Levi should not have done the microfracture as the MRI showed no lesion in the femoral condyle to operate on. Dr. Forsythe assured us that MRIs were the "ideal" means to detect cartilage lesions. (RX1a p.54) But Dr. Forsythe overlooked or ignored that the MRI facility had not used a knee coil, a technique which was needed to give a decent image of the structure. (RX1a p.56-57) And, then the intraoperative surgical photographic images showed a lesion in the area which the MRI missed. (RX1c p.12) Dr. Forsythe claimed he could not measure the precise size of the lesion from the photographic image. (RX1c p.12) So he changed his opinion to "it is not clear to me that there is an indication…to repair anything." (RX1c p.13) Dr. Forsythe's shifting analysis in the case moved from there is no lesion there to there is something there but it is not enough for surgery. During his slide, Dr. Forsythe missed the inferior imaging technique at the MRI facility, he either did not detect that the MRI image was an inferior image or withheld that information. (RX1c p.24-25). Dr. Forsythe is a not a persuasive source for information on treatment or diagnosis.

Respondent's UR doctor did not agree with Dr. Forsythe on what the standards were for microfracture treatment. Dr. Chen is also a board-certified orthopedic surgeon who was familiar with treatment of the femoral condyle and he discussed a range of treatment options for the condition. (RX2 p.4, 27) He approved Dr. Levi's arthroscopy but denied the cartilage restoration procedure as the MRI report did not show a lesion. (RX2 p.16-17) During his deposition, Dr. Chen admitted we could not trust the MRI report to provide an accurate information about cartilage lesions. (RX2 p.19) He admitted that he had really not used any treatment guidelines for his UR denial decision as the MRI revealed no lesion to address. (RX2 p.22) On cross, Dr. Chen admitted that the best way to detect a lesion is to look at the structure during surgery. (RX2 p.24)

Dr. Levi found a 2-millimeter full thickness cartilage defect on the weight bearing surface of the femoral condyle. (RX2 p.24-25) Dr. Chen admitted he did not have the information he needed to evaluate the appropriateness of the microfracture procedure when he issued the UR. (RX2 p.26) Without knowing what was found during surgery and without having the opportunity to examine Petitioner, he had no opinions to any degree of certainty as to whether the microfracture was appropriate for her. (RX2 p.28) Dr. Chen admitted that surgeons had all manner of criterion guidelines they could follow when deciding whether to perform a microfracture. (RX2 p.29) Body weight was not a contraindication for performing microfractures under the ODG. (RX2 p.29) Surgeons varied in their opinion as to the relevance of body weight largely depending on what research they were looking at. (RX2 p.29) The ODG also said the microfracture was indicated for lesions anywhere less than 2 centimeters. (RX2 p.30) Forty-five years was also the age cutoff recommendation in the ODG and Petitioner also met that indication. (RX2 p.30) Petitioner further complained of joint pain which satisfied the ODG recommendations. (RX2 p.30) Dr. Chen admitted that if there was a 2-centimeter full thickness cartilage defect on the weight bearing surface in that joint, ODG supported Dr. Levi's decision to perform the microfracture procedure on petitioner. (RX2 p.31) That is exactly what Dr. Levi reported finding at surgery. (PX2 p.18-19) While Respondent had not provided him with the information, he needed to perform a valid UR, Dr. Chen was clearly versed in treatment of femoral condyle lesions and he contradicted most of Dr. Forsythe's claims about practice standards.

The International Cartilage Repair (ICRS) research led to the standards which Dr. Forsythe claimed were the gold standard. These ICRS standards advised that microfracture procedures could be appropriate for lesions up to 2 cm^2 (RX1b p.11) Dr. Forsythe insisted that those were

old ICRS standards but never produced actual updated guidelines to support his testimony, despite sitting for three separate depositions. In the end, Dr. Forsythe's contentions about practice standards were not consistent with Dr. Levi's treatment choices, the UR doctor's opinions on relevant practice guidelines, ODG guidelines as well and even the ICRS standards that we know about. Dr. Forsythe offered no plausible reason to deny Petitioner her knee treatment for the June 13, 2019 accident, other that morbid obesity, and he ultimately conceded that the procedure and breakdown of her joint were probably related to the accident. Petitioner has proven that Dr. Levi's performance of the microfracture procedure was medically reasonable and causally related to her June 13,2019 work injury. And given that the scope led to an accelerated breakdown of the joint and continuing symptoms and limitations in the knee, Petitioner has proven a causal relationship between the accident and her need for additional treatment recommended by Dr. Levi, including surgery.

In evaluating the credibility of Dr. Forsythe, the Arbitrator is mindful that Dr. Forsythe opined that Petitioner exhibited symptom magnification. He rendered this solo opinion without a persuasive explanation. Dr. Forsythe rendered this opinion even though he recommended additional medical care. And, yet the Arbitrator notes that none of the medical providers share his opinion. Neither the company clinic physician, the company clinic therapists, the ATI therapists, Dr. Levi nor the UR orthopedic surgeon noted any signs of symptom magnification.

It is evident that Petitioner's conservative treatment failed, and the less invasive surgery failed. The Arbitrator finds that the Petitioner has proven by a preponderance of the evidence that her current condition of ill-being is causally related to her work accident.

WITH REGARD TO ISSUE (G), WHAT ARE PETITIONER'S EARNINGS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

The claimant in a workers' compensation proceeding has the burden of establishing his average weekly wage. 820 ILCS 305/10. *Edward Don Company v. The Industrial Commission, et al*. No. 1–02–2404 WC; 344 Ill.App.3d 643(2003). Rehearing Denied Dec. 29, 2003. Overtime hours worked are excluded from the average weekly wage computation where there is no evidence Petitioner was required to work overtime as condition of employment or that she consistently worked set number of overtime hours each week such that the overtime hours worked were part of regular hours of employment. 820 ILCS 305/10. *Edward Don Company v. The Industrial Commission, et al*

Respondent's payroll exhibit is the only information in the record identifying her earnings with Respondent. Res. Ex 4. That exhibit documents Petitioner's earnings over 58 weeks between June 8, 2018 and July 18, 2019. A computation of the payroll earned during the 52 weeks prior to injury – June 13, 2018 through June 12, 2019 – reveals Petitioner's gross earnings totaled $35,526.41, with $1,926.51 of that total paid as overtime earnings. Id, p18. By Petitioner's testimony, the overtime earnings received in the year prior to injury were worked voluntarily and not at Respondent's insistence. Tr. 25. She offered no contest of Respondent's payroll exhibit or claimed any inaccuracy in the information proffered.

Considering all earnings paid to Petitioner between June 13, 2018 and June 12, 2019, with the exclusion of $1,926.51 earned as overtime worked voluntarily without Respondent's insistence, Petitioner earned $33,599.90 in the 52 weeks prior to injury. Petitioner's Average Weekly Wage totals $646.15.

WITH REGARD TO ISSUE (J), WHETHER RESPONDENT HAS PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

The Arbitrator finds that medical services provided to Petitioner were reasonable and necessary. The Arbitrator further finds that Respondent has not paid all appropriate charges for the all the reasonable and necessary medical services received by the Petitioner to cure and relieve her of her work-related injury. Respondent shall pay for all treatment Petitioner received for the left knee which were submitted into evidence. (PX 5) Respondent is entitled to credit for medical bills previously paid. Respondent shall pay reasonable and necessary medical services of Persistent Toxicology in the amount of $1,914.16; Persistent Medical in the amount of $3,519.64, and Orthopaedic and Rehabilitation Centers in the amount of $1,397.12, as provided in Sections 8(a) and 8.2 of the Act, the total of which is in the amount of $6,830.92.

WITH REGARD TO ISSUES (K), IS THE PETITIONER ENTITLED TO PROSPECTIVE MEDICAL CARE, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

Dr. Levi recommends a partial knee replacement for Petitioner to address the breakdown in the knee joint. Petitioner wants the surgery. Dr. Forsythe admitted Petitioner needed additional treatment because the joint broke down quickly after the arthroscopic procedure, due to the procedure. A procedure that was intended cure and relieve of her work injury. (RX1b p.41-42) But Dr. Forsythe argued there was no need for a partial knee replacement for Petitioner given her weight and the joint space remaining in the knee joint. (RX1b p.40) Dr. Forsythe recommended viscosupplementation injections and/or corticosteroid injections, therapy and weight loss. (RX1b p.41)

The medical records reflect that Dr. Levi last saw Petitioner on May 12, 2021. (PX3 p.307) Petitioner was one year and seven months out from her surgery, still using Ibuprofen for pain at a level of 4/10, flaring to 9/10 when walking and using

stairs. (PX3 p.308) Dr. Levi and Petitioner were still waiting for approval for the partial knee procedure, which was the only hope for improving her pain and function in the opinion of Dr. Levi. (PX3 p.308) Dr. Levi saw no other alternative to improve her condition given her age and that she had not significantly improved with the microfracture procedure. (PX3 p.308) He first recommended the partial knee on February 19, 2020. (PX3 p.345)

Dr. Levi also explained his disagreement with Forsythe over the partial knee recommendation. (PX3 p.329-330) The continuing pain from her medial compartment osteochondral defect could only be successfully addressed with a medial compartment knee replacement. (PX3 p.330) The rest of her knee joint did not have evidence of advanced changes, so the partial knee option was the best option. (PX3 p.341) Dr. Levi explained in later notes that Dr. Forsythe offered no real solution for Petitioner's problem other than regular injections which carrier a risk of infection. (PX3 p.330) Injections would not improve Petitioner's condition. (PX3 p.330) As of August 19, 2020, she also needed therapy for 6 weeks to improve quad strength and pain management treatment. (PX3 p.330) Again, Dr. Forsythe's treatment plan is not persuasive. And, the Arbitrator finds Dr. Levi's treatment plan to be reasonable and necessary to cure and relieve the Petitioner of her current knee complaints and pathology. Respondent is, therefore, liable for the treatment plan of Dr. Levi, including the partial knee replacement, and the related preoperative and postoperative care.

WITH REGARD TO ISSUE (L), WHETHER PETITIONER IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

Petitioner claims Temporary Total Disability entitlement beginning September 29, 2019, when accommodated duty ended under Respondent's FMLA procedures, though the date of hearing, July 19, 2021 representing 94-2/7th weeks. Respondent claims it is only liable for TTD

for the period of September 29, 2019 through May 28,2019, the date of Respondent's Section 12 examiner's examination of the Petitioner.

Respondent has paid TTD through June 21, 2020, and severed benefits based on Dr. Forsythe's determination MMI had been reached by June 10, 2020. Petitioner worked in a modified capacity for 12 weeks following the accident. (T.26) The employer sent her home when the FMLA period ran out. (T.26) Dr. Levi had never released her to return to work in any capacity after the initial surgery. (T.22) Dr. Levi restricted her from work as her work required prolonged standing and squatting and bending which she could not due because of the cartilage injury. (PX3 p.330) He continued restricting her from work up through his last visit on May 12, 2021. He kept her off work pending the left knee reconstruction approval. 5/12/21. (PX3 p.2-18)

Dr. Forsythe opined Petitioner could return to unrestricted work. Dr. Forsythe granted that if Petitioner found she was unable to work, she could undergo a functional capacity evaluation (FCE) with validity testing to see if there is a need for work restrictions. (RX1b p.35) Dr. Forsythe's time with Petitioner was limited for the Section 12 examination. (RX1b p.35) He had not measured how long she could actually walk on the knee before symptoms became severe enough to cause her to sit. (RX1b p.36) He had not performed the measurements that were being performed by therapists or would be done in a FCE. (RX1b p.35) He knew that Dr. Levi had not released her to full unrestricted work by his evaluation. (RX1b p.36) Dr. Forsythe was also aware that the company had sent her home for being on light duty too long. (RX1b p.36) He also knew that therapists were documenting her limitations at the time he saw her, but Respondent had not given him those treatment records. (RX1b p.37) He had some earlier therapy records but not the ones closer to his examination date. (RX1b p.37) So he had no idea what they were documenting as her actual capacities.

Looking at records contemporaneous to the May 28, 2020 Section 12 examination date, therapists continued documenting Petitioner's continuing severe functional limitations. Full re-evaluations of the patient's progress are conducted at intervals in the treatment. March 4, 2002 was the last reevaluation before the Section 12 examination and July 1, 2020 was the first following the Section 12 examination. (PX3 p.184-190, 87-90) The July 1, 2020 Re-Evaluation documents severe continuing functional limitations Petitioner was experiencing with her injured leg. (PX3 p.87-90) Petitioner met only 1/5 of her therapy goals, she was not improving, and she probably needed more surgery. (PX3 p. 89) A Lower Extremity Functional Score (LEFS) measured that her affected limb was only at 35% of its expected capacity, which represented a regression from 42% earlier. (PX3 p.89) At Dr. Levi's evaluation five days later, Petitioner reported pain levels of 6/10, flaring to 7/10 with walking. (PX3 p.333) Petitioner's condition did not thereafter materially improve as is documented in the notes from Levi's group (PX3).

Dr. Forsythe admitted that Petitioner required more treatment to contend with her injury. (RX1b p.37) He simply released her to work full duty without restrictions and hedging release with his recommendation of obtaining a functional capacity evaluation (FCE) if she found she could not do the work. Respondent cut off TTD benefits at that point, rendering Petitioner homeless and sending her to Wisconsin with her two children to live with her brother's family. Dr. Forsythe opinions on the issue of work restrictions are not persuasive. Petitioner is therefore entitled to TTD from September 29, 2019 through the time of the hearing on July 19, 2021.

WITH REGARD TO ISSUE (M), SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

To obtain an award of Section 19 penalties or Section 16 fees, Petitioner must establish not only that benefits were withheld, but that there was no sound legal basis to deny payment of the

benefits withheld or that the denial/delay in benefits was vexatious or in bad faith. See generally 820 ILCS 305/19 and 820 ILCS 305/16. An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Board of Education of City of Chicago v. Industrial Comm'n*, 93 Ill.2d 20, 25, (1982). When an employer acts in reliance upon responsible medical opinion or when there are conflicting medical opinions, penalties are not imposed for employer's failure to pay workers' compensation benefits. *Matlock v. Industrial Commission*, 321 Ill. App. 3d 167, (Ill. App. Ct. 2001) Attorneys' fees under Section 16 of the Act are not recoverable in the absence of an award of penalties under Section 19(k). *Gallentine v. Industrial Comm'n,* 201 Ill.App.3d 880 (1990).

Petitioner alleges entitlement to TTD and unpaid medical bills as the basis for penalties under Sections 19(k) and 19(l) of the Act. In severing TTD after June 21, 2020, Respondent's position was based on its retained Section 12 expert, Dr. Forsythe, who opined that Petitioner reached MMI June 10, 2020. Res. Ex 1a, p35; Res. Ex 1b, p38. Respondent's Temporary Total Disability payment exhibit reflects 38 weeks of benefits paid September 29, 2019 through June 21, 2020, in the total amount of $19,580.26, representing a TTD rate of $512.27. Petitioner's payroll records reveal an AWW of $646.15, for a TTD rate of $430.77, and expose Respondent's error in computing wages and benefits on gross earnings of 58 weeks over a 52-week period. Respondent paid TTD for a period of 11 days beyond the period its Section 12 expert diagnosed MMI status. Additionally, Respondent claimed to have overpaid TTD by $81.50 for every week of the 38 weeks paid. Considering the overpayment of TTD in both the rate and period paid and considering Respondent's reliance on the sworn medical opinions of its Section 12 expert in severing TTD benefits, Petitioner's claim for Section 19k penalties is denied.

Petitioner offered no evidence when, if ever, the bills were tendered to Respondent for payment pursuant to Section 8 of the Act. With no evidence in the record the bills were disclosed to Respondent for payment prior to its tender as a trial exhibit, Respondent cannot be said to have denied or delayed its payment, or to have acted "without good and just cause" under Section 19 (l) of the Act in having failed to render payment. Petitioner's claim for Section 19(l) penalties is denied. The Arbitrator is mindful that the Respondent denied medical benefits in reliance with it Section 12 expert's opinions. Accordingly, the claim for Section 16 fees is also denied.

WITH REGARD TO ISSUE (N), IS RESPONDENT DUE ANY CREDIT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

The Respondent asserts that it is entitled to credit in the amount of $19,580.26 (Arb. Ex 1, RX 5). Petitioner in fact does not dispute the amount paid. Therefore, the Arbitrator finds that Respondent is entitled to credit in the amount of $19,580.26 for temporary total disability benefits previously paid.

WITH REGARD TO ISSUE (O), PAYMENT OF TRANSPORTATION COSTS AND CREDIT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

Respondent rendered Petitioner homeless when it used Dr. Forsythe's Section 12 report to terminate medical and TTD benefits. Petitioner now lives in Wisconsin with family due to lack of money while her treating orthopedic surgeon, Dr. Levi remains in the Chicago area. It is reasonable for Petitioner to continue treatment with Dr Levi. Accordingly, Respondent shall pay or provide for all transportation Petitioner needs to access and complete her treatment with Dr. Levi for the left knee. However, should the Petitioner require additional physical therapy, she should find a facility near her current home as well as surgical center previously used by Dr. Levi when she undergoes the partial knee replacement. The Respondent shall not be

liable for transportation costs for the local physical therapy facility nor for the local surgical center located near her current residence in Wisconsin.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014644
Case Name	Krystal Tofari v. Riverside Healthcare
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0317
Number of Pages of Decision	13
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Ryan Platt
Respondent Attorney	Edward A. Coghlan

DATE FILED: 8/19/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KRYSTAL TOFARI,

Petitioner,

vs. NO: 20 WC 14644

RIVERSIDE HEALTHCARE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and prospective medical 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. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 18, 2021 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.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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 the Circuit Court.

August 19, 2022

/s/ *Christopher A. Harris*
Christopher A. Harris

CAH/pm
O: 8/18/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014644
Case Name	TOFARI, KRYSTAL v. RIVERSIDE HEALTHCARE
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Ryan Platt
Respondent Attorney	Edward A. Coghlan

DATE FILED: 10/18/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 13, 2021 0.05%

/s/ Paul Cellini, Arbitrator

Signature

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

☐ 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)

KRYSTAL TOFARI
Employee/Petitioner

v.

RIVERSIDE HEALTHCARE
Employer/Respondent

Case # **20** WC **14644**

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 **Kankakee**, on **August 19, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 30, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,268.48**; the average weekly wage was $**774.74**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the December 30, 2019 accident.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibits 6, 7 and 8, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any and all of the awarded medical expenses that have been paid by Respondent prior to hearing, 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 the right SI joint fusion surgery recommended by Dr. Lopez, as provided in 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 18, 2021

STATEMENT OF FACTS

In December 2019, Petitioner worked for Respondent as a mental health tech/teacher's assistant, working with children 12 and under with behavioral and mental health disorders in an outpatient setting. She testified these children can act out physically, which can require removing the other children from the room and an attempt to deescalate through talking. If this is unsuccessful the child is put into a therapeutic hold for everyone's safety. Petitioner has worked in mental health since 2004 and is trained in this capacity.

On 12/30/19, a child was having a tantrum and started throwing chairs and shoving desks in the classroom, so a therapeutic hold was instituted. Petitioner had to take the child to the ground, sit on the ground and hold him by wrapping her arms and legs around the child. Petitioner testified she injured her low back while doing this. She didn't initially report the injury but told "Stephanie" the next day, and she initially sought treatment when her manager, Amy Forton, sent her to the emergency room (ER) on 1/2/20. Asked on direct exam if she had any prior low back problems, Petitioner testified she had none that she could recall: "in recent years no."

Notes from the initial 1/2/20 ER visit state: "Patient states hurt lower back while working 3 days ago. States child was aggressive and twisted while doing a hold on kid." She reported low back pain without radiation. Petitioner was diagnosed with acute lumbar myofascial strain. She was prescribed medication and advised to follow up with occupational health. (Px1; Rx6).

Petitioner testified that the Respondent then referred her to Riverside Workforce Health. The 1/3/20 report of Dr. Deepankar indicates Petitioner was doing a therapeutic hold on a client that was kicking, hitting, scratching and spitting, and she was twisting him around to prevent him from spitting on other staff, injuring her lower back. She complained of 8/10 low back pain. Exam noted pain with flexion, extension and left lateral bend with midline lumbar and left paraspinal pain. Straight leg raise was negative. Lumbosacral x-ray was ordered, and she was restricted to light duty (10 pounds, no squat/bend/climb/kneeling). Noting a 3/10/18 lumbar MRI was available for comparison, lumbar x-ray showed mild facet hypertrophy in the lower lumbar spine and a slight leftward curvature that could be positional. No acute changes were indicated. (Px2; Rx4; Rx5; Rx7).

On 1/10/20, Petitioner reported no improvement. However, Dr. Deepankar indicated that she was improving and returned her to regular work. At 1/17/20 follow up, the doctor noted Petitioner reported slow improvement, but neurologic exam was normal. Physical therapy was ordered, and light work restrictions issued. (Px2).

Petitioner started physical therapy on 1/23/20 which continued through February. The initial history indicated Petitioner felt "weird" with dizziness the last two days. She had no back pain, just tightness on the right, but also noted 5/10 pain after rotation to the right. The 2/13/20 discharge note indicates the Petitioner stated she did not have immediate pain at the time of the injury but awoke with such severe pain she could not get out of bed. She reported this was a pain she had never felt before and that she had not had any back pain prior to the injury.

Her pain varied from 0/10 to 9/10. She was noted to have been limited during therapy by both pain and dizziness. She had improvement in range of motion and strength but no significant functional improvement due to ongoing pain. Due to the lack of progress, discharge was recommended. (Px1). Petitioner testified the therapy at this point increased her pain and wasn't help her.

On 2/13/20, Petitioner reported her symptoms were unchanged. Exam noted flexion beyond 90 degrees and bilateral twists resulted in pain to the right SI region with achiness across the low back just above the buttocks. It was noted that Petitioner had looked on the internet and said that her symptoms were exactly the same as what was described as sacroiliitis. A right SI joint was performed, and Petitioner was referred to an orthopedic physician for right sacroillitis. Dr. Deepankar also continued work restrictions. Petitioner returned to Dr. Deepankar on 2/18/20, noting her symptoms had worsened. The right paraspinal and SI joint areas were tender to palpation. A lumbar MRI was prescribed, and Petitioner was continued on light duty. (Px2). The 2/20/20 lumbar MRI showed mild multilevel degenerative changes with no evidence of high-grade spinal or foraminal stenosis. Mild right and moderate left foraminal stenosis were noted at L4/5, as well as scattered colonic diverticular disease. (Px1; Px2). An intake form for the MRI reflected a consistent history of the mechanism of injury. (Px1).

Ordered by Dr. Deepankar, a sacroiliac (SI) MRI was performed on 2/24/20, reflecting minimal degenerative changes involving the upper third of the SI joints with no osseous erosive or destructive changes, and no other acute osseous or soft tissue abnormalities. (Px1; Px2). On 2/25/20, Dr. Deepankar noted all findings were discussed with Petitioner pending specialist consult/treatment. She was going to travel the following week and was concerned about pain, so Tylenol 3 was prescribed to be taken as needed for severe pain. (Px2). At a 3/10/20 follow up, Petitioner reported ongoing back pain with intermittent buttock and anterior thigh pain on the right. Exam noted right paraspinal and right SI joint tenderness. Petitioner was prescribed valium and pool therapy, as well as pain management for possible injections. (Px1).

Petitioner saw pain physician Dr. Hussein on 5/8/20. The doctor noted Petitioner's complaints of low back and right greater than left lower extremity pain. An L4/5 epidural and right SI joint injection were noted to have been postponed due to Covid, so the epidural was performed that day. (Px1).

Petitioner testified that Dr. Deepankar sent her to Dr. Rossi, who first wanted her to try pain management, so he sent her to Dr. Hussein, who performed a 2nd SI injection on 5/22/20. "It worked ok for a couple days"

Petitioner visited the ER on 5/14/20 complaining of low back pain radiating down the right leg. She was diagnosed with chronic right back pain with sciatica and advised to follow up with Dr. Hussein. (Px1). On 5/22/20, Dr. Hussein performed the right SI joint injection. The note did not reflect Petitioner's reported results following the epidural, but she testified she had immediate relief which lasted for about 2 days. On 7/8/20 Petitioner reported 50-60% improvement but ongoing groin pain on ambulation and prolonged sitting following the SI injection. A second SI joint injection was prescribed and performed on 5/22/20. (Px1). Petitioner testified this injection also lasted for a couple of days, after which she returned to her typical pain levels.

On 7/13/20, Petitioner was examined by neurosurgeon Dr. Deutsch at the request of Respondent (Section 12). The history in his report states Petitioner was wrestling with an approximate 10-year-old student and the next day had back pain, working in mental health. He noted his review of Petitioner's medical records. Petitioner reported that therapy made her worse. At the visit Petitioner continued to complain of back and right groin area pain at 3/10, worse with standing and walking. Dr. Deutsch noted Dr. Rossi had suggested a fusion surgery. Petitioner denied prior treatment for back problems. Petitioner was overweight. Neurologic exam was normal. Range of motion was normal but there was tenderness to light lumbar palpation. There was some right lateral

thigh area pain with passive hip rotation. Waddell signs were negative, and he noted no evidence of symptom magnification. Dr. Deutsch opined that, at most, Petitioner had a lumbar strain as a result of the 12/30/19 work injury. There were no objective findings which would substantiate the subjective complaints. As such, the doctor opined Petitioner needed no further treatment related to the work accident, had reached maximum medical improvement (MMI) and was able to return to full duty work, believing she was capable of going back to work going back to 4/1/20, three months post-accident. Given the unremarkable MRI, he further opined that injections were not reasonable, but therapy had been. (Rx2).

Petitioner returned to Dr. Hussein on 7/29/20, and he didn't feel the injections would work enough, so he recommended SI joint fusion and referred her back to neurosurgeon Dr. Rossi. (Px3). Petitioner followed up with Dr. Rossi on 7/30/20, reporting no change since the last visit. All of the injections helped her temporarily, for one or two days at most. She reported constant low back pain with intermittent right buttock and anterior thigh pain. Dr. Deutsch's report was reviewed. Dr. Rossi and his assistant noted, following re-review of her MRIs, that Petitioner was not a spine surgery candidate and referral to an SI joint specialist for SI joint fusion evaluation was discussed. Given this procedure was not performed by the physicians at Riverside, Petitioner was provided a list of potential physicians who did perform it. (Px1).

Petitioner initially saw Dr. Lopez on 11/20/20. Dr. Lopez indicated Petitioner had a multiyear history of low back pain that began on 12/30/19 when she developed low back pain into the buttock holding and manipulating a patient. This report notes she reported "92%" improvement on the right with injections, after which the pain returned within 1 to 2 weeks. She reported pain and transitional movement such as going up/down stairs and getting in and out of a chair. An SI joint belt helped her at times. Dr. Lopez reported that the lumbar MRI showed mild disc degeneration at L4/5 and inflammation of the right SI joint. Noting chronic SI joint pain since the accident, positive history and clinical findings of SI joint pain, and multiple SI joint injections with sustained relief over 90%, Dr. Lopez recommended right SI joint fusion. (Px4). Petitioner testified he also issued light duty restrictions – no lifting over 35 pounds, with frequent lifting or carrying up to 10 pounds. (See Px4, p. 438).

On 3/12/21, Dr. Lopez signed off on a disability form for Petitioner, indicating work restrictions through 6/4/21 (no bending, lifting or twisting; no prolonged standing or sitting). On 3/19/21, Dr. Lopez issued a Letter of Medical Necessity for Petitioner. He stated: "The patient clearly has had SI joint pain since the onset. Even on her early intake forms at Riverside she clearly draws where her pain is located in the lower lumbar region over the SI joints. Further, Dr. Manic diagnosed her initially with SI joint pain as her pain was localized to the typical location of SI joint dysfunction and pain. I do feel that this is a work-related injury as the patient had no prior history of SI joint dysfunction or pain or lumbar pain prior to the injury." He reiterated that he found her to be a good right SI joint fusion candidate, which would allow her to return to work. He requested workers' compensation approval. An additional work status was issued on 6/8/21 limiting Petitioner to the light work level along with no prolonged sitting or standing and need to readjust every hour. (Px4; Px5b). Documentation in Px4 appears to indicate that Rush would not perform the surgery via Petitioner's group health coverage even with a denial as the claim was workers' compensation related.

Dr. Deutsch issued an addendum opinion on 4/14/21 after reviewing updated medical records. Noting the SI joint MRI showed minimal degenerative change, that there were no objective findings of an SI joint condition, no documentation of physical SI joint findings on exam and no mechanism of injury to the SI joint. Further, indicating Petitioner did not have significant improvement with SI joint injections, Dr. Deutsch opined she would not benefit from SI joint fusion and that any such surgery would not be related to a 12/30/19 lumbar strain. (Rx3).

Petitioner testified she hasn't returned to her regular job. She has worked as a lobby attendant for the last year, but she just took a new position as a care associate/tech in the cardiovascular office starting on 8/1/21, which is definitely less physically demanding than her regular job, and she earns the same or higher wages in this position as she had in her regular job. She hasn't been able to return to her regular job with her work restrictions. She testified that her pain awakens her throughout the night. She is limited as to the activities she can do due to problems with prolonged walking or standing. Currently, she has a normal pain range that is about a 4 or 5/10.

On cross-examination, Petitioner testified that the child she had in a hold on 12/30/19 incident was about 10 years old, but she did not know his weight. She agreed that the history at the Riverside ER of hurting her low back with 5/10 pain and no radiation of pain was an accurate history of accident. As noted in the initial 1/3/20 report at Riverside Workforce Health, she was holding and twisting the child while he was trying to spit to avoid him spitting on others. The history given when she had x-rays at Workforce Health of twisting while restraining the child was accurate. She agreed there was no indication in her medical records of a fall onto her buttocks or the use of her legs in restraining the child. She only saw Dr. Lopez once in November 2020. Agreeing he recommended surgery, Petitioner testified she did not recall Lopez advising her to stop smoking but testified she has quit smoking and is taking Chantix.

Respondent's workers' compensation administrator (since 2/3/20), Cheri Schweiger, testified that the Petitioner remains an active employee for Respondent, currently working full-time in the cardiovascular center full-time since the beginning of August. She testified that the work duties for this job are consistent with the last restrictions she received from Dr. Lopez, as was the job Petitioner had been doing in the lobby. She testified that in her position, she gets all injury reports, she talks to the injured employee, coordinates treatment and communicates with Respondent's adjusters/attorneys. She has 30+ years in the workers' compensation field.

The evidence deposition of Dr. Lopez was obtained on 6/4/21. Dr. Lopez testified that he is a board-certified orthopedic spine surgeon, and that he has been practicing in that field for five years. He explained that when he first saw Petitioner on 11/20/20 she had already received extensive non-surgical treatment including physical therapy and injections. He reviewed her MRI images, as well as the imaging from her fluoroscopically guided injections, which confirmed she received the injections at the correct place. The injections did alleviate her right SI joint pain and MRI showed inflammation of the right SI joint. Exam did appear to reflect right SI joint pain, which is the lower right lumbar spine area. The main information he wants is a history that includes a possibility of SI joint injury, such as a prior lumbar fusion or trauma in the pelvic area, such as a fall or motor vehicle accident. If so, then he wants an exam pinpointing the area of pain. If its in the SI area, then he wants a fluoroscopic injection at the correct SI joint spot which provides significant relief "that lasts for a few months or even kind of gets rid of their pain, but as long as that initial pain relief is there." All of this was done before he saw the Petitioner, along with then his own exam and review of the films. He explained that given the Petitioner experienced 90 percent pain relief from the injections, he considered her a strong candidate for the sacroiliac joint fusion surgery. Her improvement with SI joint belting also supported the diagnosis and surgical recommendation. Dr. Lopez stated that "if I don't hear the history and physical examination findings, if it not at all adds up, I don't perform the surgery." Dr. Lopez explained further that the sacroiliac fusion is a very low-risk operation with a much quicker recovery time than, say, a lumbar fusion, due to the very limited range of SI joint motion. Cartilage covers the SI joint, and Dr. Lopez testified that when this cartilage wears down, it can become painful. The chronic pain Petitioner describes occurs with walking, standing, going up and down stairs. In the SI joint, Dr. Lopez explained, this pain is worst during transitional-type movements, including climbing and descending stairs, getting in and out of bed, and other similar position changes. Dr. Lopez testified that an SI joint fusion has been proven to be effective in patients where the criteria he explained is used. (Px5).

On cross-examination, counsel for Respondent questioned Dr. Lopez regarding alleged discrepancies in the medical records. Dr. Lopez agreed that the prior records indicated a history of restraining an aggressive child but did not mention a fall. As to the SI MRI, Dr. Lopez testified that his review of the films indicated some inflammation of the SI joints bilaterally. As to how long Petitioner's relief lasted with injections, Dr. Lopez testified that the location of the injections by Dr. Hussein were appropriate for the SI joint based on his review of the images. He agreed he documented a report of 90% improvement with SI injection, but temporary As to the discrepancy of his report noting relief lasting 1 to 2 weeks and one day of relief from the injections per Dr. Deutsch, he testified that he would deem it a positive response to the injection in either case. Dr. Lopez testified that as long as there is pain relief for even an hour or two it would be considered a positive response and the surgery would be recommended. When asked whether five minutes would be significant enough to call it a positive response, Dr. Lopez responded, "Five minutes may not be enough…so long as they get significant relief that day, I'm okay with…calling that a positive injection." Dr. Lopez did concede that there is no way to objectively measure the relief a patient experiences from an injection and stated that this is in fact a challenge with managing sacroiliac joint pain. Dr. Lopez explained that his surgical recommendation is based on the injection and imaging confirming the injection was done properly, the patient's description of her response to the injection, and the belief that the patient would not want an unnecessary surgery. Based on her complaints of pain with stairs, walking, etc., she is limited in her ability to work, basically sedentary. He agreed that he typically would advise Petitioner she would need to be off nicotine at time of surgery or it would need to be canceled or delayed as it decreases healing, though this type of fusion is much easier to heal than a spine fusion. On redirect, Dr. Lopez stated that it was normal to find a sacroiliac joint fusion surgery to be warranted in cases, like this one, where there are no objective findings of abnormalities on the MRI or other radiographic studies. (Px5).

Neurosurgeon Dr. Deutsch's deposition was taken on 6/23/21. He noted a history of Petitioner wrestling with a 10-year-old and had back pain. She was initially diagnosed with a lumbar strain. As to the lumbar MRI, he agreed with the radiologist's finding of mild multilevel degenerative changes. As to the SI joint films, he could not recall if he reviewed the films, but noted the radiologist found minimal degenerative changes. At his exam, Petitioner complained of some back and right groin pain at 3/10 level. On exam, Dr. Deutsch noted no abnormal findings. She was obese at 5'5" and 219 pounds. Petitioner's Waddell signs were negative. Dr. Deutsch diagnosed a lumbar strain related to the 12/30/19 accident. He opined she had undergone sufficient physical therapy and would not benefit from further therapy or injections. Dr. Deutsch reiterated his opinion that she could return to her full work duties. After reviewing additional records, including those of Dr. Lopez, Dr. Deutsch opined that SI joint fusion was not medically necessary because there were no specific physical findings of SI joint issues and no significant improvement with the SI joint injections she did have. (Rx1).

On cross-examination, he acknowledged that all of his work as an IME is on behalf of Respondents. He agreed that Dr. Lopez works out of the same facility as himself, Rush, and that he finds him to be a competent surgeon. Dr. Deutsch testified that he performs SI joint fusions himself. He testified that "people that do have SI joint problems often don't have any radiographic findings, and the diagnosis is sort of one where there's no identifiable cause of a person's complaints and therefore you think it might be SI joint issues." However, he did not believe that Petitioner had what he would consider positive response to SI joint injections, as one day of improvement rather than weeks is not sufficient and that Petitioner's complaints were not uniformly consistent with SI joint and not localized to one side, but rather seem to be low back complaints. He reiterated that "radiographic findings are not necessary for someone to have a SI joint fusion." But he noted that Dr. Lopez suggested that there were radiographic findings on MRI. He agreed that reasonable doctors can differ on treatment recommendations. On redirect examination, Dr. Deutsch testified his belief that "there's no such thing as a traumatic SI joint injury…. It's a degenerative finding and an uncommon diagnosis" (Rx1).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that the parties stipulated to a compensable 12/30/19 accident. It's clear that Petitioner's initial complaints related to the lower lumbar area of her back. The parties have similarly stipulated that Petitioner sustained an injury as a result of the accident. The dispute is with regard to what that injury was/is and whether it remains causally related to the accident of 12/30/19.
Prior to this injury, Petitioner was working full time, full duty, in the position she had held since 2004. She was seeking no treatment for low back pain. She denied any prior low back problems. No records were presented which would rebut this testimony. Since the injury, Petitioner has continued to consistently complain of low back pain. There is no evidence of any newer trauma or injury which would lead the Arbitrator to conclude that there has been an intervening injury or other occurrence which would break the causal chain.

Dr. Lopez has diagnosed a right SI joint problem and recommended an SI joint fusion as the appropriate treatment. Dr. Deutsch, Respondent's Section 12 examiner, has opined that the work-up to date does not sufficiently support an SI joint diagnosis, and that the Petitioner sustained a lumbar strain as a result of the 12/30/19 accident. Either way, in the Arbitrator's view, the greater weight of the evidence in the record supports the finding that the Petitioner's ongoing low back complaints remain related to the 12/30/19 accident. The Arbitrator finds that the Petitioner has shown by a preponderance of the evidence that her current condition of ill-being is causally related to the 12/30/19 work accident.

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:

Petitioner submitted the medical expenses claimed to be related to the 12/30/19 accident as Petitioner's Exhibits 6 through 8. The Arbitrator notes that these bills do, in fact, appear to be related based on a review of the bills in the context of the medical records submitted into evidence. The Arbitrator also noted that the vast majority of these bills have been indicated as paid.

Noting the Arbitrator's findings both with regard to causation (above) and prospective medical (below), the Arbitrator finds that the medical expenses contained in Px6, Px7 and Px8 are for reasonable and necessary, and causally related, medical treatment pursuant to Section 8(a) of the Act. As such, the Arbitrator awards the medical expenses contained in Px6, Px7 and Px8 pursuant to Sections 8(a) and 8.2 of the Act. The Respondent is entitled to credit for all awarded medical expenses which have been paid by Respondent pursuant to these same sections of the Act prior to the hearing date, so long as Respondent holds Petitioner harmless with regard to same. Any outstanding amounts are payable to the Petitioner so long as they reflect accurate outstanding amounts pursuant to Section 8.2 of the Act, i.e. the Medical Fee Schedule, and are not balance billing from the providers.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

As noted above, the key issues are: what is the Petitioner's correct diagnosis resulting from the 12/30/19 accident, and the associated issue of what the correct treatment recommendation is, if any.

In this case, the Arbitrator finds that the greater weight of the evidence supports the opinions of Dr. Lopez over those of Dr. Deutsch. The Arbitrator notes that Drs. Hussein and Rossi both appeared to have been considering the SI joint diagnosis prior to Dr. Lopez. Petitioner was, in fact, referred to Dr. Lopez for the purpose of determining if an SI joint fusion would be a proper procedure. Dr. Lopez indicated his recommendation for SI joint fusion surgery was based on the initial mechanism of injury, the exam findings, MRI films and Petitioner's response to the injections she received. The main thrust of Dr. Deutsch's dispute in this case involves all of these to one degree or another.

As to the mechanism of injury, Dr. Lopez indicated that he believed a pelvic injury is the proper mechanism of injury; Dr. Deutsch opined that the condition is degenerative and not traumatic. There was an issue raised as to whether the Petitioner "fell" or not in this case, or just was on the floor twisting the child who had been acting out while holding her arms around him. The Arbitrator would note that this seems to have been a relatively emergency type of situation, where the child was throwing things around and having a tantrum. Petitioner testified that part of a therapeutic hold is bringing the child to the ground. While it is unclear exactly what happened here, what does appear clear is that the Petitioner may not have been paying specific attention to her specific bodily movements while trying to hold, and protect, a child with a behavioral disorder and to keep the child from spitting on or attacking other members of the staff. It also appears clear that whatever the condition is that Petitioner complains of in terms of symptoms, it began at the time of this incident.

While the Arbitrator wishes there were more consistency across treaters and Dr. Deutsch as to the length of time she had improvement following the SI joint injections, the fact of the matter is both Dr. Hussein and Dr. Rossi believed Petitioner should undergo an SI joint workup based on their knowledge of the injections and Petitioner's response therefrom. Taking this along with the opinion of Dr. Lopez, the Arbitrator believes the greater weight of the evidence supports the finding of a right SI joint condition. Dr. Lopez's review of the SI joint films referenced inflammation, though he did indicate this appeared bilateral, while Dr. Deutsch could not recall if he reviewed the SI joint MRI films or not. Again, the Arbitrator finds that this supports the conclusions of Dr. Lopez over those of Dr. Deutsch.

As testified to by Dr. Lopez, the SI joint fusion procedure is significantly less significant than that of a lumbar fusion, with significantly less recovery time. The Arbitrator finds that the SI joint fusion procedure recommended by Dr. Lopez is a reasonable and necessary treatment within the meaning of Section 8(a) of the Act, and the Arbitrator directs the Respondent to authorize this recommended surgical procedure.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC030648
Case Name	Tommy Levault v. American Coal Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0318
Number of Pages of Decision	18
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 8/19/2022

/s/Marc Parker, Commissioner

Signature

16WC0STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILLIAMSON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tommy LeVault,

Petitioner,

vs. NO: 16 WC 30648

American Coal Company,

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 permanent partial disability, casual connection, occupational disease, legal error, evidentiary error, Sec. 1(d)-Sec. 1(f), and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 14, 2022, 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 bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 19, 2022

/s/ *Marc Parker*
Marc Parker

MP:yl
o 8/4/22
68

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC030648
Case Name	LEVAULT, TOMMY v. AMERICAN COAL CO.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 3/14/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 8, 2022 0.71%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

TOMMY LeVAULT
Employee/Petitioner

v.

AMERICAN COAL CO.
Employer/Respondent

Case # **16** WC **030648**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Herrin**, on **October 19, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 28, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's earnings were $**62,874.76** and his average weekly wage was **$1,209.13**.

On the date of accident, Petitioner was **69** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

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

ORDER

No benefits are awarded.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

MARCH 14, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on October 19, 2021, pursuant to Section 7 of the Illinois Workers' Occupational Diseases Act (820 ILCS 310) (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained an occupational disease arising out of and in the course of his employment, including whether the requirements of Sections 1(d)-(f) were met; 2) the causal connection between exposure to the occupational disease and the Petitioner's current condition of ill being; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

An Application for Adjustment of Claim was filed on October 5, 2016, wherein the Petitioner alleged he sustained an occupational disease of his lungs, heart, pulmonary system and respiratory tracts. (AX2) The Petitioner alleged he sustained an occupational disease as a result of inhalation of coal mine dust, including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 45 years, with the date of last exposure being August 28, 2015. (Id.)

The Petitioner was 69 years old at the time of his last exposure. (AX1) He lives in Sesser, Illinois, and is a widower. (T. 12) He graduated from high school and went to work in mining in 1973 without any other formal education. (T. 12) In addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes and diesel fumes. (T. 13-14) On the last date of exposure, the Petitioner was working as a permissibility man for the Respondent. (Id.) He said he was exposed to coal dust on his last day of employment, which was when the Respondent started shutting down the mine. (T. 15) He had not been employed since. (Id.)

The Petitioner began his mining career in 1973 as a laborer for Freeman Coal for four or five years throwing rock dust on coal to keep it from igniting – first by hand and later with a hose. (T. 15-16) He also sealed off areas of the mine when active mining was complete and shoveled

coal onto conveyor belts. (T. 17-18) After that, he worked at the face of the mine cutting coal for about 10 years. (T. 18-19) He then worked as a mechanic for a year or two repairing machinery while mining was occurring around him. (T. 19-20) He went to another mine in 1989 owned by the Respondent's predecessor as a repairman. (T. 20-21) He then worked as a permissibility man for two to three years until he left the mine. (T. 22) In that capacity, he checked and fixed machinery to make sure they ran up to code. (T. 23) After being laid off from the mine, the Petitioner collected unemployment and Social Security benefits. (T. 31)

While working at the mines, the Petitioner underwent periodic chest X-ray screenings by the National Institute for Occupational Safety and Health (NIOSH). (T. 33) The Respondent submitted those screenings from X-rays taken on the following dates: June 24, 1971; June 7, 1974; August 24, 2000; December 1, 2006; May 4, 2007; and April 1, 2013. (RX11) They were all read as normal. (Id.)

The Petitioner testified that he had breathed dust that caused him to cough. (T. 24) He said he could walk on level ground at a normal pace for a mile or two before having to stop and rest. (Id.) He couldn't climb many stairs. (Id.) He was not taking breathing medications, (T. 23-25) The Petitioner had a horse farm, but could not do the work, such has hauling hay, for which he had to hire out. (T. 25) He said that the other work involved in caring for his horses was not that hard. (T. 26) He fed and watered six horses at his farm, brush hogged his pasture, put up a new fence and built new stalls. (T. 36) The Petitioner had 13 grandchildren and said he doesn't chase them anymore. (T. 26) He said he did trail riding but had not in the past year. (T. 34)

The Petitioner smoked for about a pack and a half for 20 years until about age 36. (T. 27-28) He noted no other health problems. (T. 28-29)

Medical records dating back to 1996 showed occasional visits to his primary care physician, Dr. Robert Davidson at Medical Arts, for respiratory symptoms of a cold/flu nature. (RX4) A chest X-ray performed on February 26, 2009, at Heartland Regional Medical Center for a preoperative evaluation before kidney surgery showed no focal infiltrate, effusion or pneumothorax. (RX5) On October 12, 2009, another chest X-ray was performed looking for metastatic disease from kidney cancer with the same results. (Id.) On February 23, 2010, Dr. Davidson diagnosed the Petitioner with bronchitis. (RX4) Another chest X-ray performed on May 4, 2010, also looking for metastasis of kidney cancer showed that the Petitioner's lungs were clear, and there was no nodule, consolidation, pneumothorax or effusion. (PX5.) On May 13, 2010, he underwent a chest CT that showed subtle chronic changes, including two sub-centimeter noncalcified nodules in the right lung most likely related to granulomatous disease. (RX4, RX5.) Another chest CT on June 28, 2011, performed at Pinckneyville Community Hospital by radiologist Dr. Robin Biermann showed old granulomatous disease with small calcified mediastinal and hilar lymph nodes and multiple very small calcified pulmonary granulomas. (RX4, RX6) A 4-milemeter non-calcified nodule in the right lung base appeared unchanged from the previous scan. (Id.) There was a 3-millimeter non-calcified nodule in the left lower lobe that was not on the prior CT. (Id.) There were no acute infiltrates or effusions. (Id.)

On July 28, 2012, the Petitioner went to the emergency room at Franklin Hospital for an allergic reaction. (RX7) At a follow-up visit to Southern Illinois Allergy and Asthma Center on August 9, 2012, the Petitioner reported no history of asthma or restrictive airway disease. (Id.) His lungs were clear with no wheezes, rales, rub or rhonchi. (Id.)

The Petitioner was again diagnosed with bronchitis on January 20, 2014, by Dr. Davidson. (RX4) He underwent chest X-rays on June 3, 2014, due to having chest pain. (RX6) These were normal, except for the previous granulomatous disease. (Id.)

On October 7, 2016, Dr. Henry K. Smith, a "B-reader" radiologist, examined a chest X-ray of the Petitioner taken on September 28, 2016, and found interstitial fibrosis of classification p/s, in all lung zones bilaterally of a profusion 1/0. (PX2) He found no chest wall placques, classifications or large opacities but suspected minimal scattered old calcified granulomata in the bilateral mid-lung zones. (Id.) He also noted linear parenchymal scar in the medial right lung base and infrahilar region. (Id.) He diagnosed simple coal worker's pneumoconiosis (CWP) with small opacities. (Id.)

On March 14, 2017, at the request of the Respondent, Dr. Cristopher Meyer, a "B-reader" radiologist, reviewed the April 1, 2013, NIOSH X-ray, and the September 28, 2016, Harrisburg Medical Center X-ray and found no evidence of CWP on either. (RX2, Deposition Exhibit B) He did note calcified granulomas on both X-rays, with the granulomas on the September 28, 2016, X-ray being in the left upper zone and right mid zone. (Id.) In his report, Dr. Meyer disagreed with Dr. Smith's findings, stating that the examination was normal. (Id.)

At a deposition on April 4, 2019, Dr. Meyer testified consistently with his report. (RX1) He explained that quantifying opacities on a chest X-ray as a profusion of 1/0 would be on the borderline between abnormal and normal and would imply that the relative number of opacities was barely perceptible. (Id.) He said that serial X-rays allow doctors to establish chronicity if there are findings of lung abnormalities, and he saw no change between the two films. (Id.) Regarding the presence of calcified granulomas on the X-rays, Dr. Meyer stated that those were areas of prior infection – most typically tuberculosis or histoplasmosis – that incite a specific

immune response where the body sends a special kind of inflammatory cell that essentially walls off the infection and creates a little ball called granulomas to contain the infection so that it doesn't spread. (Id.) He said B-readers are trained how to distinguish these granulomas from opacities of pneumoconiosis. (Id.)

Dr. Meyer acknowledged that two equally qualified "B-readers" of chest X-rays can disagree as to whether they think they are seeing small opacities, specifically when one finds profusion of 1/0 and another finds 0/0. (Id.) He agreed with the statement that a standard radiologist at a small community hospital reading a chest X-ray for purposes other than CWP would not be nearly as valuable as a B-reading. (Id.) He said these readings would not change his opinion on an X-ray he reviewed. (Id.) Similarly, he said treatment records and lung function tests would not change his opinion. (Id.)

Regarding use of CT scans versus X-rays to diagnose CWP, Dr. Meyer stated that CT scans have not been accepted by NIOSH for diagnosing CWP. However, he acknowledged that it was possible to see CWP on a CT scan that may have been missed or was not as readily apparent on an X-ray. (Id.)

Dr. Meyer testified that CWP can progress – even after the coal miner leaves the exposure – to conditions that significantly impair lung function, such as massive fibrosis and cor pulmonale. (Id.) He agreed that the rate of progression of CWP varies in different individuals and within the same individual, who can have slow progression for a number of years and more rapid progression later. (Id.) He said that a characteristic of CWP is that it is a slow and insidious disease at the outset, such that a CWP profusion of 1/0 may take 10 years or more to develop. (Id.) He said it was possible for a miner with 30 or 40 years of exposure to develop CWP that does not manifest itself on an X-ray until a year after leaving the mine. (Id.) He agreed that a miner with a negative

X-ray could have smaller CWP macules or nodules and be subject to potential progression, although it is not typical. (Id.)

On August 7, 2017, at the request of his attorney, the Petitioner saw Dr. Suhail Istanbouly, a board-certified practitioner in internal medicine, pulmonary medicine, critical care medicine and sleep medicine. (PX1, Deposition Exhibit 2) In his report, Dr. Istanbouly noted that the Petitioner denied chronic cough but had an occasional cough for a few years that was mild in intensity with no specific triggering factor. (Id.) The cough was occasionally productive of slight yellowish sputum. (Id.) The Petitioner had no nocturnal dyspnea and no significant exertional dyspnea, but his physical capacity had been declining slowly. (Id.) He was able to walk a half mile without breathing problems. (Id.) He wrote that the Petitioner's smoking history was the equivalent of a 20-pack-year history. (Id.) A ventilation study (also known as a spirometry test) conducted that day at Harrisburg Medical Center revealed normal lung function. (Id.)

Dr. Istanbouly reviewed the study results and chest X-ray, which he said revealed mild interstitial fibrosis bilaterally, consistent with simple CWP. (Id.) Dr. Istanbouly is not certified as an A- or B-reader of X-rays. (PX1) In his report, he wrote that the Petitioner's chronic respiratory symptoms were related to long-term coal dust inhalation and advised that the Petitioner should avoid any further coal dust exposure in the future to prevent the progression of his lung disease. (PX1, Deposition Exhibit 2)

Another ventilation study conducted November 13, 2017 at Methodist Hospital revealed normal lung function without change post-bronchodilator and normal diffusion capacity. (RX10)

In a deposition on February 11, 2019, Dr. Istanbouly testified consistently with his report, stating that coal dust inhalation was a contributing factor to the Petitioner's chronic intermittent cough. (PX1) He explained that the Petitioner's cough was not a daily cough and would not

qualify as chronic bronchitis. (Id.) He said that even after a miner is not actively exposed to coal dust every day, he still has coal dust trapped in his lungs that would indicate progressive massive CWP when lung function or lung damage keeps getting worse despite quitting a coal mining career. (Id.) He said that even with a negative chest X-ray, that would not rule out the existence of CWP, and agreed with a study that found that 50 percent or more of long-term coal miners were found to have CWP at autopsy even though it was not found radiographically during their lives. (Id.)

Regarding CWP in general, Dr. Istanbouly stated that in addition to the presence of coal mine dust in the lungs, the disease requires a tissue reaction commonly known as scarring or fibrosis that causes the tissue to not perform the same function as normal, healthy lung tissue even if it was not measurable by lung function tests. (Id.) He said it was possible for a person to begin his coal-mining occupation at the top range of normal lung function and leave the mines at the bottom of the normal range but still have a significant loss of lung function. (Id.) He said CWP can progress even after a miner leaves his exposure at the mine. (Id.) He stated that progression of the disease is slow and can progress at different rates in different persons. (Id.) He said that the combination of a positive X-ray and sufficient exposure to coal dust sufficed for him to make a diagnosis of CWP. (Id.)

The Petitioner underwent another chest X-ray on June 27, 2019, at Pinckneyville Community Hospital that was ordered by Dr. Davidson. (PX3, RX4, RX6) Radiologist Robin Biermann found bilateral reticular prominence, greatest at the lung bases that was probably chronic and fibrotic in origin. (Id.) The lungs were hyperinflated. (Id.) There was no focal consolidative infiltrates or effusions, but there was old granulomatous disease. (Id.) Dr. Biermann diagnosed the Petitioner with COPD. (Id.) Dr. Smith read that X-ray on January 23, 2021, as showing interstitial fibrosis of classification p/p in all lung zones bilaterally of a profusion 1/1. (PX2) He

saw a parenchymal band in the right lower long and minimal blebs in the upper lung zones in the apical regions. (Id.) He again diagnosed CWP. (Id.)

On July 2, 2019, the Petitioner underwent an abdominal CT at Pinckneyville Community Hospital due to complaints of mid-abdominal pain. (RX6) This CT included limited images of the lung bases. (Id.) Radiologist Dr. Christopher Norbert saw moderate emphysema but no focal consolidation or pleural effusion. (Id.) The Petitioner saw Dr. Davidson on October 15, 2019, for cold and upper respiratory symptoms, at which time Dr. Davidson found expiratory wheezing. (RX4)

Dr. Meyer read the June 27, 2019, chest X-ray on December 11, 2019, and found it to be negative for CWP. (RX3, Deposition Exhibit A) He testified at a deposition on August 6, 2020, and said that X-ray was of diagnostic quality, but he rated it as lower quality because of improper position, poor contrast and under-inflation. (RX3) Dr. Meyer took exception to Dr. Biermann's diagnosis of COPD, stating that academic chest radiologists don't diagnose COPD radiographically, and he would never do that. (Id.) He explained that COPD is a clinical diagnosis based on such things as findings of chronic bronchitis (productive sputum over a specified period of time) and findings on lung function tests. (Id.) He also believed that Dr. Biermann's impression of diffuse bilateral reticular prominence was actually normal vascular markings that were crowded together because of the under-inflation. (Id.) He was certain that if the Petitioner took a deeper breath, those markings would go away. (Id.) Lastly, he believed Dr. Biermann was wrong when she stated that the lungs were hyperinflated. (Id.)

A review of the Petitioner's medical records was conducted on April 14, 2020, by Dr. David Rosenberg, a board-certified physician in internal medicine, pulmonary disease and occupational medicine hired by the Respondent. (RX1, Deposition Exhibit B) He concluded that

the Petitioner did not have a "respiratory-related condition related to past coal mine dust employment." (Id.) He noted that the Petitioner did not have parenchymal changes of a pneumoconiosis based on his chest X-ray findings and confirmed by CT scan findings. (Id.) He said that the Petitioner did not have chronic bronchitis but had intermittent cough that probably related to chronic sinus disease. (Id.) Dr. Rosenberg also pointed to the Petitioner's normal pulmonary function tests and stated that the Petitioner did not have any respiratory impairment related to past coal mine dust exposure. (Id.)

In making his conclusions, Dr. Rosenberg reviewed: the NIOSH X-rays; records from Medical Arts, Heartland Regional, Dr. Istanbouly, Methodist Hospital, Pinckneyville Hospital, SI Medical Group Allergy and Asthma Center, Sesser Community Health and Dr. Resaba; B-readings by Drs. Smith and Meyer; and Dr. Meyer's interpretations of the X-rays from September 28, 2016, and June 27, 2019. (Id.)

Dr. Rosenberg, who is a certified B-reader, read the Petitioner's chest X-rays from April 1, 2013, September 28, 2016, and June 27, 2019, and agreed with Dr. Meyer's conclusions. (Id.) He reported that the April 1, 2013, X-ray was negative, being 0/0; the September 28, 2016, X-ray was 0/0 with atelectasis in the left lower lobe; and the June 27, 2019, X-ray was 0/0 with some hyperinflation. (Id.)

Dr. Rosenberg testified consistently with his report at a deposition on July 17, 2020, and stated that under the AMA Guides to the Evaluation of Permanent Impairment, he would rate the Petitioner as having Class 0 impairment. (RX1) He said the Petitioner did not suffer from a pulmonary obstruction or restriction or an abnormality in gas exchange, based on the results of his lung function tests, and that the Petitioner was capable of heavy manual labor. (Id.) Like Dr. Meyer, he said that CWP can progress once exposure to dust ceases, but it is unlikely. (Id.)

Regarding the hyperinflation of the lungs he saw on the June 27, 2019, Dr. Rosenberg stated that it was possible that represented COPD. (Id.) He also said that it was possible for someone to have Category 1 CWP under the AMA Guides without having lung function changes. (Id.)

In discussing CWP in general, Dr. Rosenberg stated that the silica within coal dust really causes the problem and emits a toxic effect on lung tissue, having, the potential to emit that effect on the lungs as long as it is trapped there. (Id.) He agreed that CWP is a chronic disorder that can be progress into complicated pneumoconiosis, progressive massive fibrosis or cor pulmonale that are life-threatening conditions. (Id.) He said that CWP can progress after leaving the coal mine. (Id.) He stated that it is possible to have radiologically significant CWP but have normal pulmonary function tests, blood gasses, physical examination and no symptoms. (Id.)

CONCLUSIONS OF LAW

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

Issue C: Did the Petitioner suffer an occupational disease which arose out of and in the course of his employment by the Respondent?

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

The Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease as defined by the Act. Although Dr. Smith reported small opacities on the Petitioner's chest X-ray and Dr. Istanbouly diagnosed the Petitioner with

CWP, there were no other indications of lung disease, such as chronic bronchitis, asthma or emphysema. Two sets of lung function tests showed normal functioning. The Petitioner's medical records showed that he had several medical problems, but chronic breathing problems were not among them.

Regarding the NIOSH X-rays, the Arbitrator gives little weight to these, as they were all taken before the Petitioner left the mines. The X-rays following his career as a miner are more relevant, as the doctors agreed that CWP can develop after a miner has ceased working. In looking at the radiological studies after the Petitioner left the mines, the only doctors who saw signs of CWP were Drs. Smith and Istanbouly. Dr. Biermann diagnosed the Petitioner with COPD from her reading of the June 27, 2019, X-ray. However, the Arbitrator agrees with Dr. Meyer that a diagnosis of COPD requires a clinical diagnosis, of which an X-ray would be part. In this case, there were no clinical indications, such as chronic bronchitis or emphysema, that would support such a diagnosis. Dr. Rosenberg did agree that there was hyperinflation on the Petitioner's June 27, 2019, X-ray and said it was possible that represented COPD. However, a possibility does not equate with it being more likely than not – especially without other evidence to support such a diagnosis.

Drs. Meyer and Rosenberg's testimony correlated more with the Petitioner's broader medical history. They acknowledged that different B-readers could reach different conclusions when reading X-rays and that it was possible for a miner with a negative chest X-ray to have CWP. Again, a possibility does not suffice for proof by a preponderance of the evidence. Thus, the Arbitrator gives greater weight to Drs. Meyer and Rosenberg's opinions.

Regarding the element of disablement, Section 1(e) of the Act provides defines the term as an impairment or partial impairment, temporary or permanent, in the function of the body or any

of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment. The Petitioner's medical records and his testimony do not show impairment from breathing problems. Although the Petitioner said he was unable to perform certain tasks, he could still walk up to two miles without difficulty.

Lastly, Section 1(f) of the Act provides that no compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease. Based on the findings above, this issue is not reached.

Based on all of the above, the Arbitrator finds that the Petitioner has not proved by a preponderance that he suffers from a compensable occupational disease, as defined by the Act, that arose out of and in the course of his employment with the Respondent. Therefore, the Arbitrator does not reach the remaining issues.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC029861
Case Name	Corey Harrell v. Rock Island Mass Transit
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0319
Number of Pages of Decision	11
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Brian Fairfield
Respondent Attorney	Nicole Breslau

DATE FILED: 8/23/2022

/s/ Kathryn Doerries, Commissioner

Signature

22IWCC0319

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

COREY HARRELL,

Petitioner,

vs. NO: 17 WC 029861

ROCK ISLAND MASS TRANSIT DISTRICT

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Decision in its entirety except to correct a scrivener's error under the Arbitrator's Findings of Fact. On the third page under the Arbitrator's Findings of Fact, in the fourth sentence in the fourth full paragraph, the Commission strikes the word "right" and substitutes the word "left" so the sentence reads as follows, "Dr. Cobb opined that Petitioner's condition in his left shoulder "was caused by and/or significantly aggravated by his work."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on September 16, 2021, is hereby modified for the reason stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner has failed to prove that he sustained an accident arising out of and in the course of his employment. Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 23, 2022

KAD/bsd
0071222
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

/s/*Maria E. Portela*
Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC029861
Case Name	HARRELL, COREY v. ROCK ISLAND MASS TRANSIT DIST
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Brian Fairfield
Respondent Attorney	Evan Klug

DATE FILED: 9/16/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 14, 2021 0.05%

/s/ Adam Hinrichs, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Rock Island**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

COREY HARRELL
Employee/Petitioner

v.

ROCK ISLAND MASS TRANSIT DIST.
Employer/Respondent

Case # **17** WC **029861**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Rock Island, Illinois**, on **8/10/2021**. 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 14, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**33,107.48**; the average weekly wage was $**636.68**.

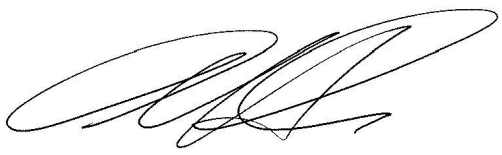
On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

ORDER

Petitioner has failed to prove that he sustained an accident arising out of and in the course of his employment. Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied.

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

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



Signature of Arbitrator

SEPTEMBER 16, 2021

FINDINGS OF FACT

Mr. Corey Harrell (*Petitioner*) is an employee of the Rock Island Mass Transit District (*Respondent*). Petitioner alleges a repetitive trauma injury manifesting on July 14, 2016. The disputed issues in this case are accident, notice, causal connection, temporary total disability benefits, medical benefits, as well as the nature and extent of the Petitioner's injuries.

Petitioner testified to work for Respondent as a transit operator in 2015. (See Arbitration Transcript, page 15, *hereinafter* "Tr. 15") In 2015 he had worked for Respondent for approximately seven years, always in the same capacity. He regularly worked approximately thirty-four to thirty-five hours per week. His full eight-hour workday was spent driving a city bus. (*Id*.)

A typical day entailed driving, and helping passengers on and off the bus when necessary. This could include assisting with wheelchairs, walkers, baby strollers, and occasionally bicycles. (Tr. 16) Petitioner indicated that he would occasionally assist with carrying bags or groceries when assistance was requested by riders, and that doing so helped to maintain the bus schedule. (Tr. 20)

When asked about weights involved in lifting on the job, Petitioner indicated sometimes people have a lot of bags, and he would assist when asked for help.

Petitioner then described the steering wheel on the bus he drove. He indicated the steering wheel was twenty inches in diameter, and that when turning he would use both hands to guide the steering wheel. (Tr. 25). He illustrated this hand and arm position by placing his arms at approximately chest level, with the hands held outside the body. Turning would involve pushing and pulling on the wheel, pulling toward the body with one hand while pushing forward with the opposite hand. (Tr. 27-28).

In the fall of 2015, Petitioner testified that he would exercise with free weights four days per week. He testified that this involved bench press, incline press, shoulder press, and lateral curls. (Tr. 29).

Petitioner testified that bench-pressing involved thirty-five to forty-five pound plates on each end of a forty-five pound bar, which he described as nothing too heavy because he was working out alone. (Tr. 30). He would perform five-to-six sets of ten-to-twelve repetitions of each exercise. (Tr. 65). He testified that incline bench press would involve lying on an inclined bench, lifting a bar weighing approximately one hundred and fifteen pounds of weight upward off the chest above shoulder level. (Tr. 66-67). He testified that shoulder press involved lifting individual dumb bells weighing approximately twenty or twenty-five pounds each straight upward off of the shoulders, and that lateral curls involved lying flat on a bench, holding the same dumb bells straight out at his sides, and then raising his straightened arms to bring the weights together over his chest. (Tr. 68-70).

Prior to the Fall of 2015, Petitioner denied any injuries to the shoulders. He denied having difficulties performing either his work for Respondent or his weightlifting regimen. (Tr. 30-31). Petitioner testified that on October 19, 2015, he sought treatment for left shoulder pain with Dr. Jason C. Clark at ORA Orthopedics. (Tr. 31-32)

On October 19, 2015, Petitioner saw a Dr. Clark for complaints of left shoulder pain. Petitioner reported that his pain began two weeks earlier when he simply awoke with pain. He denied any specific trauma or injury. During this visit, Petitioner did not mention any work-related activities contributing to his complaints. Petitioner rated his pain at 8/10. (See Respondent's Exhibit 1, *hereinafter* Rx1, p.7). After reviewing x-rays Dr. Clark diagnosed moderate AC joint osteoarthritis and provided anti-inflammatory medication, which Petitioner testified was a "temporary fix" that allowed him to sleep. (Tr. 34)

Petitioner testified that after his October 2015 onset of shoulder pain he had discomfort when performing work for Respondent, including when turning the steering wheel and carrying things like groceries onto the bus. (Tr. 35). Petitioner testified his pain continued "when I carried things, carrying in groceries, just helping assist, doing things around the house, anything to do with bearing weight on this left shoulder." (Tr. 37). Petitioner continued his weightlifting regimen from October 2015 through May 2016. (Tr. 37-38).

On November 13, 2015, Petitioner returned to Dr. Clark indicating his discomfort in his left shoulder had significantly improved and he declined to undergo a cortisone injection at that time, and was released PRN. (See Petitioner's Exhibit D, *hereinafter*, PxD, p. 3).

On May 20, 2016, Petitioner returned to Dr. Clark with complaints of increased left shoulder pain. Petitioner reported that he had been lifting weights recently and felt some discomfort while doing a bench press. The pain was over the anterior aspect of the shoulder, and Petitioner reported popping. Dr. Clark indicated this was a slightly different than Petitioner's previous complaints. Dr. Clark noted Petitioner was really worried about his shoulder as his activities of daily living and weight lifting was severely limited. (Rx1, p. 5)

Dr. Clark again diagnosed left chronic AC joint osteoarthritis, and added a new diagnosis of possible left shoulder rotator cuff tear and labral tear. An MR arthrogram and depo-medrol injection were ordered. At this visit, Petitioner did not mention any work-related activities contributing to his complaints. (*Id*.)

On June 24, 2016, Petitioner returned to ORA Orthopedics. He reported no improvement following the injection with MR arthrogram. Dr. Clark noted that MRI from June 21, 2016, showed severe tendinosis of the supraspinatus and infraspinatus tendons, with a non-retracted full-thickness tear of the supraspinatus tendon. Dr. Clark recommended surgical repair. Petitioner again failed to mention any work-related activities contributing to his complaints. (Rx1, p.3-4)

Petitioner sought a second opinion with Dr. Tyson Cobb at Orthopedic Specialists on July 14, 2016. Petitioner reported symptoms present for eight months to Dr. Cobb. He reported taking anti-inflammatory medication without improvement. Petitioner denied participating in therapy or receipt of an injection. Petitioner reported increased pain when steering the city bus, and that his symptoms were aggravated by daily activities, motion, and work activities. (Rx2, p.28)

Dr. Cobb reviewed the June 21, 2016 MRI. He diagnosed a complete rotator cuff tear, partial rotator cuff tear, as well as bursitis, impingement syndrome, and bicipital tendonitis. Dr. Cobb recommended surgery. (Rx2, p.30)

On October 3, 2016, Petitioner underwent a left shoulder arthroscopy with Dr. Cobb. Contrary to the MRI findings, the rotator cuff and biceps were intact. Dr. Cobb performed a bursectomy, acromioplasty, and distal clavicle incision. He performed ultrasound guided tendinopathy treatment using a Tenex device. Dr. Cobb also found a labral tear, which was debrided. (Rx2, p.31-32)

On October 12, 2016, Petitioner returned to Dr. Cobb for postoperative evaluation. Petitioner then followed with Dr. Cobb between October 2016 and release from care without restrictions on June 19, 2017. (Rx2, p.2-23)

Petitioner returned to work in early April of 2017. He testified that he had approximately two-to-three weeks of increased shoulder stiffness upon returning to work, but that he had thereafter been able to perform his duties without issue. (Tr. 52). He indicated his shoulder was currently fine, though noted it still gets stiff when he sleeps on it. (*Id*.)

On October 5, 2018, at Respondent's request, Dr. Mark Levin authored a narrative report following a medical record review. He reviewed medical records and imaging, diagnosed underlying osteoarthritic changes and

rotator cuff pathology of the left shoulder. Dr. Levin explained that Petitioner's medical records indicate Petitioner was a weightlifter and that he had shoulder problems with activities outside of work. Dr. Levin wrote that Dr. Clark's records show recommendation for surgery predating any allegation by Petitioner of a relationship of shoulder complaints to work, and that this only occurred when Petitioner changed medical providers and sought treatment with Dr. Cobb. (Rx5, p.3)

Dr. Levin opined that Petitioner's need for surgery was not caused by work activities. (Rx5, p.3-4)

On April 15, 2019, Petitioner saw Dr. Levin for a Section 12 exam and preparation of an AMA Permanent Partial Impairment Rating. (Rx6, p.1-2). Dr. Levin provided an AMA assessment and Permanent Partial Impairment Rating of 0% impairment of the upper extremity, and thus a 0% impairment of the whole person. (Rx6, p.12)

Respondent called Mr. Ralph Beswick, director of operations for the Rock Island County Metropolitan Mass Transit District, as a witness. (Tr. 93). Mr. Beswick testified that Respondent had procedures in place for reporting both accidents as well as other workplace incidents. He explained the procedures involved for each, noting all drivers received training in proper reporting. He explained that incident reports could be made instantaneously via radio directly to dispatch. (Tr. 94-95). He confirmed that no accident or incident reports were ever made by the Petitioner for the period between 2015 and 2016. (Tr. 96).

Petitioner's surgeon, Dr. Tyson Cobb, testified via evidence deposition. Dr. Cobb testified that he recalled treating the Petitioner. (PxH p.3). Dr. Cobb testified to his initial examination and recommendations. Dr. Cobb opined that Petitioner's condition in his right shoulder "was caused by and/or significantly aggravated by his work." (PxH p.4)

Dr. Cobb further explained his opinion on causation, relying on the Petitioner's job description, that "repetitive steering with the pushing and pulling of the large steering wheel could also aggravate those types of conditions." (*Id*.) Dr. Cobb agreed he reviewed the job description on the morning of the deposition, and did not recall reviewing it previously. (PxH p.6) Dr. Cobb was not aware of the weight or frequency that Petitioner carried items for passengers. (PxH p. 7)

Dr. Cobb testified that his notes suggested that Petitioner's onset of symptoms came without a specific incident and developed more slowly over time. (PxH p.8) When asked about review of Petitioner's prior treatment records by Dr. Clark at ORA Orthopedics, Dr. Cobb testified he was provided copies of the records on the morning of the deposition. (*Id*.) He indicated it would have been his policy to review prior records, but agreed that they were not contained the medical file from his prior clinic and that he made no mention of prior records in his own treatment notes. (*Id*.)

When discussing Petitioner's records from ORA Orthopedics and report to Dr. Clark of pain when bench-pressing, Dr. Cobb testified "I think what you're getting at is that there was a prior incident where he was weightlifting and tweaked his shoulder, but I don't view that as being necessarily significant." (PxH p.9). Dr. Cobb went on to explain that "I would view that event necessarily significant if that were the preceding event and there were no change in exam over time" adding that "so once these repetitive-type problems become an issue for a patient, then their daily activities are also going to be symptomatic, and they are from time to time going to tweak them. When that happens, then the symptoms go up, and over time they come back to baseline[…]." (*Id*.)

Respondents Section 12 examiner, Dr. Mark Levin, also testified via evidence deposition. Dr. Levin testified first to his review of Petitioner's medical records, including records from Dr. Clark at ORA and Dr. Cobb at Orthopedic Specialists, as well as MRI, operative report, and a job description. (Rx4, p.13-14). Dr. Levin testified that "my opinion was that the condition that [Petitioner] was treated for was an existing condition not

associated with any job activity; associated with weight lifting because of the position of his shoulder, and the AC joint impingement is the source of that." (Rx4, p.16)

Dr. Levin noted that weightlifting is a "classic cause" of shoulder impingement, and explained how weight lifting results in AC joint arthritis and rotator cuff symptoms. (Rx4, p.17-18). He explained that Petitioner's "job description…is not consistent with the overhead activities that would impinge on the rotator cuff like weightlifting does," adding that petitioner's condition "is consistent with his history and records of the events occurring at home - - awaking with pain and the activity of weightlifting - - and not with any post-traumatic condition." (Rx4, p.18-19).

Dr. Levin testified that the records he reviewed when forming his opinion were more complete than those reviewed by Dr. Cobb. Dr. Levin explained that "the records I have include Dr. Clark's records, which describe [Petitioner] being symptomatic before seeing Dr. Cobb. Dr. Cobb's first evaluation has a different history." (Rx4, p.19)

When discussing his examination of Petitioner, Dr. Levin testified to his findings and completion of an AMA Permanent Partial Impairment Rating. Dr. Levin noted Petitioner had a good response to surgery. He added that this was "consistent with the impingement or the rubbing of the hypertrophied acromion when you bring your arm above shoulder level - - like bench pressing - - not consistent with activities of driving or turning a steering wheel, not consistent with the activities in the job description of having to even lift occasionally fifty pounds." (Rx4, p.37).

CONCLUSIONS OF LAW

In regard to Issue (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? The Arbitrator makes the following findings:

Petitioner testified to having no shoulder injury and no difficulty performing his work for Respondent prior to the fall of 2015. (Tr. 31). Petitioner testified he had been weightlifting regularly for many years up to that point. (Tr. 64). Petitioner's weight lifting regimen is rigorous, lifting free weights four days per week, completing a circuit of bench press, incline press, shoulder press, and lateral curls.

Petitioner testified to seeking treatment for his left shoulder with Dr. Jason Clark at ORA Orthopedics in October 2015 when he awoke one morning with pain. (Tr. 32). At that time, Petitioner did not report any complaints for his left shoulder related to his work activities.

Petitioner testified that after this period he experienced left shoulder discomfort when turning a steering wheel, pushing wheelchairs, and when lifting and carrying items for passengers. (Tr. 34-35). However, when Petitioner returned to Dr. Clark in November 2015, he did not report any complaints for his left shoulder related to his work activities, in fact he reported that his shoulder was much improved.

When Petitioner returned to Dr. Clark in May of 2016 complaining of new, slightly different shoulder pain, Petitioner reported it had occurred when lifting weights. (*Id*. at p.5). During this visit, Petitioner again made no mention of any work activities contributing to his shoulder pain.

Petitioner testified that from October 2015 to May 2016 he continued with an exercise regimen that involved lifting weights four days per week. It was only shoulder pain caused by his bench pressing that Petitioner reported to Dr. Clark, nothing related to his work activities.

On June 24, 2016, Petitioner returned to ORA Orthopedics. Petitioner reported no improvement in his left shoulder, and Dr. Clark recommended surgical repair. Petitioner again failed to mention any work-related activities contributing to his left shoulder complaints.

Three weeks later, on July 14, 2016, Petitioner presented to Dr. Cobb for a second opinion. During this visit is the first mention of Petitioner relating his left shoulder pain that has continued for "8 months" to his work activities. (PxB, p. 1). Petitioner testified to certain work activities that caused discomfort in his left shoulder, but offered little testimony concerning the frequency with which these activities occurred or the forces involved. Petitioner's surgeon, Dr. Cobb, opined that Petitioner's condition was "caused by and/or significantly aggravated by his work," while recognizing that he did not have familiarity with the weights and frequencies involved in the alleged activities. (PxH p.4, 7)

Respondent's examiner, Dr. Mark Levin, opined that Petitioner's left shoulder complaints were classic symptoms in weightlifters, noting the structures of the shoulder involved in weight lifting, the mechanism of injury from weighted lifting above shoulder level. (Rx4, p.37-38, 62-63).

Given the sequence of events, and the record taken as a whole, the Petitioner's claim of a work-related accident is not supported. The Petitioner had ample opportunity to discuss work-related complaints with Dr. Clark during his four office visits over an eight-month period. In Petitioner's initial visit in October 2015, he stated nothing caused his left shoulder pain. In November 2015, Petitioner reported that his left shoulder pain had improved. In May 2016, Petitioner related new left shoulder complaints to his bench press workout, failing to mention any work activity contributing to his symptoms. In June 2016, Petitioner again presented to Dr. Clark, and again failed to mention any work activity contributing to his left shoulder symptoms.

During his July 2016 second opinion with Dr. Cobb, Petitioner did relate his left shoulder complaints during the last eight months to his job activities. However, this etiology is simply not supported by the prior eight months of treating medical records. Petitioner's testimony that his work activities continued to aggravate his left shoulder after October 2015, manifesting in a work-related injury in July 2016, is not supported by the record, and is not credible.

The Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accident arising out of and in the course of his employment with the Respondent. Given this finding, all other issues are rendered moot. Petitioner's request for benefits under the Act is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC013773
Case Name	Paul Allen v. Dakkota Integrated Systems
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0320
Number of Pages of Decision	33
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	MICHAEL BAGGOT

DATE FILED: 8/23/2022

/s/Marc Parker, Commissioner

Signature

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

Paul Allen,

Petitioner,

vs. NO: 18 WC 13773

Dakkota Integrated Systems,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/§8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, 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 February 3, 2022, is hereby affirmed and adopted.

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

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

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

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

August 23, 2022
MP:yl
o 8/18/22
68

/s/ *Marc Parker*
Marc Parker

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC013773
Case Name	ALLEN, PAUL v. DAKKOTA INTEGRATED SYSTEMS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	30
Decision Issued By	Ana Vasquez, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	MICHAEL BAGGOT

DATE FILED: 2/3/2022

/s/Ana Vazquez, Arbitrator

Signature

INTEREST RATE WEEK OF FEBRUARY 1, 2022 0.50%

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)

PAUL ALLEN
Employee/Petitioner

v.

DAKKOTA INTEGRATED SYSTEMS
Employer/Respondent

Case # **18** WC **013773**

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 **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago,** on **November 22, 2021**. 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, **April 19, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,948.80**; the average weekly wage was $**614.40**.

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

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

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

Respondent is entitled to a credit of **$2,730.00 for nonoccupational indemnity disability benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as provided in Petitioner's Exhibit 1, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $409.60/week for 29 weeks, commencing on March 14, 2019 through October 2, 2019, as provided in Section 8(b) of the Act.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Howard Freedburg, which includes a left shoulder arthroscopic biceps tenodesis, possible open distal clavicle excision, rotator cuff repair, and subacromial decompression.

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.

Ana Vazquez

Signature of Arbitrator

FEBRUARY 3, 2022

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on November 22, 2021, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: (1) causal connection, (2) reasonableness and necessity of treatment/unpaid medical bills, (3) prospective medical care; and (4) temporary total disability.

FINDINGS OF FACT

Petitioner began work at Respondent in August 2017. Transcript of Proceedings at Arbitration ("T.") at 9. Respondent is in the business of building parts for Ford Motor Company. T. at 9. Prior to November 2019, Petitioner worked at Respondent as a machine operator. T. at 8.

Petitioner testified that his job consisted of a repeated process for 11 hours. T. at 11, 12. It involved Petitioner stepping to the left and lifting the bumper from one conveyor belt, then taking two steps to the right and sitting the bumper on the next machine, then installing four clamps, then turning around to grab two chrome pieces, then turning back around and screwing the chrome pieces into the bumper, then removing the bumper off of the machine, then taking three steps to the right and leaving the bumper on another conveyor belt. T. at 11-12, 25, 40, 44.

The part is a normal, Ford Explorer bumper. T. at 24. Petitioner testified that the bumper cover weighed between 10 to 20 pounds and was heavier than a gallon of milk. T. at 11, 24-25, 40. The bumpers were both front and end bumpers. T. at 39-40. They were plastic or fiberglass, not metal. T. at 40. The bumpers were the width of a normal car, about four feet. T. at 40. The chrome pieces were plastic and were fairly light, weighing less than five pounds, but not less than one pound. T. at 47.

Petitioner would always have to lift the part above waist-height. T. at 25, 41. Petitioner is right-handed, but he used both hands when lifting the part. T. at 10, 24. Whether Petitioner lifted the part above shoulder-height depended on if there was somebody in the area. T. at 25-26. Petitioner had to lift the part high enough to fit onto the machine used to install the chrome pieces. T. at 41. The machine was "a little higher than waist high." T. at 41.

On April 19, 2018, Petitioner's work shift was from 6 p.m. to 6 a.m. T. at 10. Petitioner was "working the machine, installing parts into the bumper covers that [go] on the Ford Explorer trucks." T. at 8, 9-10. There was no one helping Petitioner on the machine. T. at 26. At approximately 1 a.m., Petitioner felt pain in his left arm and shoulder as he lifted a bumper cover off the first conveyor belt. T. at 12, 25, 41, 45. Petitioner testified that he "really felt the pain"

after placing the part onto the second conveyor belt. T. at 10-11. Petitioner described the pain as "shooting" and testified that he could barely move his arm. T. at 11. Petitioner "shook it off" and continued to work. T. at 11.

Petitioner presented to Ingalls Memorial Hospital on April 19, 2018. T. at 12, 13, 26, 33; Petitioner's Exhibit ("Px") 2 at 15. The history reported that Petitioner presented with complaints of constant left shoulder/humerus pain since 1:30 a.m., with onset of pain noted while at work, moving a part weighing approximately 20 pounds. Px2 at 15. Petitioner reported pulling his left biceps, deltoid, and triceps. Px2 at 15. Petitioner denied neck pain, back pain, or any other injury. Px2 at 15. Petitioner reported painful full range of motion. Px2 at 15. Upon examination, mild tenderness to the left biceps and deltoid was noted. Px2 at 15. Dr. Muhammad Awan noted a normal range of motion and no signs of rotator injury. Px2 at 16. Petitioner had normal abduction and adduction of the left upper extremity and was able to raise his arm above his head and across his chest. Px2 at 16. Petitioner's drop test was negative. Px2 at 16. X-rays of Petitioner's left humerus demonstrated an intact left humerus. Px2 at 15, 31. X-rays of Petitioner's left shoulder demonstrated a normal left shoulder. Px2 at 16, 30. Petitioner was diagnosed with a muscle strain. Px2 at 16.

Petitioner returned to Ingalls Memorial Hospital on April 20, 2018 and was seen by Dr. Jennifer Schnell. Px2 at 36. He reported a consistent history. Px2 at 36. Petitioner presented with complaints of left upper arm pain and swelling. Px2 at 36. Dr. Schnell noted that Petitioner arrived with significant swelling and pain, and that his primary problem was a sprain located in the left triceps brachii and left biceps brachii. Px2 at 37. Petitioner described the pain as throbbing and aching, while moderate and localized. Px2 at 37. Petitioner felt his pain was getting worse. Px2 at 37. Dr. Schnell noted that there was no previous injury to this body part. Px2 at 37. Upon examination, Dr. Schnell noted that Petitioner had considerable swelling. Px2 at 37. The biceps was intact, but tender at the bicipital notch and swelling was evident. Px2 at 37. The triceps was also very swollen and tender. Px2 at 37. Dr. Schnell noted that Petitioner arrived with his arm hanging down and it was not immobilized. Px2 at 37. Dr. Schnell was concerned that Petitioner had a partial bicipital or triceps tear since the swelling was diffuse in the left upper arm. Px2 at 37. Dr. Schnell diagnosed Petitioner with (1) strain of muscle, facia and tendon of other parts of biceps, left arm; (2) strain of unspecified muscle, facia and tendon at shoulder and upper arm level, left arm; (3) overexertion from strenuous movement or load; (4) activity, other

specified; (5) other specified industrial and construction area as the place of occurrence of the external cause; and (6) civilian activity done for income or pay. Px2 at 37. An MRI or best imaging would be considered at Petitioner's follow up appointment if swelling was present to rule out any partial biceps or triceps tears. Px2 at 41. Dr. Schnell noted the cause of Petitioner's injury was related to work activities. Px2 at 38. Petitioner was instructed to use ice for approximately 20 minutes every two hours, use a cryotherapy unit to control pain and swelling, and was placed in a sling. Px2 at 38. Petitioner was prescribed 800mg Ibuprofen. Px2 at 38. Petitioner was advised not to use his left arm. Px2 at 38. Dr. Schnell placed Petitioner on restricted duty with no use of the left arm, effective April 20, 2018. Px2 at 38, 41.

Petitioner again saw Dr. Schnell on April 23, 2018 and reported pain with certain movements. Px2 at 45. Upon examination, tenderness to palpation was noted over the anterior shoulder, over the glenohumeral joint, and over the biceps and triceps. Px2 at 45. No swelling was noted. Px2 at 45. Petitioner was able to perform flexion of the biceps and triceps without reproducible pain. Px2 at 45. No weakness or signs of rupture were noted. Px2 at 45. Dr. Schnell further noted (1) crossover positive for anterior shoulder pain; (2) a positive Hawkins; (3) a positive empty can; (4) a negative drop arm; (5) a negative O'Brien's; and (6) a negative lift-off. Px2 at 45. Dr. Schnell noted that pronation and supination reproduced pain in the anterior shoulder, biceps, and triceps. Px2 at 45. Dr. Schnell's diagnoses remained unchanged Px2 at 45. Swelling had resolved and use of the sling was discontinued. Px2 at 45. Dr. Schnell placed Petitioner on restricted duty. Px2 at 47.

On April 26, 2018, Petitioner presented to Ingalls Center for Outpatient Rehabilitation at South Holland for a Physical Therapy Initial Examination. Px2 at 49. Petitioner was discharged from physical therapy on July 6, 2018. Px2 at 72. He attended a total of three sessions. Px2 at 72. He did not return to physical therapy following his May 7, 2018 session, though three additional visits were authorized. Px2 at 72. Petitioner did not respond to messages left regarding scheduling. Px2 at 72.

Petitioner presented for a follow up on April 30, 2018 and was seen by Carmelita Lewis-Buchanan, FNP. Px2 at 55, 57. Petitioner reported pain and stiffness to the left trapezium, left deltoid, left biceps, and left triceps when he awakened in the mornings. Px2 at 55. Upon examination, tenderness to palpation was noted over the anterior shoulder. Px2 at 56. No weakness or signs of rupture were noted. Px2 at 56. Petitioner had a positive Hawkin's, a

negative drop arm, a negative O'Brien's, and a negative lift-off. Px2 at 56. Petitioner could perform an empty can test, which was negative for pain or limitation. Px2 at 56. Petitioner was able to raise his arm over his head 180 degrees, with pain noted at 180 degrees. Px2 at 56. Abduction was noted with proximal triceps pain. Px2 at 56. Adduction was noted with biceps and mild triceps pain. Px2 at 56. Left trapezium pain was noted with right head rotation and spasm was present to the left trapezium. Px2 at 56. Petitioner's diagnoses were (1) strain of muscle, fascia and tendon of other parts of biceps, left arm; (2) strain of unspecified muscle, fascia and tendon at shoulder and upper arm level, left arm; and (3) overexertion from strenuous movement or load. Px2 at 56. Petitioner was instructed on a home exercise program, was instructed to continue taking Ibuprofen, and was prescribed 10mg Cyclobenzaprine. Px2 at 56. Petitioner's restricted duty continued. Px2 at 56, 59.

On May 7, 2018, Petitioner was seen by Dr. Daniel Bakston for a follow up. Px2 at 64. Petitioner reported having pain in his neck. Px2 at 64. On exam of the left upper arm and shoulder, Dr. Bakston noted pain on motion was present with movement in all axis. Px2 at 64. Dr. Bakston noted tenderness to palpation over the anterior glenohumeral joint, lateral upper arm, and over the biceps. Px2 at 64. Petitioner had a positive Hawkins and O'Brien's, while the lift-off and Appley were negative. Px2 at 64. Left trapezium pain with right head rotation was also noted. Px2 at 64. Dr. Bakston noted tenderness to palpation over the left trap and limited active range of motion of the cervical spine with lateral bending and rotation. Px2 at 64. Petitioner's diagnoses were unchanged. Px2 at 64. Dr. Bakston instructed Petitioner to continue icing, taking Ibuprofen and Cyclobenzaprine, and also recommended Petitioner take Tylenol for break-through pain. Px2 at 64. Dr. Bakston ordered an MRI. Px2 at 64, 66. Petitioner's restricted duty continued. Px2 at 68.

On May 9, 2018, Petitioner presented at Suburban Orthopedics and was seen by Dr. Howard Freedburg. Px3 at 35. Petitioner presented with neck pain and bilateral shoulder and arm pain. Px3 at 33. Petitioner reported a consistent history. Px3 at 33. Petitioner reported that he felt more pain to his shoulder, arm, and neck. Px3 at 33. He was now having pain in his right shoulder. Px3 at 33. Petitioner's neck and bilateral shoulder pain was constant. Px3 at 33. At times, he had shooting pain to his left arm and into the back of his ears. Px3 at 33. He had stiffness to his neck and was experiencing popping to his left shoulder. Px3 at 33. He reported tingling in his left fingers and achy pain to his right shoulder. Px3 at 33. Petitioner reported

taking Flexeril and Ibuprofen for the pain. Px3 at 33. Upon examination of Petitioner's left upper extremity, Dr. Freedburg noted (1) tenderness to palpation was positive over the anterior acromioclavicular joint; (2) positive impingement signs with bicipital tenderness; and (3) a positive Speed's. Px3 at 34. X-rays of Petitioner's cervical spine and bilateral shoulders were taken. Px3 at 35. Dr. Freedburg noted that the x-rays demonstrated normal alignment, closed physis, no fractures, no dislocations, moderate degenerative changes, C4-C6 sclerosis GT, no loose or foreign bodies, and no congenital abnormalities. Px3 at 35. Dr. Freedburg's impressions were (1) cervical radiculitis, left with degenerative disc disease, and (2) left shoulder bicipital tendinitis with possible rotator cuff tear. Px3 at 35. An MRI was ordered. Px3 at 35. Mobic, Tramadol, and Flexeril were recommended, as well as cryotherapy. Px3 at 35. A home exercise program was recommended and ordered. Px3 at 35. Petitioner was placed on light duty restrictions. Px3 at 36.

On May 16, 2018, Petitioner underwent MRIs of the left shoulder and cervical spine. Px3 at 42-45. The MRI of the left shoulder demonstrated (1) mild supraspinatus tendinopathy, with low grade undersurface partial tearing at the anterior-mid insertion. No grade/full thickness rotator cuff tear or muscle atrophy; (2) mild bicipital tenosynovitis; and (3) mild degenerative changes without acute fracture. Px3 at 42. The MRI of the cervical spine demonstrated (1) multilevel cervical spondylosis with variable impingement of the ventral subarachnoid fluid column and neural foramina and (2) mild and variable stenosis C3-4 through C6-7, particularly at C6-7 with moderate cord distortion. Px3 at 45.

Petitioner presented to Dr. Freedburg for a follow up on May 23, 2018. Px3 at 48. Petitioner continued with complaints of neck and bilateral shoulder pain. Px3 at 48. Dr. Freedburg's impressions remained unchanged. Px3 at 50. Petitioner was to continue taking Prilosec, Mobic, Tramadol, and Flexeril. Px3 at 50. Petitioner was referred to physical therapy. Px3 at 53. Petitioner continued on light duty restrictions. Px3 at 52.

Petitioner began participating in physical therapy at Team Rehabilitation on May 29, 2018. Px4 at 6. Petitioner attended a total of 45 sessions and missed 11 appointments. Px4. Petitioner was discharged on April 1, 2019, as he had not returned to therapy in six weeks. Px4 at 155. The record of December 21, 2018 notes Petitioner's inconsistent attendance. Px4 at 129. Petitioner testified that physical therapy provided him no relief and he has not participated in any additional physical therapy since 2019. T. at 31-32.

Petitioner saw Dr. Freedburg again on June 20, 2018 and reported continued symptoms, with increased stiffness on the left side of his neck. Px3 at 55. Petitioner reported shooting pain from his left forearm to his left shoulder with his left hand and arm hanging at his side. Px3 at 55. He also reported throbbing pain at his elbow at 90 degrees. Px3 at 55. Dr. Freedburg's impressions remained unchanged. Px3 at 57. Petitioner was to continue taking Prilosec, Mobic, Tramadol, and Flexeril. Px3 at 58. At this visit, 80mg of Triamcinolone was injected into the subacromial space of Petitioner's left shoulder. Px3 at 58. Petitioner was referred to pain management specialist, Dr. Dmitry Novoseletsky, for evaluation and treatment of Petitioner's cervical spine. Px3 at 60. Petitioner continued on light duty restrictions. Px3 at 59.

Petitioner presented to Dr. Freedburg on July 18, 2018 with complaints of neck pain and bilateral shoulder and arm pain. Px3 at 62. Petitioner reported that his neck was constantly stiff and that the stiffness sometimes spread to the right side. Px3 at 62. Petitioner reported no pain relief from the injection. Px3 at 62; T. at 30. He reported that his range of motion had gotten better. Px3 at 62. He reported experiencing a throbbing sensation in his left biceps at the time of the visit. Px3 at 62. At this visit, Dr. Freedburg's impressions were (1) cervical radiculitis, left with degenerative disc disease and (2) left shoulder bicipital tendinitis with partial rotator cuff tear. Px3 at 64. Dr. Freedburg's recommendations and instructions from prior visits continued. Px3 at 65. Surgical and non-surgical treatment options were discussed and Petitioner elected to proceed with surgery. Px3 at 65. Dr. Freedburg recommended a left shoulder arthroscopic biceps tenotomy versus tenodesis, a possible open distal clavicle excision, rotator cuff repair, and subacromial decompression. Px3 at 65. Petitioner's light duty restrictions were continued. Px3 at 66.

On July 25, 2018, Petitioner presented to Dr. Novoseletsky with complaints of neck pain. Px3 at 72. Petitioner reported having constant, sharp shooting pain on his neck that shot down his left shoulder and arm. Px3 at 72. Petitioner reported distribution of symptoms at 90% to his neck and 10% to his arm. Px3 at 73. Dr. Novoseletsky's impressions were (1) neck pain; (2) headache; and (3) left shoulder pain; and he noted differential diagnoses as (1) disc herniation; (2) facet syndrome; (3) headache; and (4) shoulder pain-under the care of Dr. Freedburg. Px3 at 74. Dr. Novoseletsky instructed Petitioner to continue taking the previously prescribed medications and recommended a cervical epidural steroid injection. Px3 at 75. Dr. Novoseletsky also

recommended and ordered physical therapy to include the cervical spine. Px3 at 75, 77. Petitioner was to continue on light duty restrictions. Px3 at 75, 76.

On August 8, 2018, Petitioner again saw Dr. Freedburg. Px3 at 84. Petitioner reported continuing symptoms, including increased stiffness to his neck, mainly on the left side. Px3 at 84. Petitioner reported that his range of motion had gotten better but felt as if his shoulder was popping more. Px3 at 84. X-ray images of Petitioner's cervical spine and bilateral shoulders were obtained. Px3 at 86. The x-rays demonstrated normal alignment, closed physis, no fractures, no dislocations, moderate degenerative changes, C4-C6 sclerosis GT, no loose or foreign bodies, and no congenital abnormalities. Px3 at 86. There were also no other bone or soft tissue abnormalities. Px3 at 86. Dr. Freedburg's impressions were unchanged. Px3 at 87. Dr. Freedburg continued with his surgical recommendation and Petitioner continued to elect same. Px3 at 87.

On August 14, 2018, Petitioner underwent a cervical epidural steroid injection at C7-T1, interlaminar, with midline approach. Px3 at 90.

Petitioner returned to Dr. Freedburg on September 5, 2018. Px3 at 93. Petitioner reported continued pain symptoms in his bilateral shoulders and neck. Px3 at 93. Petitioner further reported no pain relief from the injection performed by Dr. Novoseletsky. Px3 at 93; T. at 30. Petitioner reported an increase in stiffness to the left side of his neck, shooting pain from his left forearm to his left shoulder, and noticed muscle spasms in his left biceps. Px3 at 93. Dr. Freedburg's impressions were unchanged. Px3 at 95. At this visit, Dr. Freedburg refilled Petitioner's medications and prescribed topical Lidocaine 5% ointment and Terocin patches. Px3 at 96. Dr. Freedburg continued Petitioner's light duty restrictions. Px3 at 101.

Petitioner saw Dr. Novoseletsky on September 12, 2018 for follow up. Px3 at 103. Petitioner continued to have pain on the left side of his neck radiating down to the left elbow. Px3 at 103. Petitioner reported no relief from the cervical epidural steroid injection. Px3 at 103; T. at 30. Petitioner reported having to leave work the previous Thursday because of severe stiffness and pain. Px3 at 103. Dr. Novoseletsky's impressions and instructions remained unchanged. Px3 at 105. At this visit, Dr. Novoseletsky recommended a left TON, C3, C4, and C5 cervical medial branch block for diagnostic and prognostic purposes. Px3 at 106. Dr. Novoseletsky continued Petitioner's light duty restrictions. Px3 at 106.

Petitioner returned to Dr. Freedburg on October 3, 2018, reporting unchanged symptoms. Px3 at 118. Petitioner reported feeling frustrated because surgery had not yet been approved. Px3 at 118. Dr. Freedburg's impressions were unchanged. Px3 at 121. Petitioner's Prilosec, Mobic, Tramadol, Flexeril, topical Lidocaine 5%, and Terocin patches were refilled. Px3 at 121. Petitioner continued on light duty restrictions. Px3 at 123.

On October 9, 2018, Petitioner underwent a (1) prognostic cervical medial branch block, left side, #1 at the medial branch of C3, C4, C5, and at the third occipital nerve; and (2) fluoroscopic needle localization. Px3 at 131. Petitioner's post-operative diagnoses were (1) chronic neck pain; (2) cervical facet syndrome; and (3) cervical spondylosis. Px3 at 131. On October 10, 2018, Dr. Novoseletsky continued Petitioner's light duty restrictions. Px3 at 135. Petitioner has not had any additional injections since October 2018. T. at 32.

On October 24, 2018, Petitioner saw Dr. Novoseletsky for follow up. Px3 at 137. Petitioner reported having 50% relief of his neck pain on the injected side, within 30 minutes following the procedure. Px3 at 137. The pain relief lasted two hours. Px3 at 137; T. at 30-31. Following the procedure, Petitioner reported performing his usual pain-provoking activities and he had the same pre-injection pain during those activities. Px3 at 137. Petitioner reported that his pain level was worse than his pre-injection baseline pain. Px3 at 137. Petitioner reported that his neck pain was moving to the right side. Px3 at 137. Petitioner reported stiffness and restricted range of motion, with range of motion being more limited turning to his left side. Px3 at 137. Petitioner reported some pain radiating into the left shoulder and into the biceps. Px3 at 137. Dr. Novoseletsky's impressions and instructions remained the same. Px3 at 140. Petitioner was referred to Dr. Dalip Pelinkovic for surgical consult by Dr. Novoseletsky. Px3 at 140. Petitioner's light duty restrictions continued. Px3 at 141.

On October 26, 2018, Petitioner presented to Dr. Pelinkovic for a spine surgery consult. Px3 at 142. Petitioner reported a consistent history. Px3 at 142. Petitioner reported that his neck pain was constant and radiated down his left shoulder and reached his left arm. Px3 at 142. He described the neck pain as "a dull/achy/throbbing" sensation and reported stiffness in his neck and headaches. Px3 at 142. Dr. Pelinkovic noted that Petitioner had left and right neck pain, and bilateral trapezial pain. Px3 at 142. Dr. Pelinkovic further noted that Petitioner denied clumsiness or dropping of objects and denied a preexisting neck condition. Px3 at 142. Dr. Pelinkovic's diagnoses were (1) cervical spinal stenosis C4-5 disc bulge; (2) C5-6 stenosis disc bulge; and (3)

cervical disc herniation at C6-7. Px3 at 145. Dr. Pelinkovic noted that he believed Petitioner's work injury aggravated his cervical spine condition and Petitioner had not responded to physical therapy or injections. Px3 at 145. Dr. Pelinkovic further opined that Petitioner would benefit from an anterior cervical discectomy and fusion at C6-7, C5-6, and C4-5 with iliac crest bone graft. Px3 at 145. Petitioner saw Dr. Pelinkovic for treatment only once. T. at 33-34.

Petitioner followed up with Dr. Freedburg on October 31, 2018. Px3 at 147. Petitioner reported increased pain on the right shoulder and difficulty raising his arm above his head. Px3 at 147. X-rays of Petitioner's cervical spine and bilateral shoulders were taken at this visit and were unchanged. Px3 at 150. Dr. Freedburg's impressions, instructions, and surgical recommendation remained the same. Px3 at 150. Dr. Freedburg refilled Petitioner's Prilosec, Mobic, Tramadol, Flexeril, topical Lidocaine 5%, and Terocin patches. Px3 at 150. Petitioner was continued on light duty restrictions. Px3 at 152.

On November 28, 2018, Petitioner followed up with Dr. Novoseletsky. Px3 at 154. Petitioner reported stiffness and restricted range of motion, with him being more limited turning to his left side. Px3 at 154. He reported some pain radiating into the left shoulder and into the biceps. Px3 at 154. Dr. Novoseletsky's impressions were unchanged. Px3 at 157. Petitioner was prescribed topical Diclofenac 1.5% solution to reduce inflammation along his neck. Px3 at 157. Petitioner's light duty restrictions were maintained. Px3 at 157.

Petitioner next saw Dr. Freedburg for a follow up on December 12, 2018. Px3 at 158. Petitioner reported that his left shoulder was worse and his neck pain was constant. Px3 at 158. Dr. Freedburg's impressions were unchanged. Px3 at 161. Dr. Freedburg provided a refill of Petitioner's medications, topical Lidocaine, and Terocin patches. Px3 at 161. Petitioner's light duty restrictions continued. Px3 at 163.

Petitioner has continued to follow up with Dr. Freedburg monthly since December 12, 2018. Px3 at 165, 173, 180, 187, 194, 201, 207, 214, 221, 228, 234, 240, 246, 253, 261, 270, 275, 282, 289, 296, 303, 311, 319, 326, 332, 338, 344, 350, 356, and 364. Petitioner's complaints of pain in the left shoulder, left arm, and left biceps have continued, with increase in pain noted. Petitioner's light duty restrictions have also continued since December 12, 2018. Px3 at 163, 170, 178, 185, 192, 199, 206, 212, 219, 226, 233, 239, 245, 251, 259, 267, 274, 281, 288, 295, 302, 309, 317, 325, 331, 337, 343, 349, 355, 362, and 369. On October 2, 2019, Petitioner reported that his neck pain had gotten better. Px3 at 228. On this date, Dr. Freedburg noted that

Petitioner had returned to work with restrictions. Px3 at 228. On January 15, 2020 and February 12, 2020, Petitioner reported that his right shoulder was not bothering him at the time. Px3 at 234, 240. An increase in bilateral shoulder pain, however, was noted on October 13, 2021. Px3 at 356.

As of November 10, 2021, Petitioner's neck pain was constant and achy, and he reported stiffness. Px3 at 364. Petitioner reported pain radiating to the left shoulder and down his left arm, which he described as constant and achy. Px3 at 364. Petitioner reported minimum achy pain in the right shoulder. Px3 at 364. Dr. Freedburg's impressions and surgical recommendations remained unchanged throughout Petitioner's treatment since December 12, 2018.

Petitioner continues to see Dr. Freedburg monthly because he is in pain and is hoping that he can proceed with surgery. T. at 45. Petitioner would have the surgery recommended by Dr. Freedburg, if it were approved. T. at 19.

Dr. Freedburg continues to prescribe Petitioner Tramadol, Cyclobenzaprine, Lenzapro, Meloxicam, and Diclofenac. T. at 32, 36, 37. Persistent RX billing is through Dr. Freedburg. T. at 42. Petitioner saw the billing from Persistent RX prior to trial and testified that he had received all of the prescriptions listed, as Dr. Freedburg had been seeing Petitioner for three and half years. T. at 42-43.

Respondent accommodated Petitioner's light duty restrictions through March 2019. T. at 17, 34. Petitioner testified that his light duty accommodations were withdrawn because Respondent stopped doing bumpers and switched systems to front-end suspension parts. T. at 34, 35. The front-end suspension parts were heavy. T. at 34, 35. Because the front-end suspension parts were heavy, Respondent did not have any light duty work available and could no longer accommodate Petitioner's restrictions. T. 34-35.

At trial, Petitioner testified that he was currently working at Laci Transport as a truck driver and had been working at Laci Transport since November 24, 2019. T. at 8, 18, 35, 37, 39. Petitioner's work as a truck driver is within the restrictions given to him by Dr. Freedburg. T. at 20-21, 35. Petitioner uses both hands on the steering wheel at the 10:00 o'clock and the 2:00 o'clock positions. T. at 38-39. Petitioner agreed that his arm is at shoulder level while driving a car. T. at 39. It is not over-the-road truck driving. T. at 37. Petitioner's truck driving is local. T. at 38. The truck Petitioner drives is an automatic. T. at 38. Petitioner works an 11-hour shift, but his job does not involve driving for a continuous 11 hours. T. at 38, 39. There "is always an hour

or so in between. When you drop, you relax and wait on your next load and pick up." T. at 39. Petitioner is working 40 hours per week and is making more money than he did working at Respondent. T. at 21, 35-36. There is no other work that Petitioner does besides driving his truck. T. at 36.

Petitioner testified that he had not had medical issues with either of his shoulders prior to April 19, 2018. T. at 9, 23. Petitioner had not treated for an orthopedic condition prior to April 19, 2018. T. at 9, 23. Petitioner had not suffered any other injuries since April 19, 2018. T. at 19. Petitioner did not have any prior shoulder problems and had no pain, soreness, or stiffness in either of his shoulders before the accident. T. at 22.

Petitioner did not have any hobbies prior to the April 19, 2018 accident. T. at 21. Petitioner did not play on any sports teams, did not work out, and did not lift weights prior to the accident. T. at 21-22.

Petitioner testified that he occasionally has right shoulder pain. T. at 23. He has not had any treatment for his right shoulder. T. at 23.

Petitioner testified that he felt shooting pain in his left arm and shoulder as he testified. T. at 19. The pain was shooting from his forearm up to the top part of his shoulder. T. at 19.

Testimony of Renee Wicinski

Respondent called Renee Wicinski as its witness. T. at 49. Wicinski has been the EHS Engineer at Respondent since January 2021. On April 19, 2018, Wicinski was the Shift Operations Superintendent at Respondent and had been in that position from March 2013 until January 2021. T. at 50, 58.

As the Shift Operations Superintendent, Wicinski oversaw all of the activities on each line. T. at 50. She made sure that Respondent "made rate," that everything shipped out correctly, and that the quality was in order. T. at 50-51. Wicinski was the highest-ranking person in the building, and "basically" ran that particular shift. T. at 51.

Respondent is a just-in-time supplier to Ford, so it stays two hours ahead of Ford. T. at 60. Wicinski explained that Respondent has something called "JPH" or job per hour. T. at 59-60. Each operator is required to perform his or her job at a specific job rate, so Respondent asks them or has the job set up so that the operator can "make rate" at approximately 60 to 65 pieces an hour. T. at 60. Petitioner would have had to produce 60 to 65 of the bumper parts per hour in 2018. T. 60.

Wicinski testified that she is familiar with Petitioner and that Petitioner worked on the front fascia line. T. at 51. Wicinski explained that the front fascia is the skin of the front bumper of any vehicle. T. at 51. It is the plastic molding piece that goes on the front bumper of the vehicle. T. at 51. Petitioner reported to Andre Morris, who reported to her. T. at 51.

Wicinski testified that she was also familiar with the accident that occurred on April 19, 2018. T. at 51-52. She was familiar with the accident because she ran that particular shift and commodity. T. at 52. When Petitioner was injured, Andre Morris brought it to her attention. T. at 52, 59. Wicinski became aware of the accident at the time that Petitioner injured himself and needed medical attention. T. at 52, 59. Petitioner was sent to Ingalls Memorial Hospital. T. at 52. Wicinski testified that to her knowledge, Petitioner had reported the accident right away. T. at 52.

At the time of the accident, Wicinski testified that Petitioner was working at commodity 32B, the front of the bumper. T. at 53. That product was about four feet long and no more than 10 pounds. T. at 53. The product was heavier than a gallon of milk. T. at 53.

Wicinski testified that some subassembly occurred at 32A, which Petitioner was not assigned. T. at 53, 54. Once the subassembly was complete at 32A, the part was put on a gravity-fed conveyor belt that went to 32B, where Petitioner was assigned. T. at 53-54. Petitioner would take the part up and put it on a fixture and add accent pieces. T. at 54. The accent pieces were small and completely plastic. T. at 54. There was no metal. T. at 54. Petitioner would add one or two accent pieces, depending on the option that the part called for. T. at 54. When Petitioner was done adding the accent pieces, he would place the part on the second conveyor to go on to the next step, which was also gravity fed away. T. at 54. Her understanding was that Petitioner would lift the piece with both hands. T. at 54.

Wicinski had worked one of the machines that Petitioner worked, as she would “jump in” if they were short-handed. T. at 58, 59. Wicinski testified that Petitioner’s description of the mechanics involved in his position were “fairly accurate.” T. at 59.

Wicinski testified that there is a process for employees to return to work with Respondent when employees have restrictions. T. at 55. After the employee is seen by a physician, Respondent tries to find the employee work within their restrictions. T. at 55. If the employee has a lifting or standing restriction, Respondent does find the employee work within that

restriction. T. at 55. Types of work within restrictions include visual inspection, quality inspection, basic cleaning, sweeping the floor, "whatever falls within their restrictions." T. at 55.

Petitioner returned to work the evening of April 19, 2018 with a 10-pound restriction. T. at 54-55. Wicinski testified that, from what she could recall, when Petitioner returned to work with a lifting restriction he probably cleaned, performed visual inspection, or pre-kited sensors on bumpers. T. 55-56. Petitioner worked with restrictions at Respondent for almost one year. T. at 56. Wicinski recalled Petitioner saying "that he was in pain from time to time" after his return with restrictions. T. at 56. Petitioner was working 40 hours per week during this time. T. at 56. Petitioner did not have any lost time while he was working light duty. T. at 56.

Petitioner's light duty accommodations were eventually withdrawn because Respondent changed commodities to suspensions, which involved switching from plastic to metal. T. at 56-57. Suspensions was a new commodity for Respondent. T. at 57. Wicinski testified that a suspension was all metal parts and employees would be lifting close to 40 pounds. T. at 57. Respondent did not want to jeopardize or go outside of Petitioner's restrictions. T. at 57. As a result, Petitioner's restrictions were not honored by Respondent. T. at 57.

When Petitioner's light duty accommodations were withdrawn, he received short term disability funded by Respondent. T. at 57. Respondent paid Petitioner short term disability from May 2019 to June 2019. T. at 58. Respondent offers group insurance to its employees. T. at 57-58. Petitioner did not utilize the group insurance. T. at 58.

Evidence Deposition Testimony of Dr. Howard Freedburg

Dr. Howard Freedburg testified by way of telephonic evidence deposition on March 19, 2019. Px5.

Dr. Freedburg first saw Petitioner on May 9, 2018. Px5 at 86. Petitioner complained of neck pain, bilateral shoulder pain, and arm pain. Px5 at 86. Petitioner provided a history of being injured on April 19, 2018, while at work, when he lifted a part off a conveyor belt and felt pain. Px5 at 87. Petitioner put the part together and carried it to another conveyor belt, where he had worse pain in his left biceps region. Px5 at 97. Petitioner reported the injury and was sent to Ingalls Immediate Care. Px5 at 87. Petitioner also provided Dr. Freedburg with his treatment history. Px5 at 87-88.

Dr. Freedburg examined Petitioner on May 9, 2018. Px5 at 88. He found that Petitioner's cervical spine had severe tenderness in the paraspinals. Px5 at 88. Petitioner had limited range of motion due to pain. Px5 at 88. Petitioner had a positive Spurling's test on the left side. Px5 at 88. Petitioner's left shoulder was tender, anteriorly, at the acromioclavicular joint. Px5 at 88. Petitioner also had positive impingement signs with bicipital tenderness and a positive Speed's maneuver. Px5 at 88. Dr. Freedburg took x-rays of Petitioner's cervical spine and bilateral shoulders. Px5 at 88. Petitioner had moderate degenerative change in the neck from C4 to C6 and some sclerosis of the greater tuberosity in the shoulder. Px5 at 88. Dr. Freedburg's diagnoses were left cervical radiculitis with degenerative disc disease and left shoulder bicipital tendinitis with a possible rotator cuff tear. Px5 at 89. Dr. Freedburg recommended MRIs of the cervical spine and shoulder, he gave Petitioner medication, he put therapy on hold, and kept Petitioner on light duty. Px5 at 89.

Petitioner underwent MRIs of the neck and the shoulder on May 16, 2018. Px5 at 89, 116. Dr. Freedburg reviewed the actual film. Px5 at 116. The MRI of the shoulder showed mild supraspinatus tendinopathy, with low-grade undersurface partial tearing of the anterior-mid insertion; a mild bicipital tenosynovitis; mild degenerative changes; and no fracture. Px5 at 89. The MRI showed tendinopathy. Px5 at 116. The word "mild" used to describe the tendinopathy was used by the radiologist. Px5 at 116.

The radiologist also diagnosed mild bicipital tenosynovitis. Px5 at 117. That is not Dr. Freedburg's diagnosis. Px5 at 117. The MRI also showed that there was degenerative change at the acromioclavicular joint. Px5 at 117. In terms of the diagnoses, Dr. Freedburg testified that if it is symptomatic, it does not matter whether it is mild or severe or moderate.

The MRI of the cervical spine showed multilevel cervical spondylosis with carriable impingement of the ventral subarachnoid fluid column and neural foramina; and mild and variable stenosis at C3-4 to C6-7, particularly at C6-7 with moderate cord distortion. Px5 at 89-90. Petitioner returned to Dr. Freedburg's office on May 23, 2018 and they reviewed the MRIs. Px5 at 90. Dr. Freedburg recommended Petitioner restart physical therapy. Px5 at 90. Petitioner was going to continue with the medications and return in four weeks for a follow up. Px5 at 90. Petitioner was still working with restrictions. Px5 at 90.

Petitioner returned to Dr. Freedburg on June 20, 2018. Px5 at 91. Petitioner still had pain and stiffness. Px5 at 91. Dr. Freedburg elected to inject Petitioner's left shoulder. Px5 at 91. Petitioner was going to continue with his rehabilitation and Dr. Freedburg referred him to Dr. Novoseletsky for treatment of his cervical spine. Px5 at 91. Dr. Freedburg testified that he would defer to Dr. Novoseletsky as to any opinions regarding further treatment of Petitioner's cervical spine. Px5 at 91. Dr. Freedburg testified that it was his opinion, to a reasonable degree of medical and orthopedic certainty, that the neck injury was causally connected to the work accident. Px5 at 91.

Dr. Freedburg treats cervical spine issues, but when they go beyond basic conservative measures he refers it to his surgeon or pain doctor. Px5 at 103. Dr. Freedburg typically refers cervical conditions to Dr. Novoseletsky. Px5 at 103. Dr. Freedburg testified that once Petitioner went to Dr. Novoseletsky, he came under the care of Dr. Novoseletsky for the cervical spine. Px5 at 104. Generally, Dr. Novoseletsky refers Dr. Freedburg's patient to a cervical surgeon if further treatment is required. Px5 at 104. Sometimes the patient could return to Dr. Freedburg and Dr. Freedburg refers it out. Px5 at 104. Dr. Freedburg did not know if Petitioner had been referred to a surgeon by Dr. Novoseletsky. Px5 at 104. Dr. Novoseletsky might have prescribed Petitioner medication when he started seeing him. Px5 at 115. Dr. Freedburg does not know what medications Petitioner has been prescribed by Dr. Novoseletsky. Px5 at 115-116.

Petitioner saw Dr. Freedburg on July 18, 2018. Px5 at 92. At that time, Dr. Freedburg recommended surgical intervention. Px5 at 92. Dr. Freedburg testified that he thought Petitioner's main pain generator was his biceps tendon. Px5 at 92. Later in some of his reports, Dr. Freedburg included possible work on the rotator cuff in his surgical consent because Petitioner has some partial tearing of his rotator cuff. Px5 at 92-93. Dr. Freedburg explained that sometimes while in surgery, they find a more demonstrative situation that requires intervention. Px5 at 93. For completion's sake, Dr. Freedburg included the rotator cuff repair in his surgical consent form for Petitioner. Px5 at 93. Dr. Freedburg testified that the rotator cuff repair was still his recommendation. Px5 at 93.

Dr. Freedburg testified that he believed the biceps tendon to be the problem. Px5 at 103, 105. The biceps tendon was injured in the April 19, 2018 work accident. Px5 at 105. Petitioner possibly had a partial interstitial tear above the supraspinatus at the time of injury. Px5 at 105.

Dr. Freedburg testified that he would possibly find some abnormalities of the supraspinatus in surgery that he would need to work on. Px5 at 105.

Dr. Freedburg testified that based upon a reasonable degree of orthopedic surgical certainty, the shoulder injury was also caused by the work accident. Px5 at 91-92. Petitioner had a mechanism that was consistent with the injury to the neck and shoulder. Px5 at 92. Petitioner has the chronology of treatment from very immediately and has had consistent symptomology through the date of deposition. Px5 at 92. There is also corroboration from the MRIs and physical examination. Px5 at 92.

Dr. Freedburg testified that the work accident of April 19, 2018 was also the cause of Petitioner's biceps problem, a contributing factor to his acromioclavicular joint arthritis, and possibly a production of the rotator cuff pathology. Px5 at 95. Dr. Freedburg testified that Petitioner sustained an injury to his biceps and interstitial tear to his rotator cuff as a result of the work accident. Px5 at 112. Petitioner also sustained an exacerbation of the mild degenerative change that he has at the acromioclavicular joint. Px5 at 112.

Dr. Freedburg reviewed Dr. Walsh's Independent Medical Examination report. Px5 at 93, 105. Dr. Freedburg had many disagreements with Dr. Walsh's report, including that Dr. Walsh felt that there was no causal connection. Px5 at 94. Petitioner never had shoulder problems and never saw a doctor for shoulder problems. Px5 at 94. Dr. Walsh said Petitioner had biceps tenderness, which Dr. Freedburg thought was Petitioner's major source of pain that he was looking to correct at the time of surgery. Px5 at 94, 95. Dr. Walsh stated that Petitioner did have an initial injury to the biceps, but he did not feel that it was related because of the rotator cuff. Px5 at 94-95. Dr. Freedburg disagreed because as Dr. Freedburg had explained, he did an all-encompassing recommendation for surgery. Px5 at 94-95. Dr. Walsh focused on the rotator cuff and distal clavicle resection and ignored the biceps. Px5 at 95.

Dr. Freedburg testified that the word "significant" in terms of Dr. Walsh opining that there was no evidence Petitioner sustained any "significant" rotator cuff pathology, was Dr. Walsh's description. Px5 at 105. While Petitioner does not have a full thickness tear, Petitioner does have rotator cuff pathology as a result of the work accident. Px5 at 106, 107. Tendinopathy can be a preexisting condition, but there is also an undersurface partial tearing of the supraspinatus, which could be playing a part in this issue. Px5 at 106, 107. Dr. Freedburg explained that tendinopathy, by definition, is pathology of the rotator cuff. Px5 at 107. It is not

degeneration. Px5 at 107. The tendinopathy is taken into account in conjunction with the partial tearing, which Dr. Freedburg believed to be related to the work accident. Px5 at 107. Dr. Freedburg did not believe that Petitioner's tendinopathy was part of the work accident. Px5 at 108. The partial tearing could be consistent with Petitioner's age, but not necessarily. Px5 at 108. Dr. Freedburg's opinion, based upon a reasonable degree of medical certainty, is that the partial tearing noted in the MRI scan is related to or a result of the work accident. Px5 at 108. This is also his opinion, more likely than not, because there was no muscle atrophy evident on the MRI. Px5 at 108. If Petitioner had muscle atrophy, the partial tearing could possibly have been preexisting. Px5 at 108. The only account that Dr. Freedburg has for the partial tearing would be from the work accident. Px5 at 108.

The MRI also demonstrated mild bicipital tenosynovitis. Px5 at 108. It is not a fair statement that Petitioner does not require a bicipital tenotomy or tenodesis as a result of the mild bicipital tenosynovitis. Px5 at 109. It is not a fair statement because the pathology is at Petitioner's biceps tendon. Px5 at 109. Biceps tendons are not well imaged on an MRI and an arthrogram does not image it well either. Px5 at 109. It can be seen more clearly arthroscopically. Px5 at 109. It is the one structure inside the shoulder that is very poorly imaged. Px5 at 109. Dr. Freedburg testified that conclusions cannot be drawn because the MRI says the bicipital tenosynovitis is "mild." Px5 at 109. Frequently, Dr. Freedburg finds a problem with the biceps when an MRI says it is "mild" and sometimes when the MRI does not visualize it at all. Px5 at 109. Dr. Freedburg testified that based on the MRI findings of "mild" bicipital tenosynovitis, he knows that he will find even more of an issue with the biceps at the time of surgery. Px5 at 109, 110. He would be very surprised if Petitioner did not have significant problems with his biceps. Px5 at 110. At that point, Dr. Freedburg would perform a tenodesis, and not a tenotomy because of the type of work that Petitioner does. Px5 at 110, 114. If a tenotomy is performed, the patient has some weakness and cramping of the muscle, which is unacceptable when someone does physical work like Petitioner does. Px5 at 115.

Dr. Freedburg agreed that a subacromial decompression might also be necessary. Px5 at 110. The Petitioner had a positive impingement test. Px5 at 110. Dr. Freedburg testified that it is often part of the problem of inside the shoulder. Px5 at 110-111. He looks at the CA ligament in the subacromial space, and if he sees any fraying or irregularity of it, he will perform a

subacromial decompression. Px5 at 111. If he puts the scope in laterally and sees a large anterior hook on the acromion, he will perform an acromioplasty. Px5 at 111.

Dr. Freedburg would not perform an open distal clavicle resection, as he always does it arthroscopically. Px5 at 111. The acromioclavicular ligament can be left intact, and whatever impingement there is can be resected. Px5 at 111. If Petitioner continues to have symptoms of the acromioclavicular joint at the time of surgery, Dr. Freedburg will certainly add a distal clavicle resection procedure. Px5 at 112. If that potentially is a pain generator or if it can be a problem after surgery, it takes Dr. Freedburg ten minutes to decompress the joint. Px5 at 112. It is probably the only joint in the body that can be resected and result in success and alleviation of any symptoms. Px5 at 112.

Dr. Freedburg testified that throughout Petitioner's treatment, Petitioner was on "some kind of" work restrictions. Px5 at 90. Dr. Freedburg explained that the reason for the work restrictions was because he did not think Petitioner was physically capable of performing his full duty job. Px5 at 90. Dr. Freedburg testified that he currently has Petitioner on light duty work restrictions. Px5 at 115. Petitioner has a 10-pound lifting restriction and no lifting over shoulder-height restriction. Px5 at 115. Petitioner has a partial restriction for pulling, pushing, carrying, and no clipping. Px5 at 115. These restrictions have been in place from the beginning of his treatment. Px5 at 115.

Dr. Freedburg is not recommending any additional injections because Petitioner failed the injection. Px5 at 117. At almost a year out, surgery is the only recommended treatment. Px5 at 117. Dr. Freedburg testified that he is not 100% sure if Petitioner will require the procedures he described, but more likely than not, Petitioner will need them. Px5 at 111. Dr. Freedburg testified that he did not see the purpose of Petitioner continuing physical therapy for his shoulder. Px5 at 118. Petitioner would go back to physical therapy after the shoulder surgery. Px5 at 118.

Dr. Freedburg testified that for someone who does heavy lifting, it would probably be "six months, twelve months, until he is at MMI." Px5 at 118. If all of the recommended procedures are performed, it could be closer to a year for MMI. Px5 at 120. Postoperative treatment would consist of physical therapy and maybe work conditioning. Px5 at 119. The duration of Petitioner's off-work period following surgery would depend on whether light duty is available. Px5 at 119. If light duty is available, Petitioner will probably get back to work earlier.

Px5 at 119. If there is only full duty available, Petitioner will be off work closer to six months. Px5 at 119.

Evidence Deposition Testimony of Respondent's Section 12 Examiner, Dr. Kevin Walsh

Dr. Walsh testified by way of evidence deposition on December 16, 2019. Rx1. Dr. Walsh testified as to his education and credentials as a general orthopedic surgeon. Rx1 at 4-5. Dr. Walsh performed only a records review. Rx1 at 17. He agreed that he never examined Petitioner. Rx1 at 17.

For his report of November 1, 2018, Dr. Walsh reviewed an IL Form 45; the employer's first report of injury; records from Ingalls Memorial Hospital; records from Ingalls Care Center; records from Ingalls Occupational Health; records from Dr. Freedburg and Suburban Orthopedics; records from Dr. Novoseletsky; physical therapy notes from Ingalls Center for Outpatient Therapy; records from Team Rehabilitation Physical Therapy; various work status sheets; and reports of Petitioner's diagnostic imaging. Rx1 at 7.

Dr. Walsh agreed that the note from April 19, 2018 from Ingalls Memorial Hospital was Petitioner's first treatment note. Rx1 at 8. In reviewing this note, Dr. Walsh found that Petitioner presented with complaints of constant left shoulder humeral pain since 1:30 a.m. Rx1 at 8. Petitioner reported that he was moving a part weighing approximately 20 pounds, when he experienced a pull in the left biceps, deltoid and triceps area. Rx1 at 8. Petitioner denied neck pain at the time of his initial presentation. Rx1 at 8. Petitioner had full range of motion, though it was noted to be painful. Rx1 at 8. The examining physician noted mild tenderness in the left biceps and deltoid. Rx1 at 8. Petitioner was neurovascularly intact and there were no signs of a rotator cuff injury. Rx1 at 8. Petitioner had normal abduction and adduction and was able to raise his arm above his head and across his chest with a negative drop arm test. Rx1 at 8. X-rays were normal. Rx1 at 8. Petitioner was placed on restricted duty and was taking Tylenol for his pain. Rx1 at 8-9. Petitioner's diagnosis was a left upper arm strain. Rx1 at 9.

Dr. Walsh explained that a drop arm test elicits whether the rotator cuff is torn. Rx1 at 9. The arm is abducted and internally rotated as it is brought into flexion. Rx1 at 9. The arm is then resisted as the patient tries to raise his arm against the resistance. Rx1 at 9. In a positive drop arm test, the arm would drop down as you push down on it when a patient has a rotator cuff tear. Rx1 at 9. A negative drop arm test is normal and means the rotator cuff is intact. Rx1 at 9.

The significance of the findings of April 19, 2018, is that Petitioner was able to raise his arm above his head when he was first evaluated. Rx1 at 9. If Petitioner had an acute rotator cuff tear, more likely than not, he would have had difficulty raising his arm above his head. Rx1 at 9.

Dr. Freedburg ultimately recommended left shoulder arthroscopy with a distal clavicle resection, a bicipital tenodesis, a subacromial decompression, and rotator cuff repair. Rx1 at 9-10. Based upon a reasonable degree of medical and scientific certainty, Dr. Walsh opined that more likely than not, the proposed surgeries were not causally related to the injury. Rx1 at 10. His basis for the tenotomy versus tenodesis being unrelated is that Petitioner had only mild bicipital tenderness when he initially presented for treatment on April 19, 2018. Rx1 at 10-11. If Petitioner had suffered an acute bicipital tendon injury, more likely than not, his tenderness would have been more than mild when he was initially seen. Rx1 at 10. It is not likely that Petitioner developed an acute bicipital tendon injury as a result of lifting a 15-pound object. Rx1 at 11.

Dr. Walsh's basis for an open clavicle excision being unrelated is that such procedure is performed for treatment of osteoarthritis of the AC joint and the distal clavicle. Rx1 at 11. It is not likely that the single act of lifting the 15-pound object caused osteoarthritis or aggravated or accelerated it. Rx1 at 11. The osteoarthritis of the distal clavicle would be an incidental finding not causally related to the injury. Rx 1 at 11.

His basis for the rotator cuff repair being unrelated is that Petitioner was able to lift his arm above his head at the initial evaluation. Rx1 at 11-12. Petitioner had no problems lifting his arm above his head. Rx1 at 12. A rotator cuff injury was ruled out by the treating physician, who initially saw him. Rx1 at 12. The physician stated that Petitioner did not have signs of a rotator cuff injury. Rx1 at 12. When Petitioner had an MRI, at best, he had only tendonitis of his rotator cuff. Rx1 at 12. There was no evidence of a full thickness tear. Rx1 at 12. There is no need to perform a rotator cuff repair for a patient who does not have a full thickness rotator cuff tear or a significant rotator cuff tear. Rx1 at 12. There was no evidence of a high-grade tear of the rotator cuff, there was only mild supraspinatus tendinopathy. Rx1 at 12.

Dr. Freedburg performed a Neer impingement test. Rx1 at 13. Dr. Walsh explained that a Neer impingement test is a test where the subacromial space is injected with Lidocaine. Rx1 at 12-13. If it eliminates the patient's pain and discomfort, it suggests that the subacromial space is a pain generator and that a decompression in the subacromial space would be indicated. Rx1 at

13. Since there was no relief of Petitioner's symptoms following the Neer impingement test, a subacromial decompression is not likely to get rid of Petitioner's pain. Rx1 at 13. This is one basis for the subacromial decompression being unrelated to the work accident. Rx1 at 13. It is also not likely that Petitioner would develop acute impingement syndrome as a result of lifting a 15-pound or 20-pound object and Petitioner was able to lift his arm above his head when he initially presented for treatment. Rx1 at 13. There were no signs that Petitioner had acute impingement syndrome as a result of the lifting activity. Rx1 at 13.

At the time of his initial report, Dr. Walsh opined that more likely than not, Petitioner could return to work without any formal restrictions based on the injury described and the treatment thereof. Rx1 at 14. Dr. Walsh also opined that Petitioner did not require any additional care as a result of the injury. Rx1 at 14.

Following his November 1, 2018 report, Dr. Walsh was provided additional records and documents for his review. Rx1 at 14. After his review of the additional documents, Dr. Walsh's opinions were unchanged from his initial report of November 1, 2018. Rx1 at 15.

Dr. Walsh is not aware of any prior care or treatment to Petitioner's left biceps, left shoulder, neck, or any body part of Petitioner's before April 19, 2018. Rx1 at 18. Dr. Walsh agreed that he was not given any records of any medical care relating to Petitioner before April 19, 2018. Rx1 at 18. Dr. Walsh did not review pictures of the conveyor belt or Petitioner's work area as part of his records review. Rx1 at 24. Dr. Walsh knows only what was contained in the initial medical record. Rx1 at 24.

Petitioner had tenderness near the biceps tendon after the lifting episode. Rx1 at 27. Dr. Walsh testified that Petitioner probably did have mild bicipital tendonitis. Rx1 at 25. Dr. Walsh testified that "[a]ccording to the medical record, yes," Petitioner had biceps tenderness initially. Rx1 at 25. Dr. Walsh does not know if Petitioner had the pain prior to the lifting episode. Rx1 at 27. Dr. Walsh testified that he did not know what Dr. Freedburg's opinion was regarding Petitioner's pain at the present time. Rx1 at 25. The records that he had for review did not clearly indicate that Dr. Freedburg thinks the biceps tendon is the main source of Petitioner's pain. Rx1 at 25. Dr. Walsh did not see anywhere in Dr. Freedburg's records that he "actually stated the biceps tendon was the main source of the patient's pain." Rx1 at 25. Dr. Walsh did not agree that Dr. Freedburg treated the biceps. Rx1 at 22. Dr. Walsh agreed that Dr. Freedburg recommended surgery, including surgery on the biceps. Rx1 at 22. Dr. Walsh testified that he could not tell

with absolute certainty what condition the Petitioner is alleging. Rx1 at 17. He believes that the four surgical procedures recommended by Dr. Freedburg are not causally related to the accident. Rx1 at 17.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. Board of Trustees v. Industrial Commission, 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner was calm, well-mannered, composed, spoke clearly, and made normal eye contact with the Arbitrator. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003). "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. Industrial Com., 93 Ill. 2d 59, 63 (1982).

The Arbitrator finds that Petitioner established a causal connection between the work accident of April 19, 2018 and his current conditions of ill-being relating to his left upper extremity. The Arbitrator relies on the following in support of her findings: (1) Dr. Freedburg's records and testimony; (2) Petitioner's credible denial of any pre-accident problems or treatment; and (3) the fact that none of the records in evidence reflect any pre-accident treatment or problems.

Dr. Freedburg has provided Petitioner with continuous treatment for his conditions since May 9, 2018 and Petitioner has had consistent symptomology since April 19, 2018. Dr. Freedburg has consistently diagnosed Petitioner with (1) cervical radiculitis, left with degenerative disc disease, and (2) left shoulder bicipital tendinitis with partial rotator cuff tear. Dr. Freedburg testified that Petitioner's conditions and need for surgical treatment were causally related to the April 19, 2018 accident. Px5 at 91-92, 95, 117. He explained that Petitioner had a mechanism that was consistent with his neck and left upper extremity injuries. Px5 at 92.

Dr. Walsh provided Respondent with an IME report dated November 1, 2018, which was based solely on a records review. Rx1 at 7, 17. Following his records review, Dr. Walsh opined that the surgical recommendations made by Dr. Freedburg were not related to the work accident. Rx1 at 10-14; Walsh Deposition Exhibit 2 at 50. The Arbitrator notes that Dr. Walsh never saw or examined Petitioner in preparation of his report and in formulation of his opinions contained therein. Rx1 at 7, 17.

Dr. Walsh further opined that when Petitioner was initially seen, there was no evidence that he had sustained an acute rotator cuff injury because Petitioner was able to lift his arms above his head and across his chest. Rx1 at 11-12; Walsh Deposition Exhibit 2 at 50. According to Dr. Walsh, if Petitioner had sustained an acute rotator cuff injury, more likely than not, Petitioner would have had pain and difficulty raising his arm above his head or across his chest. Rx1 at 9; Walsh Deposition Exhibit 2 at 50. The Arbitrator notes that while the initial treatment record of April 19, 2018 reports that Petitioner was able to raise his arms above his head and across his chest, the same record also reports that Petitioner demonstrated full range of motion,

with pain. (emphasis added) Px2 at 15. The Arbitrator calls into question the opinions of Dr. Walsh, as they are inconsistent with Petitioner's subsequent treatment records. On April 23, 2018, the record notes pain during crossover testing. Px2 at 45. On April 30, 2018, Petitioner could raise his arms over his head 180 degrees, with pain noted. Px2 at 56. On May 7, 2018, Dr. Bakston noted pain on motion was present with movement in all axis. Px2 at 64. Moreover, upon his examination on May 9, 2018, Dr. Freedburg noted that Petitioner had limited range of motion due to pain. Px5 at 88. Dr. Freedburg further noted that Petitioner had a positive Spurling's test on the left side, as well as positive impingement signs with bicipital tenderness and a positive Speed's maneuver test. Px5 at 88.

Further, while Dr. Walsh opines that the partial tear was preexisting, consistent with Petitioner's age, and unrelated to the work accident, the record establishes that Dr. Walsh did not review treatment records for Petitioner prior to April 19, 2018. Rx1 at 18. Additionally, the Arbitrator notes that Dr. Walsh reviewed only reports of Petitioner's diagnostic imaging, and not the actual diagnostic images. Rx1 at 7, Rx2 at 50. The Arbitrator finds Dr. Freedburg's opinions in this regard more persuasive, where Dr. Freedburg reviewed the actual diagnostic images and based his diagnoses and opinions upon same. Px5 at 116. Dr. Freedburg testified that a preexisting tear would have shown muscle atrophy on MRI, but there was no muscle atrophy visualized on Petitioner's MRI to suggest that the tear was preexisting. Px5 at 108. Further, Dr. Freedburg's diagnoses and opinions were corroborated by physical examination, whereas, Dr. Walsh never physically examined Petitioner. Px5 at 92, Rx1 at 17.

Additionally, Petitioner credibly testified that he had no medical issues with either of his shoulders prior to April 19, 2018; had not treated for an orthopedic condition prior to April 19, 2018; did not have any shoulder problems prior to April 19, 2018; did not have any pain, soreness, or stiffness in either of his shoulders pre-accident; and did not suffer any other injuries since April 19, 2018. T. at 9, 22, 23. Thus, the record establishes that Petitioner was asymptomatic prior to April 19, 2018.

Based on the above, the Arbitrator finds that Petitioner has met his burden in proving that his current conditions of ill-being relating to his left upper extremity are causally related to his work injury of April 19, 2018.

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 as follows:

Consistent with the Arbitrator's finding regarding the issue of causal connection, the Arbitrator finds that the treatment Petitioner has had is reasonable, necessary, and related to the work injury of April 19, 2018. Therefore, all bills, as provided in Petitioner's Exhibit 1, are awarded and Respondent is liable for payment of these bills pursuant to the medical fee schedule.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Consistent with the Arbitrator's finding regarding the issue of causal connection, the Arbitrator also finds that Respondent is liable for the prospective medical treatment plan recommended by Dr. Freedburg.

The Arbitrator considers the opinions of Dr. Walsh, but finds that they do not outweigh the opinions of Dr. Freedburg. As such, the Arbitrator relies on the opinions and treatment recommendations of Dr. Freedburg, noting that Dr. Freedburg has continuously treated Petitioner since May 9, 2018, while Dr. Walsh has not ever examined Petitioner.

Additionally, while Dr. Walsh opines that the surgical recommendations made by Dr. Freedburg are not causally related to the work accident, the Arbitrator finds Dr. Walsh's opinions unpersuasive. Dr. Walsh opines that the surgical recommendations are not related because the Petitioner (1) did not develop impingement syndrome related to the work accident; (2) did not sustain "significant" rotator cuff pathology or a high-grade full thickness rotator cuff tear; (3) the tendinopathy and partial tear were preexisting; and (4) the MRI showed "mild" bicipital tenosynovitis. The Arbitrator notes, again, that Dr. Walsh did not review actual diagnostic images while forming his opinions. Further, Dr. Freedburg credibly testified that (1) positive impingement signs were noted upon exam on May 9, 2018; (2) Petitioner does have rotator cuff pathology as well as acromioclavicular impingement; (3) the partial tear was not preexisting and was related to or the result of the work accident; (4) the biceps tendon is the main pain generator;

(5) the biceps tendon does not image well on MRI or arthrogram; and (6) in his experience, he would most likely find a more serious issue with the biceps. Px5 at 88, 94-95, 106, 108.

Additionally, the Arbitrator notes that Petitioner credibly testified that he continues to experience symptoms. Petitioner's testimony is supported by the record of November 10, 2021, wherein Petitioner reported constant and achy neck pain and stiffness, constant and achy pain radiating from his left shoulder down his left arm, and minimum achy pain in his right shoulder. Lastly, Dr. Freedburg testified that his only treatment recommendation would be surgical intervention, since Petitioner had failed conservative treatment, which included injections and physical therapy.

As a result, the Arbitrator finds that Dr. Freedburg's treatment plan is contemplated as compensable treatment under Section 8(a) of the Act and therefore Respondent is responsible for authorizing and paying for said treatment.

Issue L, whether Petitioner is entitled to any temporary total disability benefits, the Arbitrator finds as follows:

Having found that Petitioner's current conditions of ill-being relating to his left upper extremity are causally related to his work accident, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits. At issue is the claimed temporary total disability period of March 14, 2019 to November 23, 2019. (See Arbitrator's Exhibit 1, No. 8).

Petitioner credibly testified that Respondent accommodated his restrictions through March 2019. T. at 17, 34. Petitioner explained that Respondent could no longer accommodate his restrictions because Respondent switched commodities to front-end suspensions. T. 34, 35. Petitioner's testimony was corroborated by Wicinski's testimony. T. 56-57.

Dr. Freedburg has maintained Petitioner on light duty restrictions throughout Petitioner's treatment, and those restrictions were still in place at the time of trial.

Petitioner testified that he began working as a truck driver for Laci Transport on November 24, 2019, within his restrictions. T. 8, 18, 20-21, 35, 37, 39. The Arbitrator notes, however, that on October 2, 2019, Dr. Freedburg noted that Petitioner reported that he had returned to work within his restrictions. Px3 at 228.

Based on the above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from March 14, 2019 through October 2, 2019.

Further, based on the parties' stipulation, Respondent is entitled to a credit of $2,730.00 for nonoccupational indemnity disability benefits paid by Respondent to Petitioner, to the extent it is allowed under Section 8(j) of the Act.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012279
Case Name	Michael J Kelly v. First Group, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0321
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jeffrey Alter
Respondent Attorney	Mary Sabatino

DATE FILED: 8/23/2022

/s/Carolyn Doherty, Commissioner

Signature

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

MICHAEL KELLY,
Petitioner,

vs. NO: 19 WC 12279

FIRST 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, temporary total disability, permanent partial disability, medical expenses, and average weekly wage, 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 11, 2022 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 bond requirement in Section 19(f)(2) of the Act is applicable only when "the Commission shall have entered an award for the payment of money." 820 ILCS 305/19(f)(2). As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court. 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.

August 23, 2022
o: 08/18/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012279
Case Name	KELLY, MICHAEL v. FIRST GROUP, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Jennifer Kelly
Respondent Attorney	Mary Sabatino

DATE FILED: 2/11/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 8, 2022 0.58%

/s/ Rachael Sinnen, Arbitrator

Signature

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

Michael Kelly
Employee/Petitioner

v.

First Group, Inc
Employer/Respondent

Case # **19** WC **12279**

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 **Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 25, 2021 and November 3, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 4, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**34,872.24**,; the average weekly wage was $**670.62**.

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

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

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

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

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

ORDER

The Arbitrator finds Petitioner failed to prove an accident that arose out of and in the course of his employment with respondent occurring on March 4, 2019. Accordingly, all benefits are denied.

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

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

_____ **FEBRUARY 11, 2022**

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Kelly,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC012279
First Student, Inc.	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter first proceeded to hearing on October 25, 2021 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing and was continued to November 3, 2021, at which point proofs were closed. Issues in dispute include accident, causation, average weekly wage, unpaid medical bills, temporary total disability "TTD" benefits, and nature and extent of the injury. (Arbitrator's Exhibit "Ax" 1).

TESTIMONY OF PETITIONER:

Petitioner in this case is a 58-year-old single, bus driver for First Student who alleges an injury to his right shoulder on March 4, 2019. Petitioner estimated he had been working for First Student for approximately 20 years. (Transcript "T." 9). Petitioner explained March 4, 2019 was a typical day in that drivers would start the workday by punching in, getting their keys, then walking to the bus that they were driving. (T. 13). He testified there were two bright yellow lines that the drivers would walk between on the way to the bus to begin their pre-trip inspection. (T. 13). The two yellow lines were considered to be the safety zone. (T. 13). Petitioner clarified that the walkway marked by two yellow lines was for pedestrians to walk to get into the buses, and that cars were supposed to be in a different area outside of the yellow lines. (T. 34-35). He testified his shift typically began at 6:30 a.m. Petitioner testified on March 4, 2019, that as the school buses were coming out, an SUV, which was a person's private car, was coming straight at him. (T. 14). The SUV allegedly swerved into the safety zone where he was walking. He testified, "They stepped on the gas. Their light is on inside, and they were heading right towards me as fast as possible." (T. 14-15). He testified that because the light inside the car was on, he could see the person with the cellphone in their hand, "both hands on the cell phone, kind of partially on a steering wheel, coming straight at me." (T. 15). Petitioner's testimony was that, "If I don't jump out of the way, I am dead." (T. 15).

Petitioner testified that he moved out of the way as fast as possible, but he still got hit. His

testimony was that he was struck in the right shoulder by the sideview mirror. Petitioner testified the driver of the car was Kim V. (T. 15). Petitioner's testimony was that he cried out in pain and that the vehicle kept going past him. (T. 16). Petitioner's testimony was that there were signs in the lot noting a speed limit of 5 miles per hour, but that the person driving the SUV was going "40 miles an hour or better." (T. 18). Petitioner testified the impact from the car caused him to stumble but not fall. (T. 18).

When asked if the driver had swerved to hit Petitioner on purpose, he said, "naturally you're going to suspect that." (T. 38). When asked, however, why he would suspect it and whether he knew the driver, he said, "Not really." (T. 39). Petitioner also testified he did know who the driver was before she struck him. (T. 40). Petitioner also testified he never contacted the police to report any type of assault. (T. 50).

Following this alleged impact to the right shoulder, Petitioner testified he continued on with his day and was able to complete his route for the day. (T. 20). He stated when he returned from his morning route, he experienced numbness and pain in the right shoulder. (T. 20). Petitioner testified when he returned from his morning route, he filled out a report and gave it to the person at the dispatch window. (T. 20). Petitioner's testimony was that he completed his own handwritten report in his bus, then handed it to someone, he doesn't recall whom, in the dispatch window that morning. (T. 20-21). Petitioner stated that he didn't know how to report work injuries despite having prior work injuries filed at the Commission. (T. 42-43). Petitioner testified the dispatch window did not give him an accident report, but instead that he simply took his own blank piece of paper, completed it in his bus, then turned it into the dispatch window. (T. 44).

He testified after submitting a copy of the handwritten report to dispatch, he then called Jerry [Evitts] "at home on my personal phone, my home phone." (T. 21). He acknowledged he could not recall whether he told Jerry he had completed a written report as well. (T. 22). According to Petitioner, Respondent lost this original handwritten report that he had turned into dispatch, and he was forced to complete a second report. (T. 22). Petitioner could not recall who he gave his second report to, "but I made sure that they made a copy this time." (T. 23). Petitioner stated the second report was done a couple days after he had spoken to Jerry. (T. 22). Petitioner testified he reported to Advance Rehab and Spine Center Clinic on March 7, 2019. He testified he reported right shoulder pain at that time. (T. 23-24).

Petitioner was shown Respondent's Exhibit "RX" 16, which is a handwritten statement from Petitioner that appears to have been completed on March 7, 2019. Petitioner did confirm that was his handwriting and that was not the first but the second report he completed. (T. 46). Petitioner also testified that despite the incident report being dated March 7, 2019, that he actually completed it the day following the accident on March 5, 2019. (T. 49). Petitioner acknowledged that the first line of the statement says, "Monday, March 4, woman with blonde hair driving right at me, blue SUV Chevy in bus lane." (T. 46). When asked why Petitioner wrote with "woman with blonde hair" as opposed to Kim V, having just testified that he knew exactly who was driving the car, he testified he did not know her name at the time. (T. 47). The statement also references a witness to the incident, but when asked about who this witness to the incident was, Petitioner's response was, "I never got her name, and I have not been able to find her since." (T. 47).

TESTIMONY OF CAROL CASPER:

Respondent called to the stand Carol Casper, who was the former location manager at First Student on March 4, 2019. (T. 69). Ms. Casper testified that she had since retired, as of September 1, 2021, following 36 years of service. (T. 70). Ms. Casper testified she knew Petitioner as he had been one of her drivers; she estimated she had probably known him 20 years. (T. 70). Ms. Casper also testified she knew Kim V., who had been identified as the driver of the SUV in question. She estimated she had known Kim V. for approximately 10 years. (T. 71). In Ms. Casper's job as location manager, she oversaw the operations, which means she handled human resources, the drivers' benefits, and things like the employees' work schedules. (T. 71). She testified "I was just involved in every aspect of the operation." That included overseeing personnel. (T. 71).

Ms. Casper was asked whether Petitioner's testimony that he did not know Kim V. very well was accurate. Her testimony was that that did not seem accurate as they had other dealings where they had "words with each other" and where Kim would come in and formally complain that the Petitioner had said inappropriate things to her, which upset her. (T. 72). Ms. Casper estimated that the verbal altercations between the two of them had been going on for a couple of years by March of 2019. (T. 72). When asked whether it would seem accurate that Petitioner did not even know Kim V.'s name, Carol said, "Not to me, no." (T. 72). Ms. Casper even gave examples of Kim coming to her in her capacity as the Human Resources Manager to talk to her about rude things that Petitioner had said under his breath about Kim, which had then in turn caused Ms. Casper to have to discuss Petitioner's behavior with him. (T. 73).

Ms. Casper was asked about the date of incident, March 4, 2019. Ms. Casper testified that due to how extremely cold it was on March 4, 2019, there would be a start-up crew that would come in at approximately 4 o'clock in the morning to start the buses, put the hoods up on the buses that did not start, and keep track of which vehicles were and were not running. (T. 73-74). Kim V. was part of the start-up crew that morning, and Ms. Casper testified that she asked Kim to take a company vehicle as a warm-up station also, and to be in the yard with the start-up team so that if anyone got cold they could sit in the van. Kim V.'s responsibilities were also to tell Ms. Casper which buses would not start, and she was specifically required to give Ms. Casper a call in dispatch to report on what buses were not started yet, so that the mechanics could be dispatched to fix them. (T. 74-75). Ms. Casper specifically indicated Kim V. would be required to use her cellphone to call Ms. Casper with this reporting. (T. 75).

Ms. Casper described for the Arbitrator that there are six rows of buses and that Kim V.'s responsibility would be to drive in the middle to see which buses had their hoods up, which would translate to them not starting. She indicated cars and buses would drive in the middle and that there was a safety walkway in front of each of the buses where the drivers would come out of the building and then walk in the safety walkway. (T. 117). When asked whether Kim V. could have gotten up to driving 40 miles per hour, as Petitioner had testified to, Ms. Casper responded, "I would find that very hard to believe that she could be driving 40 miles an hour in the lot. It's not really a huge lot where you can whip around, and there's a lot of people walking. I just – even

when I've driven it in my car, I just can't see where you can get yourself up to 40 miles an hour." (T. 117.)

Ms. Casper was asked to describe the events of March 4, 2019 from her perspective. Ms. Casper testified that around 6:00 or 6:30 Kim V. called in to report to her what buses were still down. In the background, she started hearing somebody yelling. And then Kim started yelling, at which point Ms. Casper told Kim to "calm down, stop yelling, and when the morning was over, and everything was set to come into my office to tell me what was going on." (T. 77). Following the buses leaving for the morning, Kim V. did come in to report to Ms. Casper that Petitioner had walked past her, yelling, and screaming, and calling her a "dumbass." (T. 77).

Ms. Casper was asked to identify Respondent's Exhibit 13, which is entitled, an Employee Recognition, Coaching, and Counseling Log. (T. 78). Ms. Casper explained that this form is used whenever there has been a dispute or violation of company policy or something that management needs to make a note of. (T. 78). Ms. Casper testified this document is kept in the regular course of ordinary business. The Arbitrator notes that the first entry is dated March 4, 2019 and the entry was made by Ms. Casper. In it, Ms. Casper recounts the events of March 4, 2019, namely that Kim V. was on her cell phone yelling at someone. When Ms. Casper asked her who, she said it was Michael Kelly because he had walked by and called her a name. Ms. Casper reported that Kim V. had come into the office to talk with her and tell her about the incident. Ms. Casper in turn advised Kim V. to put the incident in writing. (T. 79-80).

Ms. Casper also testified she had a conversation with Petitioner on March 4, 2019 following Kim's reporting of this incident. Ms. Casper asked Petitioner if he had had a confrontation with another employee, and if he had been calling her names. Petitioner's response was, "I did not talk to anybody; and if anybody says I did, they're lying." (T. 81). Ms. Casper was asked when she confronted Petitioner on March 4, 2019 whether Petitioner ever reported anything about being struck in the shoulder by Kim in her SUV. Ms. Casper answered, "No, he did not." (T. 81). Ms. Casper was also asked if Petitioner had told her he had been struck in the shoulder by Kim V., whether that would have ended up in this coaching log (RX 13); Ms. Casper testified that, yes, it would have ended up in her log. (T. 82-83).

TESTIMONY OF KIM VAN DE VANTER:

Respondent called Kim Van De Vanter (Kim V.), the driver of the SUV in question, to the stand. She testified she is a standby driver at First Student. She testified she has known Petitioner for approximately five years, and in 2019 would have known him for approximately three years, as he is a coworker. (T. 122.) Petitioner testified that prior to March 4, 2019, she had had various verbal altercations with Petitioner, where she would be sitting somewhere, and he would walk by and call her a name. She stated she had reported it a number of times to Human Resources. (T. 123.)

Kim V. described for the Arbitrator what she is required to do when she is part of the start-up crew. She testified the rows of buses are lettered from A – G with two drivers on each row. She stated she would either walk up and down the rows on foot and then return to her car to make a call to Ms. Casper about what buses were starting and which ones were not, or she would drive

slowly through the lot with her windows open to listen to see if the buses were running. (T. 124-125.) She said it would be standard for her windows to be rolled down, even in the winter, as that is how she is able to listen to see if the buses have started. (T. 126.) Kim V. testified on March 4, 2019 that she was getting finished up with the start-up crew and she was waiting for the mechanics to do a couple jumps to the buses. (T. 126.) She testified her windows were open on March 4, 2019. She stated she pulled her car over next to the big building with the mechanics shop, where there is a door on the side for the drivers go in and out of. (T. 127.) She said her car was parked and she had people walking towards her, so she could not move the car even if she wanted to.

She testified her car was in park and that is when she called Carol Casper to tell her which buses were starting and which ones were not. (T. 127.) Kim V. testified she was sitting there talking to Ms. Casper when Petitioner walked past, and he called her a name -- "Dumbass." (T. 127-128.) After he called her a name, Kim V. testified she got very frustrated because he is always calling her names and harassing her and so she said back to him, "Why don't you come back here and tell me what you said." She testified she could see him in her rearview mirror and that he kept on walking. (T. 128.) Notably, Kim V. testified that there were lots of other drivers around. When asked the crucial question of whether Kim V. hit Petitioner with her car, she answered, "No." (T. 129.) Kim V. indicated Ms. Casper told her to calm down and stop yelling and to come in later on and explain to her what had happened. (T. 130.) Kim V. testified when she finished her daily route, she went back into dispatch and then went to talk to Jerry and Carol about the whole situation.

Kim V. identified Respondent's Exhibit 14 for the Arbitrator, namely the handwritten statement that she had completed on March 4, 2019. Kim V. testified she had completed it on March 4, 2019 and turned it in the same day. (T. 131.) Kim V. testified she believed she turned her written report into Jerry because she deals with Jerry more than Carol Casper. (T. 131.) Kim V's statement indicated that she was sitting in her car with the passenger window open talking to Carol about the buses starting, Petitioner walked by and called her a name. Kim V. also testified she did not know that Petitioner had alleged she struck him with her vehicle. She learned of it later.

Kim V. testified that while she was calling Carol Casper on and off for about an hour during the start-up process, and that while some of the conversations occurred in her vehicle, none occurred while she was driving. (T. 141.) When asked about when Petitioner passed Kim V., she testified, "Honestly, I don't know if I came from the A Row, the C Row or the F Row. All I know is that I was sitting there. I didn't move. I was talking on my phone at that particular moment, sitting still, my window open." (T. 149.) Kim V. testified that once she was finished determining which buses started, she was parked at the end of Row F, near the building where mechanics are and where the drivers exit. She estimated it was approximately 6:30 a.m. with her car in park when there was a rush of drivers going to get into the buses. (T. 164.) It was at that moment when the drivers were exiting the building where her car was parked that Michael Kelly passed her with the windows open yelling at her. (T. 165.)

TESTIMONY OF GERALD EVITTS:

Respondent then called Gerald, "Jerry" Evitts to testify. Jerry testified that he is the current Location Manager at First Student. At the time of the incident on March 4, 2019, Jerry was working as the Assistant Location Manager. (T. 172.) In his role as Assistant Location Manager, he ran the day-to-day operations, watched over dispatch, payroll, and routing. (T. 173.) He testified he had known the Petitioner for many years, he estimated approximately 14 years. He estimated he had known Kim V. approximately 10 years. When asked how he first became aware of any type of incident between Michael Kelly and Kim V., Jerry testified he was in the key room handing out keys and the Petitioner came in for his key. When he was giving Petitioner his key, Carol Casper came out of her office and told the Petitioner she needed to talk to him. Jerry was asked to participate in the conversation as well. (T. 174.) This conversation took place at the beginning of the afternoon shift on March 4, 2019. (T. 175.)

Jerry identified Respondent's Exhibit 13, just as Carol Casper had, identifying the Exhibit as the Coaching Log. He testified this is completed any time there is an incident between drivers or with a driver, and things are only recorded when they are considered more serious. (T. 176.) Jerry testified he had made his own entry on March 4, 2019, contemporaneous with the incident and discussion on March 4, 2019. Jerry Evitts testified that during this conversation, Petitioner never told Carol or him that Kim V. had struck him in the shoulder with her car. (T. 178.) Jerry testified Petitioner had not contacted him separately that same day or the next day to tell him that he had been struck in the shoulder by Kim V.'s car. (T. 178.)

Jerry Evitts was asked whether Petitioner ever called him on his cellphone on March 4, 2019 to advise him of the accident of being struck in the shoulder. Jerry testified Petitioner did not tell him that, but he did call him. He believed the call took place on March 5, 2019, and still Petitioner did not mention being struck in the shoulder, but instead said that Kim V. had sworn at him. In response, Jerry advised Petitioner that he would need to come in and complete a written statement. (T. 179.) Jerry explained that the discussion he had with Petitioner on March 5, 2019 was different than the discussion he and Carol had had with Petitioner on March 4, 2019, namely that in the discussion on March 4, 2019, Petitioner never referenced that Kim V. had been yelling/swearing at him; instead, he simply denied the incident entirely. On the following day, Petitioner stated that Kim V. was, in fact, the person yelling at him. (T. 180.)

Then on March 6, 2019, Petitioner came into to see Jerry Evitts. Jerry advised Petitioner to write up the incident. According to Jerry, that was the first time Petitioner advised Jerry that Kim had struck him with her car. (T. 181.) Jerry advised Petitioner that he needed a write up of the incident so they could do a proper investigation. Jerry Evitts once again referenced RX13 and the fact that he then inputted an entry on March 5, 2019. The entry from RX13 states that Petitioner had called him and said a driver in the lot called him a name when he was passing their personal vehicle. Jerry also recorded that the driver had been on her cellphone according to Petitioner and that Jerry needed a write up of the incident. (T. 182.)

Jerry Evitts did testify that Petitioner left a written statement on his desk on March 7, 2019. (T. 185.) Jerry Evitts also identified his own handwriting on the bottom of Petitioner's written

statement from March 7, 2019 (RX16) wherein he identified the date the written statement was received by First Student. (T. 186.)

Jerry Evitts advised that once the allegation was made that Kim V. had struck Petitioner with her car, they did do a search of video of the premises but unfortunately none of the cameras were facing the direction where Kim's car had allegedly been parked. (T. 188.)

Mr. Evitts returned for the second day of hearing on November 3, 2021. Jerry Evitts testified he regularly encounters Kim V. and Petitioner during the workday, as he is the current Location Manager. (2nd T. 7.) He was asked whether following the initial hearing on October 25, 2021, he had called Kim V. into his office for a meeting. He acknowledged that he had. He was then asked whether there were any discussions about the incident on March 4, 2019, which Jerry Evitts said, "No." (2nd T. 7.) To the best of Jerry's recollection, he may have called Kim V. into his office to discuss a route; he also referenced the fact that her father had recently died and, therefore, he had been consoling her in that regard. (2nd T. 8-11).

Jerry Evitts advised the court that Kim V. had approached him following the first hearing date on October 25, 2021 to discuss the trial proceedings, and Jerry responded that they could not talk about it. In fact, he stated, "She did approach me after – the day after we had gotten back from the court hearing, and I told her we can't talk about it, just like I told Mike, because he had come to me also and started discussing things." (2nd T. 12.) Petitioner's counsel also asked Jerry Evitts whether, after the initial hearing date of October 25, 2021, he had "discovered any additional information relating to what occurred on the morning of March 4, 2019." Once again, he answered, "No." (2nd T. 12.)

Jerry Evitts was also asked whether he had a discussion with Petitioner regarding the incident of March 4, 2019. He stated he did not recall, but that Petitioner may have mentioned something, and Jerry went on to state, "But again, I tried to put out there, it's a court matter, we can't discuss anything." (2nd T. 13.)

Petitioner resumed the stand on November 3, 2021 and testified about a conversation with Jerry Evitts in the bathroom that occurred after the October 25, 2021 trial. Petitioner stated, "We were both in the bathroom and he told me clearly eye-to-eye that he knows I'm telling the truth and he knows the person Kim is not; and he knows it happened halfway there and she's lying." (2nd T. 27-28.)

MEDICAL SUMMARY:

On March 7, 2019, Petitioner was seen for the first time by a chiropractor, Ansu Durgut, at Advanced Spine and Rehab Center (Petitioner's Exhibit "PX" 1). Petitioner indicated he was injured in a work-related accident when he was walking towards his bus and an SUV hit his right arm. He continued to work that day and three days after, however, his pain progressively became worse. No bruising or any other demarcation was noted on Petitioner's right shoulder. His diagnosis at that time was pain in the right shoulder and he was recommended for pain management (PX1).

The following day, Petitioner was then seen at Midwest Anesthesia and Pain Specialists on March 8, 2019 (PX2; RX5). Petitioner gave a consistent history of being struck in the right arm by a vehicle passing him. Petitioner denied having any past medical treatment to the right shoulder. No bruising or other demarcations on Petitioner's right shoulder were noted. An MRI was ordered. (PX2; RX5).

On March 19, 2019, Petitioner underwent an MRI of the right shoulder, which noted a full-thickness tear anterolateral supraspinatus tendon measuring 10 millimeters left to right and similar dimension anterior, posterior…more posteriorly the tendon is intact. Of note, there was no significant joint effusion and minimal fluid in the subdeltoid bursa (PX2).

On April 8, 2019, Petitioner was seen for the first time by Dr. Samuel Park (PX3). This history notes the Petitioner had "swelling, bruising at the time of the injury." Dr. Park recommended right shoulder arthroscopy, rotator cuff repair, subacromial decompression, and possible biceps debridement versus tenotomy versus tenodesis (PX3).

On August 1, 2019, Petitioner did undergo an IME with Dr. Cohen; however, the doctor was unable to physically examine him given that he was four days postoperative and was in a sling. (RX1). Dr. Cohen noted that the MRI did not appear acute and that there was no significant effusion, which the doctor would have expected if indeed there had been an acute tear 15 days prior to the MRI. Dr. Cohen also highlighted the fact that there was no bruising noted in the report from Dr. Ansu Durgut on March 7, 2019, nor in an evaluation with Mr. Genco at MAPS on March 8, 2019. In fact, Mr. Genco noted that the skin showed no lesions and no rash and that the appearance of the right shoulder showed normal alignment (RX1).

Dr. Cohen then authored an addendum dated September 13, 2019 following receipt medical records from 2016 through April 2018, which documented medical treatment mostly to the cervical spine, with some right shoulder components. Those medical records are marked as Respondent's Exhibit 10 – 12. Dr. Cohen noted that initial records show that Petitioner stated he was hit by the side mirror of a car while in the history Dr. Cohen obtained, he did not know what part of the car hit him. Petitioner also gave a history to Dr. Park that the incident caused him to fall while to Dr. Cohen he denied any fall. Dr. Cohen also noted that Petitioner denied having a prior work-related incident when medical records from the year prior to Petitioner's accident document that he was treating already for a work-related injury, and in fact had undergone an IME with Dr. Phillips on July 17, 2018, less than eight months prior to the alleged incident in question.

Further, Dr. Cohen noted that medical records from Advocate in June of 2016 showed impairments in the right shoulder. Petitioner had documented limitations with strength and documented difficulties with overhead reaching with the right shoulder prior to March 4, 2019. Most notably, Dr. Cohen highlighted that the abduction and forward flexion in the right shoulder from Dr. Diadula in March of 2018 showed the exact same range of motion when Petitioner first presented to Advanced Spine and Rehab Center on March 7, 2019. Dr. Cohen outlined that in the last physical therapy record he had from Concentra dated April 25, 2018, it was noted that Petitioner's right shoulder symptoms continued and that he continued to have limitations with shoulder range of motion, overhead, as well as left cervical spine rotation secondary to radicular pain with motion (RX2).

Dr. Cohen concluded that Mr. Kelly's current condition was not related to the March 4, 2019 incident based on inconsistency of the records, Petitioner's history, lack of significant MRI findings, as well as the findings at the time of surgery that showed a bursal-sided partial-thickness tear without acute changes." (RX2.)

On February 12, 2020, Petitioner followed up with Dr. Durgut where it was noted he had been back at full duty without any significant difficulties or pain. He was to see Dr. Park that week and hoped to be discharged (PX1). At this visit, it was noted, "Patient states he no longer experiences a significant increase in pain with ADL, house chores, or work tasks. He also notes he is sleeping much better." (RX1.)

On February 17, 2020, Petitioner saw Dr. Park for the final time where he was released from care. It was noted that he had returned to work without difficulty (RX3).

DEPOSITION TESTIMONY OF DR. COHEN:

On February 4, 2021, both parties took the deposition of Dr. James Cohen. Dr. Cohen testified that he was now a retired orthopedist but was a practicing orthopedist at the time of the IME in this case. At the beginning of 2020, he retired from active practice. When Dr. Cohen undertook the IME in this case, he was a practicing member at Midwest Orthopedics – Illinois Bone and Joint Institute. He was also a clinical professor at the University of Illinois and a chief section of orthopedics at Weiss Memorial Hospital. Dr. Cohen had also been a board-certified orthopedic surgeon for over 30 years. He testified that he primarily operated on the shoulder, hip and knee (RX3, p.6).

Dr. Cohen walked us through his review of Dr. Durgut's records, which began on March 7, 2019. He noted that Petitioner's right shoulder range of motion on that day was 90 degrees of abduction and 90 degrees of forward flexion, with 50 degrees of extension. His comment was that this is a very limited shoulder range of motion. Dr. Cohen outlined that the note from March 7, 2019 was interesting in that Dr. Durgut specifically noted that there was "no swelling or ecchymosis." (RX3, p.14-15.) Dr. Cohen explained that ecchymosis means black and blue or bruising. He noted this was interesting in that it was only three days after the alleged incident of March 4, 2019 (RX3, p. 15). Dr. Cohen felt that was noteworthy in that Petitioner had told him he had bruising after the incident, which was inconsistent with the first medical record following the date of accident (RX3, p. 15). Dr. Cohen was specifically asked, "If Mr. Kelly was struck in the shoulder with enough force to warrant shoulder surgery, would you have expected there would be some type of swelling of ecchymosis three days after the accident?" Dr. Cohen responded, "With this type of injury, yes." (RX3, p. 16.)

Dr. Cohen also testified he had an opportunity to review the actual MRI imaging studies from March 19, 2019, which did not show any fluid. He testified this was important because this suggested there was no acute injury to the shoulder (RX3, p. 17-18). Dr. Cohen explained that if someone was struck in the shoulder, as Petitioner described, severe enough to cause or aggravate a rotator cuff tear, that you would not only expect to see bone bruising but also some significant

fluid in the glenohumeral joint and the subacromial bursa—none of which was seen here. (RX3, p. 18.)

In regard to the addendum report that Dr. Cohen authored, he indicated that he had discussed the Concentra Medical Center records because he felt it was relevant, as Petitioner had denied ever having a work-related injury and with the Concentra records, it was evident that Petitioner had been seen there multiple times less than one year prior to the alleged incident on March 4, 2019. (RX3, p. 22.) Therefore, Dr. Cohen felt Petitioner's credibility was at issue. Additionally, the range of motion that was captured by Dr. Diadula in March of 2018 was identical to the range of motion that was captured by Dr. Durgut in March of 2019. In other words, the limited range of motion petitioner had pre-accident was the same as he had post-accident. (RX3, p. 23.)

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds the testimony of Kim V., Ms. Casper, and Mr. Evitts to be more credible than the testimony of Petitioner. The Arbitrator does not find that an accident even occurred not only based on the testimony of Respondent's witnesses but on the medical evidence as well. The Arbitrator relies on Dr. Cohen's testimony pointing out that no swelling or ecchymosis was noted by Dr. Durgut on March 7, 2019 and Petitioner's limited range of motion in his shoulder was similar to his exam findings in March of 2018. Further Dr. Cohen noted that Petitioner's March 19, 2019 MRI was inconsistent with the mechanism of injury as the MRI did not show any bone bruising or significant fluid in the glenohumeral joint and the subacromial bursa. As a result, the Arbitrator finds that Petitioner has failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

As the Arbitrator has found that Petitioner failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment, all other issues are rendered moot.

Issue G, Petitioner's earnings, the Arbitrator finds as follows:

As the Arbitrator has found that Petitioner failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment, all other issues are rendered moot.

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 as follows:

As the Arbitrator has found that Petitioner failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment, all other issues are rendered moot. As a result, no medical benefits will be awarded to Petitioner.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

As the Arbitrator has found that Petitioner failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment, all other issues are rendered moot. As a result, no TTD benefits will be awarded to Petitioner.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

As the Arbitrator has found that Petitioner failed to meet his burden in proving that the alleged accident arose out of and in the course of his employment, all other issues are rendered moot. As a result, no permanent partial disability benefits will be awarded to Petitioner.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006825
Case Name	Jerry Hunt v. Village of University Park
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0322
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Joseph P. Brancky
Respondent Attorney	John Fassola

DATE FILED: 8/23/2022

/s/Carolyn Doherty, Commissioner

Signature

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

JERRY HUNT,

Petitioner,

vs. NO: 21 WC 6825

VILLAGE OF UNIVERSITY PARK,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 19, 2022 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.

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 23, 2022
o: 08/18/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006825
Case Name	HUNT,JERRY v. VILLAGE OF UNIVERSITY PARK
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Joseph P. Brancky
Respondent Attorney	John Fassola

DATE FILED: 1/19/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 19, 2022 0.37%

/s/ Paul Cellini, Arbitrator

Signature

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

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

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

JERRY HUNT
Employee/Petitioner

v.

VILLAGE OF UNIVERSITY PARK
Employer/Respondent

Case # **21** WC **06825**

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 **Kankakee**, on **November 19, 2021**. 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, **October 22, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**58,094.40**; the average weekly wage was $**1,117.40**.

On the date of accident, Petitioner was **63** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

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

ORDER

The Arbitrator finds that the Petitioner's cervical spine condition and his right leg radiating pain and numbness are causally related to the October 22, 2020 accident.

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Exhibits 2, 4, 6, 7 and 9, as provided in Sections 8(a) and 8.2 of the Act.

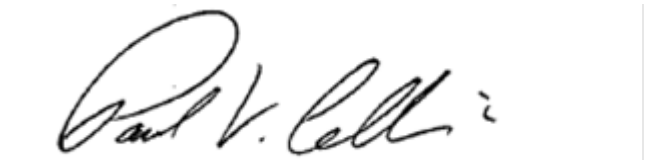
Respondent shall be given a credit for any and all awarded medical expenses that have been paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j)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

Respondent shall authorize the cervical surgery recommended by Dr. Singh.

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

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

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



Signature of Arbitrator

JANUARY 19, 2022

STATEMENT OF FACTS

Petitioner, an eight year employee of Respondent's Public Works department, testified that he works as a maintenance tech, performing manual work on the village's electrical system. This includes the use of assorted hand tools and a boom truck. He travels to work at locations throughout the village in work vehicles. He is a union member (AFSCME) and his normal work hours are 7 a.m. to 3:30 p.m. Petitioner is paid hourly, working 40 hours per week, earning $27.93 per hour. On 10/22/20, Petitioner testified that he was working on a repair of streetlights. He was operating a boom truck vehicle that the Respondent had rented. It was about 15' long and 8' high. He was positioned in a cage at the end of the boom arm at the back of the truck, with the boom arm lowered while he was driving the vehicle. With the arm down, Petitioner estimated the cage was about two feet above ground level. He testified this truck could only go about 2 to 3 miles per hour and was operated using two joysticks inside of the cage. Around 1 p.m., Petitioner was on Sandra Street going west with two other public works trucks following him to keep traffic away from his vehicle. An SUV came around the trucks on the left and hit the left side of the cage Petitioner was in, throwing him back and then forwards. He testified his chest hit the cage in the front and when he went back it snapped his neck back. It felt like lightening shot through his body. He testified he had pain in the neck/upper back into the right shoulder and down the right arm to his fingers, as well as some right thigh pain.

The SUV driver left the scene, police were called, and a police report was completed, all of which the Petitioner believed took about an hour. Petitioner believed his co-workers saw the accident. He reported it to his supervisor, Donnie Brown. Petitioner indicated he would finish that day's job, testifying he initially believed the pain would improve. He worked about 30 minutes more with ongoing pain, testifying he felt like he still had a shock down his arm. His back had numbness and a dull pain, but "I just stuck it out." He drove the vehicle back to Respondent's facility and left work at his regular time. He testified his condition worsened after he went home.

The police report indicates Petitioner reported that while he was operating the lift truck with two other city vehicles behind him. He had to slow down to pass parked vehicles when a vehicle did not want to wait and tried to pass, striking the lift truck, causing damage to that vehicle's passenger mirror. The officer noted no damage to the lift truck and Petitioner stated he did not need medical attention. Given there was only damage to the offending vehicle, no further action was taken. (Rx2).

Petitioner completed an incident report with supervisor Brown, he believed on 10/23/20. The secretary gave him the paperwork and he was sent by Respondent to Ingalls Occupational Health for evaluation. There, Petitioner reported that around noon on 10/22/20 he was driving a lift and was hit on the left side of the cage: "Pt states he was thrown a little." Petitioner's primary problem was a mid-back strain with moderate sharp pain radiating down the right arm to the hand and into the neck region. A more detailed history was indicated as well: "…another vehicle going around 20 mph ran into his work truck with him another employee [sic] present. He

tried to brace for the impact by grabbing hold of the cage in the truck and that is when he sustained the back strain injury." Diagnosis was strain of muscle and tendon of back wall of thorax and conservative treatment and work restrictions were recommended. The note indicates the condition is related to the work activities. There is a 10/23/20 telephone record indicating that Darrel Byther authorized treatment for Petitioner's injury. (Px1). Petitioner testified he was advised he had deep bruising.

Petitioner returned to Ingalls on 10/27/20. The report indicates Petitioner indicated "he is having a dull ache but was doing fine to be released to full duty." A history of cervical decompression surgery for right arm symptoms was noted. Petitioner had the same ongoing complaints he had before but felt he was improving, noting a pain level of 2 out of 10 (2/10). He reported a popping sensation in the neck since the accident. Cervical x-rays possible stenosis at multiple levels with no acute fractures. The x-ray order form notes a diagnosis of thoracic strain and states: "Hx of cervical spine surgery and pain in right arm has returned since MVC." Petitioner was again given work restrictions and prescribed hand exercises. It was noted that Petitioner had an unrelated procedure taking place the following week. If he was not improved within a week the plan was to refer him to a spine specialist or to physical therapy. (Px1). Petitioner testified the Respondent accommodated the light duty restrictions, and he basically performed his regular job with a co-worker in his truck who "did the heavy lifting, so to speak."

On 11/4/20 at Ingalls, the report looks very similar to the prior report, but notes Petitioner reported a dull ache in his back with no concerns. His pain was noted to be at a 0/10 level with mild numbness in his 1st through 3rd right fingertips. Petitioner was released to full duty and a one week follow up was planned. Petitioner testified that he developed increased pain when he returned to full duty work. On 11/11/20, he reported aching pain in his back and a feeling of numbness radiating to his right hand. His pain level was again noted as 0 while it was also noted that he continued to have pain and right hand stiffness. Petitioner indicated he had canceled his other procedure to attend to this problem. The "Discharge Pain Level" is listed as 5/10. The note states both that Petitioner could return to restricted duty and that his recommended status was full duty, while the Work Status note reflects restricted work duties. Two weeks of physical therapy was prescribed. (Px1).

The initial therapy examination of 11/12/20 reports: "Patient stating that on 10/22/20 he was slightly hit and shaken while he was on a lift cage at work, at first he did not have any pain but the next day felt excruciating pain (10/10), cannot grip, dropping object and a lot of 'popping' at his neck went and saw company MD." Petitioner reported that when he went back to work he still felt tightness in his right mid back close to the shoulder blade and right upper traps." (Px1).

On 12/8/20, Petitioner was noted to have cervical pain that ranged from 4/10 to 8/10 with activity. He did indicate improvement with therapy. Petitioner reported that he was going to be off work for the unrelated procedure from 12/8/20 to 1/4/21. Work restrictions and therapy were continued, which Petitioner testified were again accommodated. (Px1).

On 1/27/21 at Ingalls, Petitioner complained of numbness and radiating pain from the right side of his neck to the right hand. He indicated only temporary improvement with therapy, and he felt he was worsening. The report states: He developed right hand then right leg weakness in December 2020 to the point he now limps occasionally and drops his tools on occasion at work due to weakened grasp." A cervical MRI was ordered, Petitioner was referred to a spine specialist, restrictions were continued and Voltaren gel was prescribed. The referral order form notes a diagnosis of cervical stenosis with right arm radiculopathy and right leg weakness." At a 2/3/21 follow up, Petitioner complained of numbness radiating to the right leg and calf. The report states Petitioner had cervical surgery 15 years prior and no further issues with it since until this injury. He "has been having tingling on his right thigh and calf at times and states he has been limping since early December 2020

and has to watch kick off his foot on his heel. He had surgery on his right knee 3 years ago and saw his ortho for an injection in the knee in December 2020." The cervical MRI had not yet been approved. Physician's assistant Patel stated: "Petitioner's complaint of (right lower extremity) pain, tingling and weakness does not appear to be related to his work injury and likely stemming from his ongoing knee pain for which he has seen his personal ortho for in December. He has been compromising the way he walks and shifting his weight due to pain. He denies any low back pain and did not hurt his hip during the injury." (Px1).

The 2/11/21 cervical MRI impression was moderate to severe degenerative changes in the mid cervical spine most notable at C3/4, C4/5 and C5/6 with areas of cord signal hyperintensity at C3/4 and C4/5. Foraminal stenosis was noted at multiple levels from C2 to C6, right greater than left. Petitioner returned to Ingalls Occupational one last time on 2/17/21. PA Patel noted the MRI findings and that Petitioner's symptoms were unchanged. His surgical referral had not yet been approved. Prednisone was prescribed and restrictions were continued. (Px1).

Petitioner testified he felt weak on his right side and felt dizziness on 2/24/21, so he went to the St. James Hospital ER. A lumbar CT was performed, noting low back pain with radiation, but also: "prior surgery, new symptoms" and that there were complaints of lateral right thigh and calf numbness referencing an October 2020 motor vehicle accident. The findings reflected no evidence of traumatic fracture or subluxation and moderate degenerative changes: moderate multilevel degenerative disc disease and facet arthropathy, most pronounced at L5/S1, and posterior disc bulges from L3 to S1. (Px5). Petitioner testified the only thing he knew was he had the thigh issue with numbness and had neck issues going down the arm. He also testified that he believed he returned to work but could not recall exactly when that was.

Petitioner ultimately saw orthopedic surgeon Dr. Kusuma on 3/11/21. The "Outpatient Encounter" states that Petitioner presented with neck pain starting October 2020 following a motor vehicle accident: "His c/o pain in his neck that radiated down the right arm with (numbness/tingling). He has tried PT for this and states that it did not provide any pain relief." Petitioner reported the pain was worse with bending/neck movement at an 8/10 level with radiculopathy. Dr. Kusama's review of the cervical MRI indicated C4/5 fusion and severe spinal stenosis at C2 to C4 with myelomalacia. Both conservative measures and surgery (C3/4 anterior cervical decompression and fusion with possible decompressive laminectomy and posterior fusion) were discussed. Petitioner opted to continue conservative treatment at that time, to include therapy, medication, and possible injections. Cervical CT scan was ordered, and Petitioner was advised to follow up on 3/25/21. (Px3).

Petitioner next sought treatment with orthopedic surgeon Dr. Singh on 4/20/21. He reported he was driving a construction cart covered by a cage when another employee rear-ended his cart with another cart. He was not wearing a seatbelt and declined an ambulance. He complained of neck and low back pain, with the neck pain radiating into the right arm and the 1st and 3rd digits of the right hand with numbness and tingling. The low back pain went into the right thigh. He reported subjective right arm weakness and gait disturbances. Following exam, Dr. Singh diagnosed: 1) status post-cervical posterior laminectomy, 2) cervical muscular strain and 3) lumbar muscular strain. He recommended cervical and lumbar MRIs and off work status. (Px7).

The Arbitrator notes that in Dr. Singh's intake documentation, Petitioner's complaints were of numbness on the right side, neck, shoulder, arm, upper back, and outer thigh. Nothing is specifically noted about low back complaints. The Arbitrator also notes that only a lumbar MRI was indicted on the order form, with no reference to a cervical MRI. (Px7).

On 5/5/21, Petitioner returned to Dr. Singh, who now was reporting a history of neck and bilateral upper extremity dysesthesias after Petitioner's cart was rear-ended at work and "he immediately neck [sic] with right

greater than left upper extremity dysesthesias. His pain was at an 8 to 9/10 level. Petitioner noted significant arm pain with bilateral hand weakness and occasional right radiating leg pain with weakness and numbness into the foot. He reported dropping things and fine motor function problems, weakness with overhead reaching and pain with sitting and sleep. Dr. Singh reviewed the 2/11/21 cervical MRI, as well as 5/5/21 cervical x-rays. It appears he had a lumbar MRI performed that day which showed a lumbarized S1 level. Additionally: 1) minimal lumbar levoscoliosis with minimal retrolisthesis of L3, multilevel degenerative disc/endplate changes, particularly at L3/4 and L5/S1, and multilevel facet arthropathy that was moderate to severe at L5/S1; 2) mild canal stenosis at L3/4 with no high grade narrowing at any other level, severe bilateral foraminal stenosis, moderate at L3/4, with no critical foraminal narrowing at other levels. Dr. Singh diagnosed cervical myelopathy secondary to cervical stenosis from C2 to C7, degenerative lumbar spondylosis, status post cervical laminectomy 20 years prior. The doctor recommended a C2 dome laminectomy surgery and C3 to C7 laminoplasty with instrumentation. He noted Petitioner had hyperreflexia in all extremities with positive Hoffman's and inverted brachioradialis sign consistent with myelopathy. He failed PT and NSAIDs. His cervical MRI confirmed C2 through C7 cervical spinal stenosis with cord changes at C3/4 consistent with myelomalacia. It was discussed that if the planned surgery failed to resolve the pain, a C2 to C5 posterior fusion secondary to prior laminectomy could be needed. Potential complications were discussed which included C5 nerve palsy and intractable axial neck pain "requiring a conversion of the posterior spinal fusion." Petitioner was to be off work. (Px7).

On 6/9/21, Petitioner was examined pursuant to Section 12 of the Act by orthopedic surgeon Dr. Wehner at the Respondent's request, and the doctor issued a 6/29/21 report. Dr. Wehner noted Petitioner's initial history at Ingalls of being "thrown a little" and the description of middle, back and neck pain radiating to the right hand. She also noted that by 10/27/20, he was reporting a dull ache (2/10 pain) but felt well enough to be released to full duty. She also noted that on 11/4/20, Petitioner reported a 0/10 pain level and he was allowed to continue working regular duty. Dr. Wehner noted there were no neurological symptoms at that time, and it would have neem anticipated that neurological symptoms would have been evident if sustained acutely in an accident. Dr. Wehner felt that Petitioner's mechanism of injury would not be associated with a substantial injury pattern. She opined that Petitioner's initial course of medical treatment was not consistent with a condition requiring spinal surgery. She noted that Dr. Singh was provided a history that Petitioner was rear-ended and had immediate neck pain rated as 8 to 9 out of 10. It was Dr. Wehner's opinion that Petitioner had a pre-existing degenerative condition of the cervical spine, and his complaints were not related to his work accident. She believed Petitioner was at maximum medical improvement (MMI) for the work incident and was capable of returning to his full duty work. (Rx1).

In a separate narrative-type report of 8/3/21, addressed to Petitioner's counsel, Dr. Singh noted Petitioner had undergone a prior cervical decompression and fusion 15 years before. Dr. Singh reviewed the prior cervical MRI and lumbar CT scans and reviewed Petitioner's medical records. He diagnosed cervical myelopathy secondary to cervical spine stenosis from C2 to C7, status post-cervical laminectomy. He opined that Petitioner sustained an aggravation of a preexisting cervical spondylosis condition on 10/22/20: "This opinion is supported by the patient's having bilateral upper extremity weakness, as well as hyperreflexia, consistent with his imaging findings of C2 to C7 cervical spinal stenosis with myelopathy. His prior surgical intervention was years before and he had no symptoms in proximity to the date of injury in question." He recommended a C2 dome laminectomy and a C3 to C7 laminoplasty with instrumentation which he opined was related to the 10/22/20 accident. Pending same, he opined that the Petitioner should remain off work. (Px7). Petitioner testified he went off work after this.

Petitioner testified that following his visit to Dr. Wehner, the recommended surgery was not approved. The Respondent paid him his regular salary while he was off work for this injury. He testified that wants to undergo the recommended surgery. Petitioner testified that Respondent asked him to return to work following his

evaluation with Dr. Wehner, which he did, testifying: "They told me to go back to my regular duties. It's been difficult."

As to his prior cervical surgery, Petitioner testified he previously injured his neck about 19 years ago and underwent surgery involving bone removal from the nerve. He testified he was not given any work restrictions when he was released, hasn't had any ongoing problems, and hadn't seen a doctor for his cervical spine since his post-surgical release. Prior to the 10/22/20 accident, he testified his neck and back felt great and he had no pain or problems in his right leg, arm, or hand. Currently, he has ongoing neck pain and numbness in the right arm and leg. He has constant pain on the right side of his body and weakness. He has numbness going through the right shoulder to the elbow to the thumb, index, and middle fingers of the right hand. At work, holding tools, climbing, and digging trenches for wires are all difficult. He reports his right thigh has intense numbness these days, a little bit in the calf as well. Petitioner feels he has worsened since the accident, noting he has started to get popping in his neck that sometimes gives a feeling of a "shock" down the right arm to his hand. This occurs when he first gets out of bed and turns his neck. As to his continuing to work full duty with such symptoms, he testified: "I have to survive" and work through the pain.

On cross-examination, Petitioner reiterated that the boom truck he was in wasn't a normal "truck" and does not go over 3 miles per hour. He agreed that the cage is pretty sturdy and that the accident involved the SUV sideswiping the cage after Petitioner's vehicle had come to a complete stop. As to any damage to the SUV, Petitioner testified that he could tell from a distance that the mirror had been knocked off. Petitioner acknowledged no damage to the cage and that he continued to operate the vehicle to complete his work that day. The police asked if he was okay and he told them he was but had neck pain that went down his arm with a lightening shock feeling down the arm. He did not say anything about his leg. He agreed he declined an ambulance, again testifying he hoped the pain would subside. He was aware that the police ultimately spoke to the SUV driver but was not aware of what was discussed. He was told the driver was not ticketed because there was no damage to Petitioner's vehicle. Petitioner wasn't certain if Public Works director Darrel Byther came to the accident scene or not. He believed that Donnie Brown, the foreman, asked if he wanted treatment and Petitioner declined, hoping the pain would subside. Other than driving the boom truck, he testified that he didn't believe the total amount of work he performed after being injured lasted longer than 30 minutes.

Petitioner did not recall rating his pain on 10/27/20 as 2 out of 10 (2/10), though he recalled being asked to rate his pain, and he denied rating his pain at 0/10 on 11/4/20, chuckling about this when asked. He agreed he was released to full duty on 11/4/20. As to whether he stated, as indicated in his 11/12/20 therapy report, that "at first he didn't have any pain, but the next day felt excruciating pain", he testified: "I told them I had dull pain and I didn't go to the doctor that day, but had to go the following day." As to how his neck was related to his thigh complaints, he testified that he was told the thigh is connected to the lumbar nerves. To his recall, all Petitioner told Dr. Singh on 4/20/21 was that he got hit, so he didn't know how it was recorded that he had been rear-ended. He testified he told Singh he had pain after the initial impact in his neck, upper back and arm to his fingers and had some leg numbness. He has not seen a doctor since his 5/5/21 visit with Dr. Singh, testifying that the doctor's only prescription was surgery, not medication or further therapy.

Mr. Byther, Respondent's director of public works since September 2018, testified that he was made aware of Petitioner's accident and went to the scene himself within minutes. He acknowledged the machine Petitioner was on was rented, and that the cage Petitioner was pretty sturdy in order to protect the worker. Mr. Byther testified he spoke to Petitioner at the scene and asked how he was, and Petitioner said he was fine. Mr. Byther said that Petitioner didn't describe to him any of the symptoms he testified about. He advised Petitioner he should see a doctor, but that he declined and said he was fine. Mr. Byther testified he saw no external damage to the boom truck cage and that it was returned to the rental company with no indication that damage had been

found which Respondent would have had to pay for. The first time he learned Petitioner was having pain was the next day. Mr. Byther confirmed that Petitioner is currently working full duty. He testified he does interact with him regularly, and Petitioner has not reported any difficulties with work, he hasn't observed Petitioner having difficulty or having to rely on his co-workers at job sites, and none of Petitioner's co-workers has indicated to him that Petitioner was having problems doing his job.

On cross-examination, Mr. Byther agreed he has no expertise in the boom truck Petitioner was using and only looked on the outside for external damage. The next day the Petitioner did report he wasn't feeling good and was going to see the doctor. Mr. Byther denied telling Petitioner to go to Ingalls Occupational Health as he indicated on 10/22/20 that he was okay and didn't need treatment. He testified this "took it out of my hands" and Petitioner sought treatment with his own doctor, though he acknowledged that normal procedure would have been to send Petitioner for a medical evaluation on 10/22/20 and that Respondent normally sends injured workers to Ingalls Occupational Health. Mr. Byther also agreed that most of Petitioner's job is done outside of his presence but indicated he would observe him when he would go out to Petitioner's job sites. As to how often this would occur, he testified it varied.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner's current cervical condition, and the symptoms resulting therefrom, are causally related to the 10/22/20 accident.

The Petitioner's testimony regarding being struck by the SUV while in the machine is consistent with the initial medical records. He was not belted in the machine. He testified that the impact threw him forward and back. Petitioner's initial complaint to medical personnel was a mid-back strain with moderate sharp pain radiating down the right arm to the hand and into the neck region. The impact was significant enough that it knocked the mirror off of the SUV. The 10/27/20 Ingalls report notes Petitioner had a history of cervical surgery and that pain in his right arm had returned since the accident date. While an 11/4/20 report indicates 0/10 pain, an 11/11/20 report, following Petitioner's return to full duty, notes a 5/10 pain level. The initial therapy examination of 11/12/20 reports: "Patient stating that on 10/22/20 he was slightly hit and shaken while he was on a lift cage at work, at first he did not have any pain but the next day felt excruciating pain (10/10), cannot grip, dropping object and a lot of 'popping' at his neck went and saw company MD." On 2/3/21, Physician's assistant Patel stated: "Petitioner's complaint of (right lower extremity) pain, tingling and weakness does not appear to be related to his work injury and likely stemming from his ongoing knee pain for which he has seen his personal ortho for in December. He has been compromising the way he walks and shifting his weight due to pain. He denies any low back pain and did not hurt his hip during the injury

Mr. Byther denied referring Petitioner to Ingalls Occupational Health, and that Petitioner's indication on the accident date that he didn't need treatment "took it out of my hands" and Petitioner sought treatment with his own doctor. However, not only did he acknowledge that Respondent's procedure would have been to send an employee who alleges injury to Ingalls Occupational Health, documentation from that facility indicates that Mr. Byther approved Petitioner's treatment there on 10/23/20.

Respondent's argument to a large degree is that the impact of the SUV to the rented boom truck cage was minimal and could not have caused the Petitioner's current condition and need for treatment. In support of this,

Respondent noted that there was no damage to the boom truck, and that Petitioner indicated in his initial visit to Ingalls that he was thrown "a little" inside the cage. Dr. Wehner also noted this history in providing her opinion. The Arbitrator believes that this information in and of itself does not indicate that the Petitioner did not sustain injury on the accident date. The Petitioner indicated that the SUV that struck him was going 20 miles per hour. While this may not have been the exact speed, given Petitioner did not testify he had a speed camera, it was enough to result in the impact knocking the passenger side mirror off of the SUV. The Petitioner was not belted inside of the cage and testified was essentially not moving at the time he was struck. However, the level of being "thrown" is described, it would still appear to be a competent cause of a neck injury. While he may not have indicated to police that he needed treatment at the time of the accident, he credibly testified that he worsened after he went home and promptly reported this to Respondent the next day, when he was sent to Ingalls.

Overall, the Arbitrator found the Petitioner's testimony to be credible. There may have been a level of exaggeration of the impact of the accident in Petitioner's testimony versus the histories contained in the medical records. Additionally, Dr. Singh's indication that Petitioner initially had bilateral upper extremity complaints, right greater than left, does not jibe with either Petitioner's testimony or the medical records in evidence. However, the evidence supports the Petitioner having a significant cervical condition that is resulting in symptoms that have been going down his arm since the accident occurred. For the reasons noted above, the Arbitrator finds that the causation opinions provided in this case by Ingalls and Dr. Singh outweigh the opinion of Dr. Wehner as to the cervical spine injury.

Our courts have held that a claimant can support a causation argument by proving a "chain of events", which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 442 N.E. 2d 908 (1982). Petitioner had a previous surgery to the cervical spine, which appears to have been a multilevel laminectomy and possibly a one level fusion. However, this took place 15 to 20 years ago, and the Petitioner testified that he had no cervical problems since his post-surgical released and prior to the work accident he had no neck or back pain and full function. No evidence was presented to rebut this, and the Petitioner appears to have performed a fairly physical job at the times he was making electrical repairs. He suffered an acute injury with complaints of initial pain that he hoped would go away and a significant increase in symptoms the next morning.

The seminal case involving a significant preexisting condition and what needs to be shown regarding causation is *Sisbro, Inc. v Industrial Comm'n*, 797 N.E.2d 665, 207 Ill.2d 193, 278 Ill.Dec. 70 (2003). Initially, the Supreme Court noted that recovery depends 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. Noting that the employer takes the employee as it finds him, the court went on to state that: "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. 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." Of key importance in this decision is the fact that an employee need only show that an accident was "a" causative factor, as opposed to the primary or most significant factor ("Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being."). The Court went on to state: "*National Malleable* and *Illinois Bell* do not stand for the proposition that where a causal connection between work and injury has been established, it can be negated simply because the injury might also have occurred as a result of some "normal daily activity." Rather, these cases demonstrate that whether "any normal daily activity is an overexertion" or whether "the activity engaged in presented risks no greater than those to which the general public is exposed" are matters to be considered

when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance. We have never found a causal connection to exist between work and injury and then, in a further analytical step, denied recovery based on a "normal daily activity exception" or a "greater risk exception." *Id.*

In this case, the language of *Sisbro* and the chain of events analysis support compensability. The Petitioner does have a significant preexisting cervical condition, including post-surgical degeneration. However, the surgery took place at least 15 years prior to the accident, there is no evidence the Petitioner had the symptoms he ultimately complained of prior to 10/22/20, and he has since had essentially the same complaints – pain and numbness in the right side of his body. The Arbitrator believes that the clear weight of the evidence in this case supports the finding that Petitioner's cervical condition of ill-being, and the surgical recommendation, are causally related to the 10/22/20 accident.

There is an issue with regard to what is causing the Petitioner's right thigh and leg symptoms. The Arbitrator notes that Dr. Singh has diagnosed a myelopathy, which involves a level of cord compression. Such a compression could potentially result in leg symptoms. The Arbitrator finds that the Petitioner's right leg symptoms, based on the consistency of complaints since the accident date, are related to the 10/22/20 accident. It is unclear at this point if these symptoms are due to the cervical or lumbar spine. The Arbitrator further finds, however, that if these leg symptoms are ultimately related to the right knee, the Petitioner has failed to prove that any right knee condition is causally related to the accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings, above, regarding causation and a stipulated 10/22/20 accident, Respondent is liable for the medical expenses contained in Petitioner's Exhibits 2, 4, 6, 7 and 9, pursuant to Sections 8(a) and 8.2 (Fee Schedule) of the Act. Additionally, the parties have stipulated that Respondent is entitled to credit for all awarded expenses that were paid by Respondent prior to the hearing date, whether via workers compensation' or group health coverage under Section 8(j) of the Act, so long as the Respondent holds the Petitioner harmless with regard to same.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds the opinions of Drs. Kusuma and Singh to be more persuasive than that of Dr. Wehner and finds Mr. Hunt is entitled to prospective medical care in the form of a C2 dome laminectomy and C3-C7 laminoplasty with instrumentation, with a potential C2-5 posterior cervical fusion. Respondent shall authorize same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017509
Case Name	Don L Hardin III v. Gordon Food Services
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0323
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Olivero
Respondent Attorney	Elaine Newquist

DATE FILED: 8/23/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DON L. HARDIN, III,

Petitioner,

vs. NO: 19 WC 17509

GORDON FOOD SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 28, 2022 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 $6,800.00. 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.

August 23, 2022
o: 08/18/22
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017509
Case Name	HARDIN III, DON L v. GORDON FOOD SERVICES
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	David Olivero
Respondent Attorney	Elaine Newquist

DATE FILED: 2/28/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 23, 2022 0.71%

/s/ Paul Cellini, Arbitrator

Signature

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

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

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

DON L. HARDIN, III
Employee/Petitioner

v.

GORDON FOOD SERVICES
Employer/Respondent

Case # **19** WC **17509**

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 **Joliet**, on **December 15, 2021**. 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 **Two Doctor Rule**

FINDINGS

On the date of accident, **December 3, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $**84,400.16**; the average weekly wage was $**1,623.08**.

On the date of accident, Petitioner was **48** 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 is entitled to a credit for any paid medical expenses under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injury to his left wrist which arose out or and in the course of his employment with Respondent on December 3, 2018.

The Arbitrator finds that the Petitioner's left wrist Kienbock's disease was either caused or aggravated/ accelerated by the December 3, 2018 work accident.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibits 8 through 13, as provided in Sections 8(a) and 8.2 of the Act. Respondent also shall reimburse Petitioner for any out-of-pocket payments made by Petitioner in relation to these medical expenses.

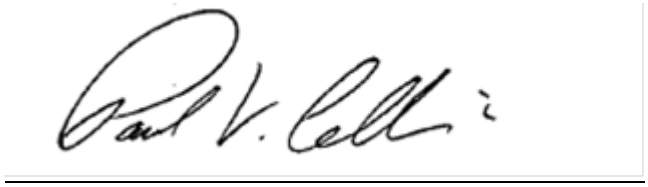
Respondent shall be given a credit for any and all medical expenses that have been paid by Respondent prior to hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize the surgery recommended by Dr. Fernandez pursuant to 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

FEBRUARY 28, 2022

ICArbDec19(b)

STATEMENT OF FACTS

Petitioner worked for Respondent as a sales service driver for 7 years until June 2015, when he moved into a transit driver position, his current position. While service drivers would deliver products to customers, transit drivers move trailers from the distribution center to individual GFS stores. This involves night work, hooking, transporting, and unhooking trailers. He also would perform pre and post trip inspections. Petitioner is right hand dominant.

On 12/3/18, while performing his pre-trip inspection, Petitioner testified he was trying to access and clean the exterior back window of the tractor. While standing on the top step, he was holding a handle inside of the cab with his left hand and another handle outside of the tractor to make his way to the back catwalk. While doing so, he testified that the wind grabbed the cab door and slammed it onto the top of his left wrist. He indicated that the photos in Px1, while not of the exact truck he was using on 12/3/18, show the location of the handles, and he marked these with an "X". The Arbitrator notes that, consistent with the testimony of the Petitioner, the Petitioner marked the exterior grab bar with an "X" in photo #1 and the interior grab bar in photo #2. The third photo depicts where Petitioner alleges his hand was when the alleged injury occurred with his hand holding onto the interior grab bar. (Px1). Petitioner testified he felt severe pain when the door struck his wrist and he initially thought he had broken bones. It was a cold that day, and when he went inside to warm up and he started to get the feeling back, he noticed it was swollen and bruised.

Petitioner denied any left wrist pain, problems, or treatment prior to 12/3/18. He did acknowledge a prior left thumb problem due to a lifting incident at work, he believed in 1996, where he "popped" a tendon in the thumb and a forearm tendon from about 5" up his wrist was used to surgically repair the thumb tendon. He testified he has had an ongoing occasional "popping" of the tendon out of place since the surgery, but that the current accident didn't injure the thumb.

Petitioner advised that he didn't report the incident until telling his supervisor on 12/7/18, noting his boss is stationed in Rockford, Illinois while he works out of a remote location in Peru, Illinois, so he doesn't see him on a daily basis. He reported it when he came down to have lunch with everyone, noting his hand was still swollen and bruised at that time. He also did not seek treatment until 1/15/19. Asked why he waited; Petitioner testified he initially thought it would resolve on its own. While his pain initially improved, it then slowly worsened again. His supervisor didn't give him any direction on where to go for treatment so he ended up calling an orthopedic local doctor, Dr. Shin, for an evaluation, and he couldn't get an appointment until a month and a half later. Petitioner testified that when he saw Dr. Shin on 1/15/19 he described the 12/3/18 incident the same way

he testified at the hearing. As to whether he still had swelling and bruising when he first saw the doctor, Petitioner testified: "The swelling and bruising eventually went down. I'm sure it was still swollen a little bit. Nothing was noticeable to the eye. But the pain was still there, and it got worse progressively every day."

The 1/15/19 report of Dr. Shin states that Petitioner had complaints of left wrist pain "over the last several months", increased over the last several weeks: "He does state that he slammed his wrist in a door about a month ago, did not seek any treatment, but it was a little bit bruised, but states it did get a little better in this region." A question as to whether this was a workers' compensation visit was answered "no." Petitioner reported a 4 out of 10 (4/10) to 9 out of 10 (9/10) pain level, describing the pain at the wrist joint, dorsal capsule, radial and ulnar side of the wrist. The pain was dull with occasional stabbing pains depending on his gripping activity. He noted a prior left thumb surgery dating back to the 1990's. Dr. Shin also states: "he states that he was washing something about a couple of months ago and felt a popping type sensation on the radial side and was concerned." The x-ray report reflected no fracture or dislocation but some mild radiocarpal degenerative joint disease, and some changes at the first CMC joint including what "appear to be some postsurgical changes from a prior surgery at the base of the first metacarpal." Following examination, Dr. Shin diagnosed left wrist pain and swelling, a wrist sprain and ECU tendinitis. A cortisone injection was performed. He indicated he did not dispense a wrist brace because Petitioner already had one at home. (Px2). Petitioner testified that Dr. Shin had prescribed a wrist splint, indicating he purchased the same model he had recommended for a lot less than Dr. Shin's office was going to charge. Petitioner returned to Dr. Shin on 2/12/19, reporting that the dorsal pain had improved with injection, but he had continued pain to both sides of his wrist. He was using the brace and taking over-the-counter medication as needed. The wrist was injected a second time and a Medrol dose Pak was prescribed. (Px2). A left wrist MRI was obtained on 3/28/19, and the impression was consistent with Kienbock's disease/avascular necrosis of the lunate with collapse of the structure and fragmentation along the dorsal surface. In addition, there were mild to moderate degenerative changes, findings which suggested tendonitis or partial tearing of the exterior carpi ulnaris tendon, postoperative change from the ulnar collateral ligament repair of the first MTP joint and radiocarpal and mid carpal joint effusions. The history indicated in the MRI report was: "Posterior wrist pain after the patient struck his wrist on a door two months ago. He has a remote prior history of tendon removal for use in thumb surgery." (Px2; Px3).

On 4/1/19, Dr. Shin stated: "We have been treating him since mid-January for wrist pain that he had starting in December when he had his left wrist slammed in a door." The MRI was reviewed, and Dr. Shin noted that therapy, bracing and injections had failed to provide relief. He recommended Petitioner see a hand specialist, and after discussion, recommended Dr. Bear in Rockford, releasing him from care. (Px2).

Petitioner testified that physical therapy just "made things a lot worse" with severe pain when the therapists were trying to exercise or stretch the wrist in different directions. Petitioner testified that he did discuss with Dr. Shin the intermittent popping sensation he would get in his left thumb, which Petitioner acknowledged was not related to the work accident.

Petitioner testified that when he contacted Dr. Bear's office for an appointment, he was advised there was a three month wait, so he instead went to see Dr. Adamson, also a hand specialist, to get in sooner. He was continuing to work his regular job and normal hours up to this point, testifying he had to pay his bills and work through his pain. When Petitioner saw Dr. Adamson on 4/12/19, he testified he told him about his hand getting slammed in truck door on 12/3/18 and about the popping sensation in the thumb. He testified that Dr. Adamson diagnosed Kienbock's disease, indicating it could be caused from a couple different things, but in this case was due to blunt force trauma, and provided surgical options.

Dr. Adamson's 4/12/19 report noted he had previously seen Petitioner for his left thumb and had performed a stabilization of the basal joint: "The left thumb has done quite well." Petitioner reported that "in December he was driving his truck and the door struck him in the left dorsal wrist and this caused significant pain. Initially he thought he may have broken the wrist, and he did have some bruising and swelling. Subsequently, he has had gradual worsening of his discomfort and stiffness." Petitioner also reported a two year history of on and off symptoms of left tennis elbow, for which he had undergone an injection some time ago. Dr. Adamson's review of the MRI films reflected Kienbock's disease with MRI and an x-ray confirming of lunate collapse with a fairly large dorsal fragment. They discussed various possible surgical alternatives with a recommendation from Adamson for proximal row carpectomy. Petitioner reported that his job was not super vigorous requiring heavy work with both hands, and that he was working around vigorous use of the left hand, though "he is frustrated because he has some degree of pain at all times and this is worsening." Left lateral epicondylitis was also diagnosed. (Px4). A 4/12/19 x-ray of the left elbow was negative per the radiologist. The left wrist film impression was chronic left lunate stage 3 Kienbock's disease/osteonecrosis. (Rx6).

Petitioner was examined by hand/wrist surgeon Dr. Balaram on 6/4/19 at Respondent's request. Petitioner reported the 12/3/18 incident when the truck door struck his dorsal left hand and wrist with immediate bruising and swelling. After reporting he incident on 12/7/18, the wrist continued to worsen and he sought treatment, including physical therapy and injection with no relief, and ultimately was diagnosed with Kienbock's disease and prescribed surgery to remove the diseased wrist bones. Petitioner reported his job involved coupling/uncoupling and delivering trailers, and that he was working on an unrestricted basis with ongoing pain, constantly mild but sharp with certain movements, and difficulty gripping. Dr. Balaram reviewed the 1/15/19 x-rays, noting evidence of lunate sclerosis with dorsal osteophyte information at the lip, with nondisplaced lucencies in the lunate but no evidence of carpal collapse. His review of the 3/28/19 MRI reflected signal change throughout the lunate indicative of Kienbock's disease with collapse and fracturing. There was no current evidence of bruising, ecchymosis, or laceration. He also reviewed the 4/12/19 report of Dr. Adamson and a job description from Respondent, indicating as a transit driver Petitioner had to do forceful gripping, medium work including lifting up to 50 pounds with frequent lifting/carrying of 25 pounds and loading/unloading of cargo. Dr. Balaram diagnosed a resolved left wrist contusion and left wrist Kienbock's disease stage 3. It was his opinion that the Petitioner sustained a wrist contusion on 12/3/18, but that the Kienbock's disease was unrelated. He did not see a mechanism of injury that would cause late stage Kienbock's as seen on the MRI, which would be consistent with a chronic underlying degenerative condition: "This would not be associated with a direct blow to the wrist." While the work injury may have caused increased pain in the wrist area, it did not accelerate or aggravate the underlying Kienbock's bone disorder – "I would deem that the patient's current wrist condition is a natural progression of Kienbock's disease leading to advanced collapse of the wrist." He agreed that surgery was appropriate but would be unrelated to the work injury. He opined that Petitioner's care to date had been reasonable and necessary. (Rx3).

Dr. Adamson passed away on 6/11/19 (Px15), so, based on his attorney's recommendation, Petitioner sought treatment with Dr. Rhode, who ultimately referred him to Dr. Fernandez. Dr. Rhode's report was not submitted into evidence. Petitioner was examined by Dr. Fernandez on 9/10/19. Noting Petitioner was there for a left wrist evaluation, Dr. Fernandez recorded that the problem began with a 12/3/19 work injury: "This was during the wintertime when there was a strong wind that blew his truck door close [sic] onto his left wrist. He noted the immediate onset of pain and swelling and thought that he may have broken it. He developed ecchymosis and bruising at the site and 'tried to treat it on his own.' Because of persistence and increasing symptoms of pain and swelling, he then underwent evaluation" with Dr. Shin on 1/15/19. After reviewing Petitioner's prior records, the doctor noted complaints of left wrist pain and swelling with lading and an associated loss of grip strength and difficulty leaning on the wrist. Petitioner indicated he was continuing to work due to financial constraints, as his case had been denied and "he has to do what he has to do.' Dr. Fernandez reviewed the prior and MRI and

obtained a CT scan, which showed fairly significant collapse and fragmentation of the lunate including a coronal split and dorsal sagittal split. Dr. Fernandez opined that the 1/15/19 x-ray showed no significant collapse. He indicated he agreed with Dr. Rhode as to causation: "I do strongly believe . . . that the left wrist condition of Kienbock's disease and his avascular necrosis should be treated as work-related." He based his opinion on Petitioner having no prior similar problems and no treatment, a sudden injury "which was well-documented and possible", an initial 1/15/19 x-ray that did not reflect a preexisting Kienbock's disease, and the fact that it typically takes 6 to 8 weeks for fragmentation of the bone to occur "and this fits into the timeline regarding the onset perfectly in this case." Dr. Fernandez opined that the 3/28/20 MRI films did not show advanced findings that would have predated the onset of injury before 12/3/19. He stated that Kienbock's disease can occur idiopathically, but that injuries such as Petitioner's can also be causative: "The mechanism of Kienbock's disease overall is somewhat poorly understood. There is some evidence and theories that support that there may be an abnormality in the blood supply that is then at risk with trauma or injury including a sudden impact as the one described." He opined that, to disagree with causation in this case, one would have to believe that it occurred completely randomly and coincidentally with the work injury: "While this is certainly possible like many things are possible, it is not very probable. Instead, it is much more probable that the Kienbock's disease occurred as the result of the work injury and I believe strongly that is what happened in this case." He indicated the treatment options were limited at the stage of Petitioner's disease, with a prognosis of less than 33% for wrist salvage surgery. He recommended reconstruction such as proximal row carpectomy with total fusion. Also discussed was a radius osteotomy as part of a revascularization procedure versus proximal row carpectomy. As to work, Dr. Fernandez recommended a 10 to 20 pound force restriction with no repetitive use, but that Petitioner indicated he needed to continue to work due to financial issues. An Exos splint was also recommended. Petitioner planned to discuss the options with his wife. (Px5).

Petitioner testified he understood Dr. Fernandez recommended removal of three bones as well Dr. Adamson, which would limit his range of motion, and if that failed or "goes too long", he would recommend the wrist fusion.

Dr. Fernandez issued an 11/20/19 addendum report at the request of Petitioner's counsel after review of Petitioner's updated medical and the report of Dr. Balaram. He reiterated much of the 9/10/19 report, noting it was important that the initial 1/15/19 report indicates he was injured at work with the door of his truck and then had increasing pain over the few weeks prior. He noted there was no history of Petitioner having prior symptoms or diagnostic studies before the work injury, and that he reported his symptoms began with the truck door incident with pain, swelling and bruising. Stating "no one will know for sure what the 'exact' mechanism of injury was, but what is, does not appear to be anticipated by even Dr. Balaram, is that there was a significant enough impact to the wrist to cause" these symptoms. He opined that the causal relationship of the work injury to Kienbock's disease is that a traumatic injury can essentially be the last straw, so to speak, is that the combination of an underlying predisposition to the condition is impacted by the work injury: "Let [me] be clear that even if there is an underlying disposition, this does not medicate [sic] or take away that there is still a traumatic origin, i.e. the work injury in this case making it work related." He indicated this would be similar to having a new tire versus an old tire, where a new tire might withstand a pothole, where a tire with some wear and tear would have a blowout. As such, he opined that at a minimum, the work trauma either aggravated or accelerated the condition: "a patient with asymptomatic Kienbock's disease can have a traumatic event, which can then further compromise the bone causing a fracture and/or collapse that otherwise would not have occurred" He opined it was also possible that the trauma caused the Kienbock's directly. Assuming Petitioner had a clinically silent or asymptomatic Kienbock's, "it is impossible to know what the exact state the lunate was in at that time." However, the degree of disease and collapse he had in the March 2019 MRI is consistent with an injury that would have occurred a few months prior, and not consistent with a condition of the disease in excess of 6 to 12 months. The recommended treatment would be either proximal row carpectomy or fusion,

which would be at the patient's option, and he would likely have some level of permanent restrictions in either case and "it is not likely that he will return to his preinjury level of activity or work." As to Dr. Balaram, Dr. Fernandez states that he respects him "quite a bit", but that he disagrees with his causation opinion, stating: It should be noted that while anything is possible, it is not very probable that the Kienbock's disease occurred coincidentally with the work injury. In addition, Dr. Balaram's own opinion a 'temporary aggravation of symptoms' is not likely to have occurred absent further progression in the Kienbock's disease, such as collapse or fracture." Thus, it is more probable than not and reasonable hold that opinion. Instead, it is more probable than not and reasonable that the work injury either solely caused and/or significantly aggravated the Kienbock's disease requiring its treatment." (Px7).

On 6/30/21, Dr. Fernandez was deposed by the parties. He testified that Petitioner was referred by Dr. Rhode, who refers him more complicated cases. Dr. Fernandez described Kienbock's disease as avascular necrosis of the lunate bone in the wrist, which is due to a lack of blood supply. He further stated that the symptoms of Kienbock's disease are pain in the wrist, typically in the center of the wrist, as well as swelling, loss of mobility and weakness. He testified that there are three groups of causes for Kienbock's disease, idiopathic, traumatic, and systemic. Idiopathic is a generic term that has to do with no identifiable cause. Traumatic would include direct trauma, like a blow to the wrist. Systemic would be certain types of blood disorders like lupus or rheumatoid arthritis. He agreed Petitioner had not been worked up for a possible systemic problem. There are four different stages to Kienbock's disease. Stage 1 is where there is evidence of avascular necrosis on a bone scan or MRI scan, but not on x-ray. Stage 2 is where there is radiographic appearance, but without fracture or collapse. Stage 3 is broken up into 3A and 3B with 3A being stage of collapse, but without rotational instability and 3B is collapse with rotational instability. Stage 4 is where there is progression to degeneration or arthritis. The remainder of his testimony on direct was consistent with his reports. (Px6).

On cross exam, Dr. Fernandez agreed that he saw the Petitioner only once and has no knowledge of his current condition or work status. He testified the progression of the Kienbock's disease is multifactorial and varies depending on how much trauma you impose on the lunate, the quality of the bone and how aggressive you are in moving and using the wrist. All of those factors in combination are what probably determine how quickly you go through the stages. Two causative factors can occur in combination, for example someone with lupus who then has a trauma. Some people progress slowly, others very rapidly, such as when there is a significant trauma. An idiopathic Kienbock's takes longer to develop before its significant enough that someone seeks treatment. Dr. Fernandez explained that when Kienbock's disease starts it is not necessarily when the collapse occurs, and when someone comes in for treatment can depend on their pain tolerance. The condition is typically always progressive and does not reverse course. Petitioner was at stage 3B when Dr. Fernandez saw him, and "without treatment, I can almost unequivocally tell you that he's at stage 4", which would be difficult to perform work with, especially heavier work. Even when he saw Petitioner, he was at a stage where Dr. Fernandez's recommendation was not revascularization, which was not likely to work, but rather carpectomy or fusion. (Px6).

Dr. Fernandez was aware Petitioner did not seek immediate treatment after his work injury. As to the 6 or 7 week gap before he saw Dr. Shin, while continuing to work, he noted that Dr. Shin's x-rays almost looked normal, which was likely why he hadn't picked up the diagnosis and treated it like a wrist sprain, injected him and put him in a splint: "so that, in my opinion, is actually more support for my argument that its causative." He testified that a trauma that initiates avascular necrosis does not have to be a significant one, and that Petitioner's trauma was significant enough to cause pain and swelling and even bruising six weeks later and Kienbock's disease. the condition that appeared on the 3/28/19 MRI, two months after Dr. Shin saw him, was "fairly fresh." While Dr. Fernandez agreed it could be a complete coincidence, that Petitioner had only a superficial bruise and developed Kienbock's that he would have developed anyway, based on the x-ray, the MRI, and the presentation

to Dr. Shin, which all points to that time from when this occurred: "it's a hell of a coincidence if it's not related." (Px6).

Asked about the history Dr. Shin initially recorded, Dr. Fernandez testified that even if Petitioner had pain for several months when he saw Dr. Shin, Dr. Fernandez opined that it would be a strong possibility he had some preexisting avascular necrosis, "in which case then I think the work accident aggravated it." He can't say for sure that the work injury was the "sole causative agent." Dr. Fernandez did not believe that petitioner's episode where he felt a pop in the radial side of his left wrist while washing something a couple months before 1/15/19 could have been the trauma that started Kienbock's: "I mean, you'd have to describe to me better the energy of the injury, you know what I mean? Washing something, using the hand for something normal, short of a traumatic event." The trauma would have to be something more traumatic, impact or indirect injury equivalent to somebody falling. If Petitioner truly had wrist pain for several months leading up to his work injury, its more likely than not that he had Kienbock's, but he would still find it work related for the reasons noted. As noted, however, Dr. Shin's initial x-ray did not show it, and it would typically be visible on x-ray at a more advanced stage. It is 100% possible for Kienbock's to have gone from a stage zero to stage 3B between 12/3/18 and 3/28/19. (Px6).

As to Dr. Balaram's findings, Dr. Fernandez testified that, once you already know the patient has Kienbock's, there is some evidence of a Grade 2 condition on Dr. Shin's x-rays, but that a large proportion of hand surgeons who had no advanced knowledge would look at the films and say the lunate looks normal. Fernandez did not see nondisplaced lucencies in the lunate on the films – "I would love Ajay (Balaram) to show that to me because I don't see that at all." Again, is it possible that Petitioner had an idiopathic Kienbock's that started several months before he saw Dr. Shin and it had a natural progression to Stage 3 by the time of the 3/28/19 MRI, yes it is possible. The condition will tend to progress more if the person is performing heavier activities with the left wrist than if they are not. However, he again states it is more likely that the work accident either caused or aggravated the condition than that it had no involvement. Dr. Shin's report noted an increase in pain over the last couple weeks and that he slammed his wrist in a door about a month prior, and he had swelling and bruising he didn't have before the work injury. (Px6).

Dr. Balaram testified on 8/31/21 via deposition. He testified consistent with his 6/14/20 report on direct exam. He testified that Kienbock's disease is an avascular necrosis of one of the central wrist bones, the lunate, and over time it dies off due to a lack of blood flow and begins to disintegrate. As you get to stage 3, it splits into A and B, the latter being when arthritis begins, and the adjacent bones become affected. There are 8 small carpal/wrist bones. In stage 4 all of the bones are arthritic. As to the 1/15/19 x-rays, he testified Petitioner was at a stage 2/3A, and it had advanced by the time of the 3/28/19 MRI. He did note "I had the advantage of reviewing the x-rays at the same time as the MRI." The bone spur he saw can sometimes occur as the lunate starts to change, and the lucencies he saw occur as the bone starts to die off and are a hollowing of the bone. As to how long the Petitioner had Kienbock's by the time of the 1/15/19 x-rays, Dr. Balaram testified: "I would say that once you start to see changes on the x-rays themselves, that indicates a longstanding condition associated with the wrist." He could not give an exact date but would say "it was greater than the amount of time associated with the patient's reported injury" a month prior. Kienbock's is a progressive condition, but the stage at which a patient gets symptoms varies. The majority start having symptoms in stage 1, which then get more severe. (Rx3).

As to the MRI findings, it showed the lunate had signal change throughout and was starting to crumble. The scaphoid showed no evidence of necrosis, so it appeared isolated to the lunate versus a trauma decreasing blood supply throughout the entire wrist. There was some involvement of the adjacent bones, but no advanced collapse that would lead to a stage 4 diagnosis. There was advancement between the 1/15/19 x-ray and the 3/18/19 MRI,

but "there's a little bit of comparing apples to oranges" since the MRI is more detailed. Dr. Balaram opined that Kienbock's has various causes associated with it, but in general its idiopathic: "That's why it's called Kienbock's disease as opposed to post-traumatic wrist necrosis." The majority develop over time with increasing wrist pain that isn't diagnosed until it can be seen on imaging. Generally, causes are things that diminish blood supply to the wrist, including smoking, and potentially "severe trauma that disrupts the carpal ligaments can diminish blood supply." The most common traumatic cause is high energy trauma where the wrist bones are dislocated. When ligaments surrounding the lunate where the blood supply is are torn, it can disrupt blood supply. In his opinion, the next theories out there are that some people develop the condition secondary to a genetic predisposition. In his opinion, the trauma described by Petitioner wasn't sufficient to develop Kienbock's as it wasn't enough to disrupt the carpal ligaments or blood vessels. The Petitioner's description of swelling and some bruising on the dorsal wrist after the injury further points to a soft tissue injury of a contusion versus disruption of the lunate bone. Dr. Balaram testified: "when it comes down to it, the same type of things that would potentially fracture your wrist . . . would be the energy required to develop a post-traumatic necrosis of the lunate", which itself is a slightly different condition than Kienbock's disease, which is due to an underlying blood supply problem. As to whether the incident could have aggravated the underlying condition: "in my opinion the blow to the back of the wrist did nothing to stop the blood vessels from delivering blood to the lunate", and as such it was not causative of a permanent aggravation. (Rx3).

It appears Dr. Balaram only reviewed the prior report of Dr. Adamson, not Dr. Shin's. Petitioner did not report having any left wrist problems prior to the work injury. After reviewing the initial 1/15/19 report of Dr. Shin, Dr. Balaram testified that a complaint of left wrist pain over the last several months would suggest Kienbock's had a chronic gradual onset of wrist pain. As to Petitioner reporting washing something about a couple months prior to Dr. Shin and feeling a popping type sensation in the radial wrist, Dr. Balaram testified the popping sensation is concerning, especially given the objective findings of a bone spur on both x-ray and MRI on the radial central lunate, that spurring and possible fragmentation of the lunate could contribute to such popping. It was his opinion that when he saw Petitioner, he had reached MMI as to the causally related wrist contusion, and that MMI likely occurred about 6 weeks post-accident. (Rx3).

On cross-examination, Dr. Balaram was asked if he believed Petitioner's work-related wrist contusion temporarily aggravated his underlying Kienbock's, and he testified: "I believe that the contusion was associated with pain. I wouldn't say there was a permanent aggravation but there may have been a temporary aggravation associated with the wrist." He acknowledged that Dr. Shin's 4/1/19 report indicates Petitioner's wrist pain started on the accident date, but that the more contemporaneous 1/15/19 report indicates it started at least two months prior to that date. He agreed he did not have Dr. Shin's records when he prepared his initial report. He agreed his review of the initial Shin x-rays showed lunate lucencies but Dr. Shin's did not, so there is a difference of opinion, though he acknowledged that he had the benefit of already having the MRI findings when he reviewed the x-rays. However, he testified that he believed any radiologist would see the lunate cysts in the films. Advised that Dr. Fernandez did not see them, he testified: "That doesn't surprise me", though he reiterated that having the MRI was a benefit. As to Petitioner indicated he thought he might have broken his hand with the work injury, Dr. Balaram opined that a blunt dorsal trauma would not be sufficient to disrupt blood supply to the lunate without evidence of dislocation of the lunate or damage to the ligaments. Bruising and swelling, again, would indicate contusion versus trauma associated avascular necrosis. (Rx3).

Dr. Balaram, given his opinion that Petitioner was at Kienbock's stage 2 on 1/15/19, could not say exactly when Petitioner had been at stage 1, just that it would have been prior to 12/3/18: "I would say that there would be symptoms prior to December of 2018 given the changes on x-rays noted." In terms of a temporary "exacerbation" of the condition on 12/3/18, Dr. Balaram testified this involved symptoms rather than an altering of the natural progression of the underlying Kienbock's. He could not put a timeline on how long it takes for

Kienbock's to fragment the lunate. Some people stay in stage 1 for months or years, and he couldn't say how long Petitioner may have been at stage 1, other than to say that stage 1 is usually associated with pain without radiologic findings. He couldn't say if Petitioner was at stage 1 or 2 as of 12/3/18. Imaging is the only way to differentiate between stages 2, 3 and 4. Dr. Balaram testified that a proximal row carpectomy would end up leaving Petitioner with some decreased range of motion and, potentially, grip strength that would likely be permanent. On redirect, Dr. Balaram testified that his current review of Dr. Shin's notes would not have changed his opinions. (Rx3).

Respondent obtained utilization reviews with regard to the injections performed by Dr. Shin. (Rx2).

Petitioner has continued to work since 12/3/18, other than as noted for his hip condition. As to whether his job has changed since 12/3/18, he testified that the duties are the same, but Respondent has made some accommodations, such as providing him with an automatic transmission tractor at his request, as the manual truck required him to steer with the left hand to shift with the right. While they typically do two runs per night with double trailers, a lot of times they allow him to do one trailer if possible to alleviate some of the hand work. Petitioner testified his pain is located right under where a wristwatch face would be. The splint he is currently using is one that was specifically formed to his hand/wrist by Dr. Fernandez, whom he initially saw on 9/10/19. He has used one type of splint or another from 1/15/19 to present, noting that while it restricts his wrist motion it doesn't prevent him from performing his job. He has continued to work without medical restrictions while awaiting surgical approval. The pain continues but it is worse with wrist motion, so the splint does help because the wrist is immobilized. His bills have been covered so far by his group health coverage, but he is seeking reimbursement for his out-of-pocket expenses. Petitioner testified he wants to go forward with the recommended surgery.

On cross exam, Petitioner agreed that he had been prescribed surgery going back to April 2019 (Dr. Adamson) and was advised his condition Kienbock's disease would progress but elected not to use his group health coverage to pay for it in the last two years despite having used this group health coverage to cover other medical expenses related to this case. Petitioner generally uses the same tractor to deliver trailers in a variety of sizes to other GFS facilities. To connect a trailer, he backs underneath it, hooks two air lines and an electrical cord up, and lifts the dolly legs off the ground with a crank. He generally has worked 50 to 60 hours per week for Respondent for the last 13 years to present, other than during Covid slowdowns. He was likely wearing an unpadded basic leather glove when the door shut on his wrist, similar to the one in the photo in Px1. The tractor door struck the top of his wrist, not his hand, which is where there was swelling and bruising. He was not wearing a watch at the time.

Petitioner had swelling and bruising on the top of his wrist when the accident happened, but thinks the bruising was gone but there still was some swelling when he saw Dr. Shin ("it's been three years"), a local orthopedic doctor he previously saw for an unrelated problem. He did not recall if he was using a splint when he first saw Dr. Shin. Only Dr. Adamson had been involved with the prior thumb injury. Petitioner testified he assumed he was asked if his condition was work related when he saw Dr. Shin but did not recall saying "no." As to telling Dr. Shin he'd been having left wrist pain for the last several months, Petitioner testified "those were not my words." He further testified: "I did not say several (months). I provided him with a date of the accident. So he misconstrued a month and a half to be 1 to 2 months that would be several, I believe, but I did not, would not say several, not when I gave him a specific date." He did tell him on 1/15/19 that he had increasing left wrist pain over the past couple of weeks, which Petitioner indicated was due to the truck door incident despite that being about 6 weeks prior. Petitioner agreed he said he slammed his wrist in a door about a month prior, and that it was a little bit bruised but that it got better. As to indicating to Dr. Shin that he had a pop in the wrist while washing something a couple months prior, Petitioner testified he had been doing dishes, and the pop was

in the part of his thumb that he was talking about earlier and had nothing to do with the wrist. He confirmed that Dr. Shin performed two injections to the wrist.

Petitioner went to see Dr. Rhode at the recommendation of his attorney when Dr. Adamson died, and Rhode referred him to Dr. Fernandez, whom he has seen once. He also saw Dr. Balaram once on 6/14/19 for an IME. He testified he hasn't seen anyone since Dr. Fernandez because it's hard to find treatment for a workers' compensation matter when workers' compensation isn't paying for the treatment. He went on to testified that he cannot use his group health insurance because a worker's compensation claim has now been filed, per Dr. Fernandez' office. He has not tried to see any other hand doctor since.

Petitioner agreed if his payroll records (Rx1) show he worked less hours (30 to 40 hours/week) between March and July 2020, it likely was due to the covid slowdown. He had a hip condition where he used sick time and collected short term disability from GFS while off work during 2021 (5/30/21 to 10/2/21), noting he just returned to work about 2 months prior to the hearing. Since 10/3/21, he has been working 55-56 hours per week. He had restrictions for the hip for about a month but has worked full duty since.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator find that the Petitioner sustained accidental injury to the left wrist which arose out of and in the course of his employment with Respondent on 12/3/18.

Petitioner credibly testified that his tractor cab door got caught by the wind and slammed onto his left wrist while he was outside of the cab on a step with his left hand holding an interior grab bar. Petitioner's testimony that he reported the injury to his supervisor on 12/7/18 was unrebutted, and Respondent did not dispute that Petitioner had provided timely notice of the accident and injury pursuant to the Act. (Arbx1).

The Petitioner was clearly in the course of his employment at the time of this incident as he was performing work for the Respondent during his normal work hours. As to the "arising out of" portion of the claim, it is clear that the work he was performing was part of his regular job duties at the time, and that his pre-trip inspection created an increased risk of injury by his truck door slamming shut due to the wind while he was trying to access a rear window for cleaning.

The Petitioner has fulfilled the burden of proof that he sustained accidental injury arising out of and in the course of his employment on 12/3/18 by the preponderance of the evidence.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The key issue in the dispute between the parties in this case is causal connection. The Petitioner's diagnosis is Kienbock's disease, which essentially is a disease that results from a lack of vascularization to the lunate bone in the wrist. This is obviously a known condition to all doctors involved in this case, and they all have essentially agreed that the vascular problem is what results in disintegration of the lunate. The question becomes

whether the condition was preexisting and idiopathic, as argued by respondent's Section 12 examiner Dr. Balaram, or if the condition was caused or contributed to by the work injury involving a direct blow to the top of the left wrist, as opined by Dr. Fernandez.

The Arbitrator finds in the Petitioner's favor in this case. The most significant aspect of the defense in this matter was the fact that the Petitioner did not obtain any medical treatment related to the 12/3/18 work accident until 1/15/19, and that when he saw Dr. Shin at that time, the doctor's note indicates Petitioner reported left wrist pain "over the last several months" which had increased over the last several weeks after slamming his wrist in a door about a month prior. Dr. Shin also reports that Petitioner told him he had been washing something a couple of months prior and felt a popping type sensation on the radial side and was concerned.

While the Arbitrator also must note that the report indicates that this was not a workers' compensation visit, the Petitioner clearly reported a work injury to Dr. Shin on 1/15/19. As such, it is unclear how both of these things could occur in the same report. Given the detail involved in describing the incident with the truck door, it seems more likely that not that the error was in checking the "no" category as to the visit involving workers' compensation.

The Arbitrator finds in the Petitioner's favor on the issue of causation. This is most significantly based on the reports and testimony of Dr. Fernandez. In the Arbitrator's view, the testimony of both Dr. Fernandez and Dr. Balaram more or less agree that it is unlikely that the work accident caused the existence of the Kienbock's disease. However, Dr. Fernandez provided strong testimony in support of the accident being a contributing cause to the ultimate collapse of the Petitioner's left lunate. The Arbitrator also would note that common sense would seem to dictate that a door being slammed shut on one's wrist, as described by Petitioner, reflects what is potentially a significant trauma.

The Petitioner's ongoing work supports the idea that he is a fairly tough minded individual. This isn't a case where we have, for example, a bulging disc in one's back where the level of pain involved can be quite variable. Here, there is clear objective evidence that the Petitioner was almost at an end stage of Kienbock's disease in March 2019.

Dr. Fernandez's testimony was more persuasive to the Arbitrator. His testimony was that it would have been quite a coincidence that the Kienbock's condition worsened so significantly between 1/15/19 and 3/28/19 had the work accident not been a contributing factor. Dr. Fernandez made a lot of sense in terms of the view of the initial 1/15/19 x-rays in terms of how having a subsequent film available can change one's view of the films. He questioned the existence of any significant lesions in the lunate in those films, which also were not seen by Dr. Shin at that time. Dr. Balaram also agreed that his having reviewed the MRI may have contributed to his ability to see lunate lesions in the 1/15/19 left wrist films. The point, in the Arbitrator's view, is that the lunate was not impacted enough as of 1/15/19 for doctors to agree that Kienbock's was visible. Yet, by the 3/28/19 MRI, the bone had disintegrated significantly. Thus, there had been a significant progression of the condition over a less than three month period between 1/15 and 3/28/19.

Based on the above, the Arbitrator finds that the greater weight of the evidence supports the finding that the 12/3/18 work injury was a contributing factor to accelerating the loss of the Petitioner's left wrist lunate, and that this loss of bone is the basis for the current surgical recommendation.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL

APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings regarding accident and causation, above, the Arbitrator finds that the Respondent is liable for the medical expenses contained in Petitioner's Exhibits 8 through 13.

While the UR reports submitted by Respondent questioning the efficacy of the injections provided by Dr. Shin in this case, both Dr. Fernandez and Dr. Balaram have indicated that the treatment to date has been reasonable, and both were aware Petitioner had undergone an injection. Additionally, given the readings of the 1/15/19 x-rays by both Shin and Dr. Fernandez, it was not unreasonable for Dr. Shin to initially diagnose an EHL problem and to treat the wrist for that condition until it was later determined that he has Kienbock's disease.

Petitioner is also entitled to reimbursement of any out-of-pocket expenses he incurred, such as co-pays, by putting the treatment through his group health coverage.

The Respondent is entitled to credit for all awarded medical expenses that have been paid either through workers' compensation coverage of group health coverage through the Respondent, which the Petitioner agrees is subject to Section 8(j) of the Act per Px1. In obtaining this credit, the Respondent shall hold Petitioner harmless with regard to all medical expenses for which they are receiving such credit.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

All of the hand specialist physicians in this case, including Dr. Adamson, Dr. Fernandez, and Dr. Balaram, agree that the Petitioner needs left wrist surgery. The standing recommendation at this time is a proximal row carpectomy, which again is agreed as reasonable by all of the noted physicians. The only caveat to this from the Arbitrator's perspective is whether the Petitioner's condition has worsened since the recommendation was made such that a fusion may instead be recommended. If so, the Arbitrator finds that such recommendation would also be reasonable if the condition has so worsened.

WITH RESPECT TO ISSUE (O), WHETHER PETITIONER EXCEEDED THE TWO-DOCTOR RULE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has not violated the two doctor rule in this case. He initially saw Dr. Shin, who referred him to Dr. Bear. While Petitioner did not specifically see Dr. Bear, he testified that this physician's office indicated he would have to wait three months for a visit. As such, the Arbitrator believes the most reasonable way to view this is that Dr. Shin referred Petitioner to a hand specialist, and because he couldn't get in to promptly see Dr. Bear, he instead sought treatment with Dr. Adamson.

Dr. Adamson then passed away shortly after Petitioner initially saw him, after which he sought treatment with Dr. Rhode. While this arguably could be considered Petitioner's second choice, the Arbitrator believes an argument could be made that this still was in the initial chain of referral given the Petitioner had little choice but to seek treatment elsewhere when his treating surgeon passed away. Dr. Fernandez then clearly testified that Petitioner was referred to him by Dr. Rhode.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027369
Case Name	Roosevelt Meeks Jr v. National Express CDT
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0324
Number of Pages of Decision	24
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Matthew Sheriff

DATE FILED: 8/23/2022

/s/Carolyn Doherty, Commissioner

Signature

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: Causal Connection, Medical Expenses, Prospective Care, TTD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROOSEVELT MEEKS, JR.,

Petitioner,

vs. NO: 20 WC 027369

NATIONAL EXPRESS (CDT),

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective care, and temporary total disability, and being advised of the facts of law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings including a determination of permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

The Commission affirms the Decision of the Arbitrator with respect to the issue of accident and modifies the Decision of the Arbitrator with respect to the issues of causal connection, medical expenses, prospective care, and temporary total disability.

I. **Causal Connection**

The Arbitrator concluded that Petitioner failed to prove that his claimed current condition of ill-being, a herniated lumbar disc with radiculopathy, was causally related to the motor vehicle accident on September 16, 2020. This conclusion was primarily based on the Arbitrator's assessment of Petitioner's lack of credibility and untruthfulness.

A successful claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). "It is axiomatic that employers take their employees as they find them." *Id*. Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that her employment was also *a* causative factor. *Id*. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981). A claimant also may rely on the "chain of events" in his case to demonstrate the aggravation or acceleration of a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC, ¶¶ 25-29.

When the Commission reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and is not bound by the arbitrator's findings, including those regarding credibility. See, *e.g*., *Farris v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130767WC, ¶ 67; *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009).

In finding causal connection between Petitioner's current condition of ill-being and the September 16, 2020 accident, the Commission accepts the opinions of Petitioner's treating physicians over those of the Section 12 examiner. The Request for Hearing indicates that Respondent stipulated that Petitioner sustained a work related accident on September 16, 2020, but that it disputed the causal connection between Petitioner's herniated lumbar disc with radiculopathy and the accident. Petitioner testified without rebuttal that he had no back or knee symptoms prior to the September 16, 2020 motor vehicle collision. On September 25, 2020 – only nine days after the accident – Petitioner followed up on his hospitalization with Dr. Thomas, reporting bilateral leg pain, right greater than left, mostly around the knees and thighs, rating his pain at 7/10. At that time, he also complained of pain around the waistline and decreased movement since the accident. On October 27, 2020, Petitioner returned to the hospital, complaining of bilateral knee pain and back pain radiating down his right leg, worsening over the prior week. An examination disclosed tenderness to palpation bilaterally over the knees, tenderness over L4 in the back, and a positive straight-leg raise sign on the right.

Petitioner then treated with Dr. Freedberg, whose examination disclosed similar symptoms. Dr. Freedberg noted that the onset of Petitioner's present illness was on September 16, 2020 and that the cause and mechanism was a traumatic work motor vehicle accident. He ordered a Shields knee brace and a lumbar corset. He prescribed medications and ordered a course of physical therapy. Dr. Freedberg subsequently ordered a lumbar spine MRI, which Drs. McNally, Novoseletsky, and Pelinkovic, as well as Respondent's Section 12 examiner, interpreted as indicating: (1) multilevel lower lumbar spondylosis; (2) an L4-L5 disc herniation eccentric to the right impinging epidural fat without gross compression of the general sac and possible referred pressure to the right L4 nerve root; and (3) an L5-S1 prominent disc herniation obliterating epidural fat causing mass effect on S1 nerve roots, left greater than right, with possible referred pressure on the left L5 nerve root. Petitioner's EMG/NCS results indicated: (1) evidence supportive of mild

bilateral L5-S1 radiculopathy, with reduced motor recruitment and reinnervated motor unit potentials; and (2) possible concomitant right focal deep peroneal neuropathy in the ankle or proximal foot segment.

Dr. McNally opined that Petitioner's increasing low back pain with radiating bilateral lower extremity pain since the accident were consistent with the objective EMG/NCS testing and MRI results. He also opined that the accident did not cause the degenerative changes in Petitioner's lumbar spine. He further opined that Petitioner's disc herniations were consistent with a history of trauma. Dr. McNally opined to a reasonable degree of medical surgical certainty that the accident aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spine conditions. Dr. Pelinkovic diagnosed Petitioner with a right L5-S1 disc herniation and recommended a right-sided L5-S1 microdiscectomy. Dr. Pelinkovic opined that the disc herniations were related to the September 16, 2020 accident because to his knowledge, Petitioner did not have a pre-existing condition and his back was asymptomatic prior to the accident.

The Arbitrator found that due to his failure to report his diabetes Petitioner was an unreliable reporter of his medical history and thus not credible in his testimony regarding the accident and his physical condition. The Arbitrator discounted the opinions of Petitioner's treating physicians because Petitioner did not report his history of diabetes to them. However, the Commission notes that Petitioner's treating physicians did not rely entirely on Petitioner's reporting and were aware of Petitioner's diabetic condition in rendering opinions. Drs. McNally and Pelinkovic reviewed and summarized Dr. Bernstein's Section 12 report, which discusses Petitioner's diabetes. After reviewing Dr. Bernstein's report, Dr. McNally did not change his diagnoses or opinions. Dr. Pelinkovic reached similar conclusions and expressly disagreed with Dr. Bernstein, chiefly because Dr. Bernstein had not reviewed Petitioner's MRI films indicating pathology. Dr. Bernstein later did so and did not change his opinions, but acknowledged that the lumbar spine MRI indicated pathology. However, Dr. Bernstein maintained that Petitioner did not suffer a significant spinal injury and displayed symptom magnification.

Lastly, there is no medical evidence in support of the conclusion that Petitioner's current condition of ill-being was related to his diabetes. Given that Petitioner reported hip and leg symptoms nine days after the accident, consistent with his MRI and EMG/NCS results as stated by Drs. McNally and Pelinkovic, and the lack of any evidence that Petitioner's lumbar condition was related to his diabetes, the Commission modifies the Decision of the Arbitrator and concludes that Petitioner proved that the stipulated September 16, 2020 accident is a cause of his current condition of ill-being.

II. **Medical Expenses**

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also concludes that Petitioner is entitled to an award of his reasonable and necessary medical expenses. Respondent disputed only the causal connection in the Request for Hearing, raised no specific objections to Petitioner's claimed expenses on review, and there is no persuasive evidence to suggest that the treatment has been unreasonable or unnecessary. Accordingly, the Commission modifies the Decision of the Arbitrator to award the payment of Petitioner's unpaid medical expenses as represented by the

bills in Petitioner's Exhibits 3 through 9, pursuant to the medical fee schedule, as provided in sections 8(a) and 8.2 of the Act. Respondent is awarded a credit for any medical expenses already paid.

III. **Prospective Care**

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also modifies the Decision of the Arbitrator to award Petitioner the right-sided L5-S1 microdiscectomy recommended by Dr. Pelinkovic, and any related and necessary associated care.

IV. **Temporary Total Disability**

Having concluded that Petitioner established a causal connection between Petitioner's work accident and his current condition of ill-being, the Commission also concludes that Petitioner is entitled to an award of additional temporary total disability (TTD) benefits. In the Request for Hearing, Petitioner claimed TTD benefits for the period from September 16, 2020 through the hearing date of November 29, 2021. The record indicates that Petitioner was taken off work by his primary care physician upon following up from his initial hospitalization. Respondent raised no objection in the alternative on the issue of TTD. Accordingly, Commission modifies the Decision of the Arbitrator to award Petitioner TTD benefits for the period from September 16, 2020 through November 29, 2021, a period of 62 and 6/7ths weeks.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated March 3, 2022 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's condition of ill-being at the time of the arbitration hearing was causally connected to his work accident on September 16, 2020.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner's unpaid medical expenses as represented by the bills in Petitioner's Exhibits 3 through 9, pursuant to the medical fee schedule, as provided in sections 8(a) and 8.2 of the Act. Respondent is awarded a credit for any medical expenses already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the right-sided L5-S1 microdiscectomy recommended by Dr. Pelinkovic and any related and necessary associated care.

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

the sum of $693.33 per week[1] commencing September 16, 2020 through November 29, 2021, a period of 62 and 6/7ths weeks, that being the period of temporary total incapacity for work under section 8(b) of the Act. Respondent is entitled to a full credit for any temporary total disability benefits already 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.

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

Bond for the removal of this cause to the Circuit Court 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.

August 23, 2022
o: 8/18/22
CMD/kcb
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

[1] In the Request for Hearing, the parties agreed that Petitioner's average weekly wage was $1,040 per week, two-thirds of which is $693.33.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027369
Case Name	MEEKS JR, ROOSEVELT v. NATIONAL EXPRESS (CDT)
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	John Connolly

DATE FILED: 3/3/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 1, 2022 0.67%

/s/Steven Fruth, Arbitrator

Signature

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)

Roosevelt Meeks
Employee/Petitioner

v.

National Express (CDT)
Employer/Respondent

Case # **20 WC 027369**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **November 29, 2021**. 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, **September 16, 2020**, 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 $**54,080.00**; the average weekly wage was **$1,040.00**.

On the date of accident, Petitioner was **52** 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 §8(j) of the Act.

ORDER

Based on the finding that the Petitioner's claimed current condition of ill-being is not causally related to the injury, all 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.

MARCH 3, 2022

Signature of Arbitrator

ICArbDec19(b)

Roosevelt Meeks Jr. v. National Express CDT
20 WC 27369

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** Is Petitioner entitled to prospective medical care?; ***L:*** What temporary benefits are in dispute? TTD

FINDINGS OF FACT

Petitioner Roosevelt Meeks Jr. was 52 years old on September 16, 2020. He was working for Respondent National Express CDT as an auto technician for PACE. His job responsibilities involved repairing buses. Petitioner worked from 3:00 or 4:00 AM until 12:00 PM. Petitioner had been working for Respondent for approximately one year.

Petitioner testified he had never had any medical treatment to his back or knees before his September 16, 2020 accident. He was taking oral medication for diabetes. However, he had never had any issues with diabetic ketoacidosis before his accident or been hospitalized for it.

On September 16, 2020, Petitioner was working for Respondent. About 12:00 PM he was directed to retrieve a broken-down bus from Dolton, Illinois. Upon arrival, Petitioner was told that the driver had moved the bus to Harvey, Illinois. Petitioner then went to Harvey and retrieved the bus and began driving it back to Respondent's garage. Petitioner was driving eastbound on 159th Street. As he approached a viaduct, a truck on his right began a right turn into the intersection and abruptly stopped, leaving the truck's trailer partially in Petitioner's lane. Petitioner collided with the truck's trailer.

Petitioner was traveling at 35 miles per hour at the moment of the collision. The entire dashboard crumpled into his chest, including the steering wheel. No airbag deployed. He testified his chest was pounding and it was hard for to breathe. His leg was jammed between the seat and the dashboard. He was able to get out of the bus though the driver's door.

The truck driver pulled off and the bus began to roll because it was still in drive. Petitioner ran and jumped back into the bus and hit the brakes, but there were no brakes. He threw the bus into park. The bus jumped a curb and then came to a rest.

Petitioner testified that the bus was badly damaged. The front-passenger side of the bus was pushed in all the way to the windshield. Petitioner asked a passing driver to call the ambulance and the police. He then sat down on the front step of the bus to catch his breath. He was experiencing chest pain and leg pain.

Petitioner was transported to Ingalls Memorial Hospital ("Ingalls") by Bud's Ambulance, where he was admitted as an inpatient care for three days (PX #3 & PX #4). EMS responders noted Petitioner was confused, combative, and appeared postictal.

Ingalls Emergency Department notes documented Petitioner's confusion. He was diaphoretic with altered mental status when EMS arrived. Petitioner testified that he complained about his back while an inpatient. CT scans of the head and cervical spine were taken. Both were negative for acute findings, although there were degenerative changes in the cervical spine. There were no documented complaints or assessment of low back pain or radicular symptoms. Petitioner was diagnosed with acute renal failure, rhabdomyolysis, diabetic ketoacidosis, and lactic acidosis (PX #4).

Petitioner testified that he was not treated for his back at Ingalls while an inpatient, only his diabetes. He signed out of the hospital AMA (against medical advice) after three days. Petitioner also testified that he received physical therapy at Ingalls, although there are no records documenting Petitioner receiving physical therapy at Ingalls.

Petitioner followed up with his primary care physician, Dr. Cynthia Thomas, over telehealth conferencing on September 22, September 25, October 2, October 8, and October 15, 2020 (PX #5). The primary focus of these consultations was the status of his diabetes.

On September 25 Petitioner reported he was experiencing 7/10 pain around his waistline, as well as in his legs, right greater than left, mostly in his knees and thighs. On October 2 Petitioner reported tingling in both feet, although there were no documented complaints of low back pain or radicular symptoms. Dr. Thomas diagnosed "Polyneuropathy, unspecified." Dr. Thomas also noted, "S/P MVA trauma at work, admitted and left AMA after 3 days with continued complaints including uncontrolled DM/myalgias/decreased vision." The consultations on October 8 and October 15 were again focused on Petitioner's diabetes. There were no notes regarding complaints or assessment of low back pain or radicular symptoms.

On October 27, 2020, Petitioner returned to Ingalls complaining of bilateral knee pain and back pain radiating down his right leg (PX #4). Petitioner reported that he had

been experiencing knee pain and back pain ever since his motor vehicle accident on September 16, 2020, but that it had worsened one week ago. On examination, there was tenderness to palpation bilaterally over the knees, tenderness over L4 in the back, and a positive straight-leg raise sign on the right. X-rays of the knees were unremarkable. An X-ray of the lumbar spine revealed mild disc space narrowing at L3-4 with small multilevel endplate osteophytes. Petitioner left the hospital AMA prior to discharge.

Petitioner consulted orthopedic surgeon Dr. Howard Freedberg at Suburban Orthopaedics on November 11, 2020 (PX #6). Petitioner complained of low back pain radiating to both hips, as well as sharp stabbing pain in the medial aspect of his knees. Petitioner gave history of driving a bus at work when a truck pulled out in front of the bus, causing him to hit the truck. He had immediate pain in his right leg down to his hip. Petitioner was treated at "Engles" [sic] Hospital, had X-rays, and was told to follow up with his primary care physician. He reported he followed up his primary care physician the following week and was given Tylenol and ibuprofen for the pain.

Dr. Freedberg did not note Petitioner's history of a three-day hospitalization at Ingalls Memorial Hospital for acute renal failure, diabetic ketoacidosis, and lactic acidosis following his September 16 accident.

On physical examination, Dr. Freedberg noted tenderness to palpation over the lumbar spinous process with severe tenderness over the paraspinal muscles, as well as diffuse anterior tenderness to palpation over the lower extremities. Petitioner had a positive straight-leg raise sign on the right. Petitioner's lumbar range of motion was limited by pain. Sensation was intact. Lumbar spine X-rays noted mild degenerative changes.

Dr. Freedberg diagnosed lumbar neuritis/radiculitis, bilateral knee contusion/sprain, and bilateral hip sprain/strain. Dr. Freedberg noted the onset of Petitioner's present illness was on September 16, 2020. He noted the cause and mechanism was a traumatic work MVA. He ordered a knee brace and lumbar corset, and prescribed Protonix, Mobic, Tramadol, Flexeril, and Lyrica for his symptoms. Dr. Freedberg also ordered a course of physical therapy and took Petitioner off work with restrictions of weight-bearing as tolerated.

On November 12, 2020, Petitioner returned to Dr. Thomas (PX #5). The focus again was his diabetes. He reported that he was taking prescribed cyclobenzaprine, meloxicam, pantoprazole, pregabalin, and tramadol. There were no notes regarding who had prescribed these medications. There was no note that Petitioner had consulted Dr. Freedberg or that he had ordered physical therapy. There were no notes

documenting complaints about low back pain or radicular symptoms. Dr. Thomas ordered Lyrica herself but without stating why or for what condition.

On November 16, 2020, Petitioner began a course of physical therapy at Team Rehabilitation Physical Therapy (PX #6 & PX #7). The initial evaluation noted diminished right leg and right hip strength and diminished range of motion. Petitioner's diabetes was also noted. Petitioner's job duties as an auto mechanic required lifting up to 70 pounds. Petitioner attended 80 sessions of therapy through July 7, 2021.

On November 19 and December 3, 2020 Petitioner returned to Dr. Thomas via telehealth, complaining of back pain (PX #5). He reported that he had been taking Meloxicam and Tramadol at night to help him sleep, but that this did not help him during the day. He also reported that Lyrica made him "loopy." Again, there was no documentation that Petitioner was treating with Dr. Freedberg or that he was receiving physical therapy.

Petitioner returned to Dr. Freedberg on December 9, 2020 (PX #6). He complained of constant, achy, sharp, shocking pain in his lower back radiating to both hips, as well as constant sore, aching, stabbing, throbbing pain in both knees. He rated his pain a 9/10. He reported that his lumbar brace was helping a lot.

Findings on clinical physical examination were essentially unchanged, with tenderness to palpation over the lumbar spinous process, severe tenderness over the paraspinal muscles, diffuse anterior tenderness to palpation over the lower extremities, a positive straight-leg raise test on the right, and lumbar range of motion was limited by pain. Dr. Freedberg ordered a lumbar spine MRI and continued Petitioner on physical therapy.

The December 17, 2020 MRI demonstrated multilevel lower lumbar spondylosis, an L4-5 disc herniation eccentric to the right without gross compression of the general sac and possible referred pressure to the right L4 nerve root, and an L5-S1 prominent disc herniation obliterating epidural fat causing mass effect on S1 nerve root, left greater than right, with possible referred pressure on the left L5 nerve (PX #6).

On December 23, 2020, Petitioner returned to Dr. Freedberg and PA-C Anthony Bartkowiak with continued complaints of 8/10 pain in the lower back, hips, and knees. Back pain radiated into both hips. Medial knee pain was sharp and stabbing. Findings on physical examination were unchanged. Dr. Freedberg reviewed Petitioner's MRI results and referred him to Dr. McNally for treatment of his spine.

Petitioner presented to orthopedic surgeon Dr. Thomas McNally and PA-C Michael McClellan at Suburban Orthopaedics on January 15, 2021 (PX #6). Petitioner complained of constant back pain at 8/10 radiating down his legs bilaterally, which increased with any activity other than lying down, and was more bothersome on the right than the left. Petitioner reported that the pain was now reaching his feet. He gave a history of injury from driving a bus on September 16, 2020 when a truck pulled out, causing him to hit the truck. He was admitted to "Engles" [*sic*] Hospital for three days. It was not documented that Petitioner was admitted to Ingalls Memorial Hospital for acute renal failure, diabetic ketoacidosis, and lactic acidosis. Petitioner was on a variety of medications for hypertension, high cholesterol, and diabetes following his September 16 accident.

Petitioner stated that the pain was disturbing his sleep, and that he could only walk for up to 10 minutes before he needed to lie down. On physical examination, there was tenderness to palpation over the midline lumbosacral/coccyx area, diminished lumbar range of motion with pain, diminished strength in the right anterior tibialis and extensor hallucis longus, sciatic notch tenderness on the right, bilateral positive straight-leg raise signs, and inability to heel or toe walk on the right.

Dr. McNally took lumbar spine X-rays, which showed decreased disc space at L3-4, L4-5, and L5-S1. Dr. McNally reviewed Petitioner's lumbar spine MRI of December 17, 2020. His independent reading of the images was "basically the same as the official report."

Dr. McNally diagnosed lumbar spinal stenosis with neurogenic claudication, transitional vertebra, lumbar disc displacement, lumbar degenerative disc disease, and strain of the muscle, fascia, and tendons of the lower back.

Dr. McNally discussed surgical versus nonsurgical treatment options, as well as the risks of surgery. He noted that surgery usually leads to faster improvement of radicular symptoms. He opined that Petitioner would be a candidate for decompressive surgery if conservative treatment failed. Dr. McNally referred Petitioner to Dr. Dimitry Novoseletsky for interventional pain management and ordered an EMG/NCV of the lower extremities. He continued Petitioner on Meloxicam and physical therapy.

Petitioner underwent an EMG/NCS with Dr. Aleksandr Goldvehkt on February 3, 2021 (PX #6). The EMG demonstrated evidence of bilateral L5-S1 lower extremity radiculopathy, with reduced motor recruitment and reinnervated motor unit potentials. There was possible concomitant right focal deep peroneal neuropathy. Dr. Goldvehkt recommended lumbar spine imaging to correlate a structural cause for nerve root disease.

Petitioner returned to Suburban Orthopaedics on February 24, 2021, when he was seen by Dr. Novoseletsky (PX #6). Petitioner complained of low back pain at 8-9/10 radiating down both legs. His pain was worse with standing, walking, bending, sitting, and reaching overhead. Dr. Novoseletsky reviewed Petitioner's course with Drs. Freedberg and McNally and noted that physical therapy was helping. Petitioner's history of an MVA September 16, 2020 was noted. He denied losing consciousness in the accident.

Dr. Novoseletsky did not note Petitioner's history of a three-day hospitalization at Ingalls Memorial Hospital for acute renal failure, diabetic ketoacidosis, and lactic acidosis following his September 16, 2020 accident.

On examination Dr. Novoseletsky noted tenderness to palpation in the lumbar paraspinal muscles and reduced lumbar extension and flexion range of motion limited by pain. Fortin Finger test, FABER/Patrick's test, and Gaenslen's test were positive on the right. Straight-leg raise was negative. There was reduced muscle strength in his right leg and reduced deep Achilles tendon reflexes on the right. Dr. Novoseletsky noted that Petitioner exhibited no Waddell signs.

Dr. Novoseletsky reviewed Petitioner's imaging studies and the EMG/NCS results. He noted the EMG was positive for L5-S1 radiculopathy. Dr. Novoseletsky opined that the cause/mechanism of Petitioner's condition was "traumatic (MVC)." Dr. Novoseletsky recommended an epidural steroid injection and continued physical therapy.

Orthopedic surgeon Dr. Avi Bernstein performed a §12 IME on April 26, 2021. He wrote an addendum report on October 4, 2021. Dr. Bernstein testified at his evidence deposition on October 18, 2021 (RX #1). His April 26 report was marked as Deposition Exhibit #2 and his addendum report was marked as Deposition Exhibit #3. DepX #2 and DepX#3 were admitted in evidence without objection.

Dr. Bernstein testified he is board-certified in orthopedic surgery and is affiliated with The Spine Center. He primarily treats adult degenerative traumatic disorders, disc herniations, and fusions. He performs approximately 100 IMEs per year. He refreshed his memory of Petitioner's case with referral to his records.

Dr. Bernstein testified that at the April 26, 2021 IME Petitioner denied any prior history of low back pain. He reported he was a bus mechanic for PACE and had been involved in a collision with a truck when he was driving a bus. Petitioner reported that he was transported to the emergency room and admitted to the hospital for three days for severe complaints of back pain, that he underwent tests, and then was discharged.

Petitioner saw his primary doctor following discharge, who ordered X-rays. Dr. Bernstein further testified that Petitioner reported he was sent to Dr. Freeburg by his attorney. Dr. Freedberg gave him medications and ordered X-rays as well as an MRI. Petitioner had physical therapy over six months, which he reported was somewhat helpful, although symptoms returned after leaving the therapy unit. Dr. Bernstein testified Petitioner described his symptoms as a "Charley horse" sensation around his knees and described a stinging sensation. Dr. Bernstein explained that a Charley horse sensation is not a symptom normally describing a spine or nerve root compression problem. Petitioner reported that he took medications but could not remember the medications. Petitioner also reported that he had seen specialists who recommended an epidural steroid injection and possible surgery, none of which had been approved.

Dr. Bernstein testified that Petitioner reported that his symptoms were worse when standing and with any physical activity including bending, lifting, or twisting. The only improvement he realized was during physical therapy. Petitioner also reported that he needed a cane constantly to help him walk. He described pain radiating down both legs, including buttocks, thighs, and calves, with no leg being particularly worse than the other.

On examination Dr. Bernstein noted Petitioner was a large strongly built, overweight individual who appeared comfortable when seated in a wheelchair. Petitioner moaned and groaned when he got out of the wheelchair, complaining of low back pain. He was able to ambulate without support. He was able to get up on his toes and his heels but with low back pain. He forward flexed to where his fingers were at mid shins but with pain. Petitioner had intact and brisk reflexes at the knees and ankles. He had excellent strength of the lower extremities. Straight-leg raising was negative, meaning without back pain or radiating leg pain. There was no atrophy in the lower extremities.

Dr. Bernstein also reviewed Petitioner's medical records including the December 17, 2020 MRI report which described disc degeneration throughout the spine, especially at L4-5 and L5-S1. Dr. Bernstein noted the radiologist described a prominent central disc herniation at L5-S1 with mass effect on the nerve roots bilaterally and an eccentric to the right disc herniation at L4-5.

Dr. Bernstein reviewed the hospital records which demonstrated Petitioner's diagnosis with acute renal failure and lactic acidosis from poorly controlled diabetes. Dr. Bernstein also noted the ER doctor's observation that Petitioner did not remember the accident and the report of emergency personnel that Petitioner had altered consciousness at the scene. He noted the reason for Petitioner's admission was diabetic

ketoacidosis. Dr. Bernstein also noted there were no complaints of low back pain in the emergency room or at any time during the admission to the hospital.

Dr. Bernstein noted that Petitioner followed with Dr. Thomas with telehealth visits. He noted that by October 15 Petitioner reported he felt well and was ready to return to work. However, on October 27 Petitioner returned to Ingalls Hospital complaining of pain of pain in both legs, hips, and low back, especially over the last week.

Following review of Petitioner's medical records, Petitioner's history given at the IME, and his examination Dr. Bernstein could not identify a spine injury that resulted from the motor vehicle accident on September 16, 2020. He noted that Petitioner had severe complaints for which he could not find support in the examination. Petitioner had negative findings on exam that were unexpected with the severity of subjective complaints. Dr. Bernstein felt that when subjective complaints were eliminated there was no reason why Petitioner could not return to work.

Dr. Bernstein testified that he did not review the actual MRI films at the time of his April IME. However, he reviewed the actual films on October 4, 2021. He thought the MRI demonstrated multilevel disc degeneration throughout the lumbar spine, a large central disc bulge or protrusion or even herniation impinging on the S1 nerve roots, and a central to right-sided disc protrusion at L4-5, which he testified agreed with the radiologist's interpretation.

Dr. Bernstein opined that the MRI findings were not related to the September 16, 2020 incident. He explained that there were no concomitant complaints of low back pain. He noted the first reference to low back pain was 11 days after the accident. He expected that suffering an acute back injury with a disc herniation would generate immediate or slightly delayed complaints of back pain and then neurologic symptoms.

On cross-examination Dr. Bernstein confirmed that he noted symptom magnification and exaggeration on the physical examination. He noted Petitioner had a nonfocal neurological evaluation. Dr. Bernstein acknowledged Petitioner did have pathology in his lumbar spine. He also confirmed that he had no knowledge of any prior treatment for low back complaints and that Petitioner was working full duty as a bus driver before the accident.

Petitioner returned to Dr. McNally on June 4, 2021, complaining of continued lower back pain at 8/10 radiating down his legs (PX #6). Petitioner now reported tingling and numbness in his legs reaching his feet, predominantly on the right. He reported that he could now only walk four minutes before he felt his sides start to

tighten and he had to sit down to avoid falling over. He had not seen Dr. Novoseletsky for planned injections because they were denied by insurance. Findings on physical examination were unchanged, as were the diagnoses..

Dr. McNally reviewed Dr. Bernstein's April 26, 2021 IME report. He noted Dr. Bernstein's opinion that Petitioner did not suffer any serious injury to his spine as a result of his motor vehicle incident. Dr. Bernstein added Petitioner's admission to the hospital and subsequent medical treatment was for diabetic ketoacidosis and that Petitioner did not voice low back pain until a month following a motor vehicle accident. Dr. Bernstein also noted symptom magnification and opined that Petitioner was able to function in an unrestricted capacity.

Dr. McNally noted his own opinion that the MVC (motor vehicle crash) on September 16, 2021 did not cause the degenerative changes in Petitioner's lumbar spine. He further opined the disc herniations from the December 17, 2020 lumbar MRI were consistent with a history of trauma and to a reasonable degree of medical surgical certainty he opined the MVC of September 16, 2020 aggravated and accelerated pre-existing previously asymptomatic degenerative lumbar spine conditions.

Dr. McNally again discussed operative and non-operative treatment options with Petitioner. He added that if Petitioner failed non-operative care he would be a candidate for surgical intervention. He recommended Petitioner continue with Dr. Novoseletsky and physical therapy

Petitioner was seen by orthopedic surgeon Dr. Dalip Pelinkovic at Suburban Orthopaedics on July 2, 2021 for a spine surgery consult (PX #6). He complained of 8/10 low back pain. Dr. Pelinkovic reviewed Petitioner's history, diagnostic studies, and care under Drs. Freedberg, McNally, and Novoseletsky, as well as the course of physical therapy.

Dr. Pelinkovic did not note Petitioner's history of a three-day hospitalization at Ingalls Memorial Hospital for acute renal failure, diabetic ketoacidosis, and lactic acidosis following his September 16 accident.

Dr. Pelinkovic's findings on physical examination were similar to the findings of Drs. Freedberg and McNally. Dr. Pelinkovic noted the MRI findings of herniated discs at L4-5 and L5-S1, as well as the EMG findings of bilateral L5-S1 radiculopathy. The doctor also reviewed Dr. Bernstein's IME report. Dr. Pelinkovic diagnosed a right L5-S1 disc herniation and recommended a right-sided L5-S1 microdiscectomy to address Petitioner's recalcitrant symptoms.

Dr. Pelinkovic testified at an evidence deposition September 17, 2021 (PX #10). Dr. Pelinkovic is a board-certified orthopedic surgeon affiliated with Suburban Orthopaedics. He has a subspecialty in spine surgery. He noted that Dr. McNally is no longer in his practice. He testified from his own records, the MRI imaging, the EMG report, and Dr. Bernstein's April 26, 2021 IME report. He also testified that he had access to the electronic records of Suburban Orthopaedics.

Dr. Pelinkovic testified that he saw Petitioner on July 2, 2020 for lower back pain. Petitioner reported injury on September 16, 2020 when he was driving a bus that collided with a truck. He reported that airbags deployed. He also denied losing consciousness. Petitioner further reported that he was initially treated at Ingalls Hospital in the ER where he was examined, and radiographs were done.

Petitioner reported he followed with Dr. Freedberg and had further imaging, an MRI, and prescribed physical therapy. Petitioner then followed up with Dr. McNally for a spine surgery consult. Dr. McNally ordered further imaging and referred petitioner to Dr. Novoseletsky for pain management. Dr. Novoseletsky examined Petitioner and ordered epidural injections.

Dr. Pelinkovic testified that Petitioner presented with constant sharp lower back pain, right more than left, and pain shooting down his leg. Pain was reproduced or exacerbated by prolonged sitting and physical activities such as walking. The doctor noted Petitioner came to standing with upper extremity support. He had pain and tenderness at the junction between the lower back of the pelvis. Petitioner had somewhat decreased range of motion with pain, notably down the right leg. The MRI showed herniations at L5-S1 to the right, the symptomatic side, and a disc protrusion at L4-5.

Dr. Pelinkovic diagnosed right lower extremity radiculopathy correlating to a right L5-S1 disc herniation, for which he recommended a microdiscectomy. He testified that he recommended a microdiscectomy because Petitioner was not improving with conservative treatment despite a year of physical therapy, and his symptoms were impacting his activities of daily living. Dr. Pelinkovic further opined that Petitioner's condition was causally related to his work accident because, to his knowledge, Petitioner did not have any pre-existing condition and was asymptomatic prior to the accident.

Dr. Pelinkovic noted that Dr. Bernstein confirmed that Petitioner did not have a pre-existing condition. He disagreed with Dr. Bernstein's opinions, noting that Dr. Bernstein did not have an opportunity to review the MRI imaging. Dr. Pelinkovic testified that Dr. Bernstein's opinions were based on limited information.

On cross-examination Dr. Pelinkovic acknowledged that Petitioner had mostly normal muscle strength and presented with no muscle atrophy. The doctor also acknowledged that he did not review previous records before seeing Petitioner. He also acknowledged that he did not know the specifics of Petitioner's physical therapy.

On redirect examination Dr. Dr. Pelinkovic testified he relied on Petitioner's history, his examination, the EMG, the MRI, and X-rays.

Petitioner testified he has not worked since September 16, 2020.

Petitioner testified his back continues to keep him up at night such that he can barely get any sleep. Pain in his lower back radiates down his right leg and down his left leg to the knee. He testified that he can't control anything. He takes the medications prescribed to him at Suburban Orthopaedics to try to manage the pain. He testified that his pinched nerves have ruined his whole life.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner failed to prove that his claimed current condition of ill-being, a herniated lumbar disc with radiculopathy, was causally related to the motor vehicle accident on September 16, 2020. This finding is primarily based on Petitioner's lack of credibility and untruthfulness.

Petitioner testified at trial in detail regarding the specific facts of the underlying accident. However, the EMS and Ingalls Emergency Department records documented Petitioner's altered mental status and loss of memory. It is unlikely that Petitioner actually had direct recall of the facts he testified to at trial.

Petitioner admitted to Ingalls Memorial Hospital due to a diagnosis of diabetic ketoacidosis and renal failure, which he confirmed in his testimony at trial. At his IME with Dr. Avi Bernstein on April 26, 2021 Petitioner gave a history to Dr. Avi Bernstein that he was "admitted to the hospital for three days for severe complaints of back pain." This is blatantly untruthful. In addition, there were no documented complaints of back pain or radicular symptoms or assessment for the same in the Ingalls inpatient records. Also, Petitioner testified that he received physical therapy at Ingalls, although there are no records documenting physical therapy at Ingalls.

Petitioner followed up with his primary physician, Dr. Cynthia Thomas. Although Dr. Thomas did document complaints pain at the waistline and into the legs

on September 25, 2020 her primary focus was management of Petitioner's uncontrolled diabetes. There were no notes regarding assessment of those complaints or consideration of a referral for an orthopedic consultation. There was no documented report of Petitioner's claimed back complaints before September 25, 2020. It is noteworthy that over the course of his care with Dr. Thomas following the accident Petitioner did not report the concurrent care he was receiving from Dr. Freedberg at Suburban Orthopaedics.

The Arbitrator takes note that of Petitioner's subsequent treating physicians did not document Petitioner's hospitalization for diabetic ketoacidosis and renal failure or include a diagnosis of diabetes. None these physicians in the chain of care and referral gave consideration of the well-recognized impact of diabetes on peripheral nerve symptomology. None of the physicians who recommended surgery made note of the well-recognized risk presented by poorly controlled diabetes to any surgery. There was no documentation of Petitioner's concurrent medical care with Dr. Thomas.

In addition, the subsequent treating physicians attending Petitioner at Suburban Orthopaedics engaged in "cut and paste" of Petitioner's original history and physical exam findings by Dr. Freedberg, which included the "Engles" misspelling of Ingalls Memorial Hospital.

Apparently Petitioner withheld significant medical history information from each and every physician who he consulted after his accident or that each and every of those physicians obtained a significantly inadequate and incomplete medical history of Petitioner's clinical case. Regardless, due to the inadequate and incomplete histories these physicians obtained, most likely in large part due to Petitioner withholding significant information, any opinion of Drs. Freedberg, McNally, Novoseletsky, and Pelinkovic lacks some degree of reliability and persuasion. Those opinions are also questionable in light of the "cutting and pasting" of Dr. Freedberg's history and physical findings, that indicates the subsequent physicians did not take a genuine history or conduct a meaningful clinical examination.

On the other hand, Respondent's examining IME physician, Dr. Bernstein, reviewed a substantial body of Petitioner's medical records, records that Petitioner's treating physicians had not reviewed. Further, Dr. Bernstein obtained a more detailed history, which included Petitioner's untruthful report of the nature of his inpatient care at Ingalls Memorial Hospital, and conducted a more thorough clinical examination. Dr. Bernstein's observed that a traumatically caused herniated lumbar disc with generate immediate pain, which was not Petitioner's documented history. As such Dr. Bernstein opined that Petitioner did not sustain a significant injury in the September 16, 2020 motor vehicle collision, an opinion which the arbitrator finds a reasonable.

The Arbitrator also notes that Petitioner signed out from Ingalls Memorial Hospital against medical advice on two separate occasions. This raises an inference of Petitioner's noncompliance with and necessary medical care, which also adversely affects his credibility.

In light of all of the above evidence and inferences the Arbitrator finds the lack of causation opinion of Dr. Avi Bernstein is more reasonable and persuasive than the causation opinions of Drs. Freedberg, McNally, Novoseletsky, and Pelinkovic.

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

The evidence demonstrated that Petitioner was in diabetic crisis as a result of the motor vehicle accident on September 16, 2020. However, Petitioner's claim here is that he sustained a herniated lumbar disc and radiculopathy that were causally related to that accident. The Arbitrator has previously found that Petitioner failed to prove that his herniated lumbar disc and associated radiculopathy were causally related to his work accident on September 16, 2020. Therefore, the Arbitrator finds that petitioner failed to prove that the medical care and treatment, as well as the professional fees and charges for the treatment, were reasonable and necessary to treat or cure a medical condition causally related to the underlying accident.

K: Is Petitioner entitled to prospective medical care?

As noted above, the Arbitrator has concluded that Petitioner's current condition of ill-being is not causally related to the accident. This is an essential element to be proven by the Petitioner in order to recover benefits. Due to this failure, the arbitrator finds that Petitioner e failed to prove he is entitled to any prospective medical care.

L: What temporary benefits are in dispute? TTD

As noted above, the Arbitrator has concluded that the Petitioner's current condition of ill-being is not causally related to the accident. This is an essential element to be proven by the Petitioner is order to recover benefits. Therefore, the Arbitrator finds that Petitioner failed to prove that he is entitled to total temporary disability benefits.

The Arbitrator noted the inconsistency of Petitioner's testimony claiming an off-of work period beginning September 16, 2020 in his testimony, Arbitrator's Exhibit #1,

and the medical records indicating the Petitioner was still working for Respondent as of September 25, 2020.

Steven J. Fruth, Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC012060
Case Name	Melvin Young Jr. v. Ford Motor Company
Consolidated Cases	17WC016050;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0325
Number of Pages of Decision	27
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Paul O'Toole, David Froylan
Respondent Attorney	Kirk Kuhns

DATE FILED: 8/24/2022

/s/ Deborah Baker, Commissioner

Signature

22IWCC0325

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELVIN YOUNG, JR.,

Petitioner,

vs. NO: 15 WC 12060

FORD MOTOR COMPANY,

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 temporary total disability benefits, temporary partial disability benefits and Petitioner's entitlement to permanent partial disability benefits and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. This case was consolidated for hearing with case number 17WC16050.

The Commission hereby incorporates by reference the findings of fact and conclusions of law contained in the Decision of the Arbitrator, except as stated below. As it pertains to permanent partial disability, the Commission modifies the Decision of the Arbitrator. In the Decision of the Arbitrator, the Arbitrator declined to award permanency, noting that Dr. Gabriel S. Levi diagnosed Petitioner with a cervical strain after the instant accident on October 20, 2014, but Petitioner had not received treatment for his injury since May 5, 2015. The Arbitrator also noted that on that date, Dr. Levi placed Petitioner on restricted duty without explanation and did not see what more he could do to make Petitioner better. Moreover, at trial, Petitioner did not complain of any cervical issues.

The Commission views the evidence differently than the Arbitrator, and, based on the analysis mandated in Section 8.1b of the Act, finds that Petitioner is entitled to a permanency award in the instant matter.

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur

after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Commission notes Petitioner was a Forklift Operator at the time of accident. Subsequently, Dr. Levi gave Petitioner permanent restrictions of no repetitive motion of the arms and neck and limited use of a forklift, which continued through his final treatment date of May 5, 2015. At no point in time were these restrictions removed. Substantial weight is assigned to this factor.

With regard to subsection (iii) of §8.1b(b), the Commission notes Petitioner was 30 years of age at the time of the accident. The injuries Petitioner sustained to his cervical spine and right shoulder would inhibit the substantial work-life Petitioner appears to have remaining due to his young age. Substantial weight is assigned to this factor in favor of an increase in permanent disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity, the Commission finds no credible evidence of reduced earning capacity contained in the record. Petitioner testified that after being terminated by Respondent, he worked for one year as a Security Guard, which required little to no physical activity, and then worked part-time as a CTA Bus Driver for one year before resigning. As a Bus Driver, Petitioner testified that he mainly drove up and down streets, only having to turn the wheel occasionally. Petitioner argues that his permanent restrictions have limited his job market. He indicated that he resigned his position as a Forklift Operator with Respondent in order to find something better, but gave no indication that his resignation had anything to do with his medical condition. Further, despite Petitioner's argument that his job market has been reduced, there is no evidence in the record that Petitioner is now unable to earn a similar wage to that which he earned as a Forklift Operator. Liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. See *Deichmilier v. Industrial Commission*, 147 Ill. App. 3d 66, 74 (1st Dist. 1986). Moderate weight is assigned to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the record reflects that Petitioner's treatment after the accident included physical therapy, ointment, pain medication and a Medrol Dosepak. During his last visit with Dr. Levi on May 5, 2015, Petitioner complained of occasional pain and constant numbness, although the location of the numbness was not provided. He also had pain in the right trapezius muscle and was diagnosed with a cervical strain. Although Petitioner indicated physical therapy was "helping very much," Dr. Levi did not see what more he could do to make Petitioner better. However, Dr. Levi released Petitioner to work with restrictions of no repetitive motions of the upper extremity and neck, thus limiting Petitioner's use of a forklift. He recommended a pain management doctor if Petitioner wanted further treatment. Substantial weight is assigned to this factor.

Based on the above analysis, the Commission finds that Petitioner proved he is permanently and partially disabled due to the injuries he sustained on October 20, 2014, and hereby modifies the Decision of the Arbitrator, finding that the injuries sustained caused a 3.5% loss of use of Petitioner's person-as-a-whole.

All else is affirmed.

IT IS THEREFORE FOUND BY THE COMMISSION that the Decision of the Arbitrator filed October 27, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner has established causation between the instant accident and his current right shoulder and cervical spine conditions of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $438.30 per week for a period of 8 & 1/7ths weeks, from March 10, 2015 through May 5, 2015, this 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 receive §8(j) credit of $14,777.67, per the parties' stipulation, for any short-term disability benefits it paid during the period of temporary total incapacity.

IT IS FURTHER ORDERED BY THE COMMISSION that the claimed bill from RX Development (Petitioner's Exhibit #6) is declined, as said bill relates to medication prescribed by Dr. Levi in 2017 for Petitioner's bilateral cubital tunnel condition.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $394.47 per week for a period of 17.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 3.5% loss of use of his person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,600.00. 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.

August 24, 2022

O: 6/29/22
DJB/wde
043

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Stephen Mathis*
Stephen Mathis

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC012060
Case Name	YOUNG JR, MELVIN v. FORD MOTOR COMPANY
Consolidated Cases	17WC016050
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Molly Mason, Arbitrator

Petitioner Attorney	David Froylan
Respondent Attorney	John Fassola

DATE FILED: 10/27/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 26, 2021 0.06%

/s/Molly Mason, Arbitrator

Signature

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

Melvin Young, Jr. Employee/Petitioner
Case # **15 WC 12060**

v.

Ford Motor Company Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2021**. 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 **10/20/2014** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

For the reasons stated in the attached decision, the Arbitrator finds that Petitioner established causation as to right shoulder and cervical spine conditions that required treatment in 2014 and 2015 but failed to establish causation as to any permanent condition of ill-being.

In the year preceding the injury, the Petitioner earned $**33,529.96**; the average weekly wage was $**657.45**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **1** child under 18.

For the reasons stated in the attached decision, the Arbitrator declines to award the RX Development medical bill (PX 6) claimed by Petitioner. That bill relates to medication that Dr. Levi prescribed in March 2017 for Petitioner's bilateral cubital tunnel condition.

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $14,777.67 for other benefits, for a total credit of $14,777.67. Arb Exh 1.

Respondent is entitled to a credit of $5,239.11 under Section 8(j) of the Act. Arb Exh 1.

ORDER

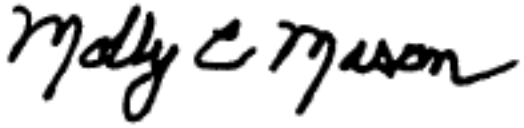
RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $438.30 PER WEEK FROM MARCH 10, 2015 THROUGH MAY 5, 2015, A PERIOD OF 8 1/7 WEEKS, WITH RESPONDENT RECEIVING SECTION 8(J) CREDIT, PER THE PARTIES' STIPULATION, FOR ANY SHORT-TERM DISABILITY BENEFITS IT PAID DURING THIS PERIOD.

FOR THE REASONS SET FORTH IN THE ATTACHED DECISION, THE ARBITRATOR FINDS THAT PETITIONER ESTABLISHED CAUSATION AS TO RIGHT SHOULDER AND CERVICAL SPINE CONDITIONS THAT REQUIRED TREATMENT IN 2014 AND 2015. THE ARBITRATOR DECLINES TO AWARD THE CLAIMED BILL FROM RX DEVELOPMENT (PX 6) BECAUSE THAT BILL RELATES TO MEDICATION DR. LEVI PRESCRIBED IN 2017 FOR PETITIONER'S BILATERAL CUBITAL TUNNEL CONDITION.

FOR THE REASONS SET FORTH IN THE ATTACHED DECISION, THE ARBITRATOR FINDS THAT PETITIONER FAILED TO ESTABLISH CAUSATION AS TO ANY PERMANENT RIGHT SHOULDER OR CERVICAL SPINE CONDITION OF ILL-BEING. THE ARBITRATOR DECLINES TO AWARD PERMANENCY BENEFITS IN 15 WC 12060.

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.



OCTOBER 27, 2021

Signature of Arbitrator

Melvin Young v. Ford Motor Company
15 WC 12060 and 17 WC 16050 (consolidated)

Summary of Disputed Issues in Both Cases

Petitioner, a forklift operator with a remote history of a gunshot wound in his right upper arm, claims a work accident of October 20, 2014 [15 WC 12060] involving right shoulder and neck injuries and repetitive trauma bilateral cubital tunnel injuries manifesting January 10, 2017 [17 WC 16050]. Petitioner testified he experienced pain in his right shoulder and neck on October 20, 2014 while operating the forklift and using his right hand to maneuver the four levers on the forklift. He reported this pain and underwent care at Respondent's in-house medical facility on the evening of October 20, 2014. He underwent Emergency Room care early the following morning, after he left work. Emergency Room personnel documented the previous gunshot wound and indicated that Petitioner complained of right shoulder pain caused by "repetitive motion" from "operating fork lift at job." PX 2. Petitioner was given restrictions, which he presented to Respondent. He returned to the Emergency Room about nine days later and was again given work restrictions, which he provided to Respondent. He subsequently saw Dr. Levi, an orthopedic surgeon, and underwent physical therapy and a right shoulder MRI. The radiologist who interpreted the MRI indicated he was unable to fully evaluate the rotator cuff due to metallic fragments from the gunshot wound. He noted no labral abnormalities. A cervical spine MRI, performed on March 19, 2015, showed posterior annular disc bulges at three levels. PX 4, 5.

Petitioner acknowledged he last underwent care for his shoulder and neck condition on May 5, 2015. On that date, Dr. Levi again imposed restrictions but noted no shoulder abnormalities on examination and released Petitioner from care. At the hearing, Petitioner did not testify to any current shoulder or neck symptoms.

In the second claim [17 WC 16050], Petitioner alleges bilateral cubital tunnel syndrome secondary to repetitive trauma manifesting on January 10, 2017. Petitioner acknowledged he did not work at Respondent between February 2015 and February 2017. Petitioner did not file his Application in 17 WC 16050 until May 31, 2017. RX 2.

Dr. Neal, a board certified orthopedic surgeon, conducted two Section 12 examinations, in June 2016 and November 2017. In his first report, he noted bilateral upper extremity paresthesias and recommended EMG testing as well as a repeat cervical spine MRI but saw no connection between Petitioner's forklift operation and his symptoms. He found Petitioner capable of full duty but conceded Petitioner would remain symptomatic if he resumed working. RX 4. In his second report, he diagnosed bilateral cubital tunnel but did not causally link this condition to Petitioner's work activities. He again conceded that Petitioner would remain symptomatic if he resumed operating a forklift. RX 5.

In 15 WC 12060, the disputed issues include accident, causal connection, various periods of temporary total disability, various periods of temporary partial disability and nature

and extent. In 17 WC 16050, the disputed issues include accident, notice, causal connection, temporary total disability, temporary partial disability, prescription expenses and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he was born on October 5, 1984. He was 36 years old as of the hearing.

Petitioner acknowledged sustaining a gunshot wound in his right arm, above the elbow, in October of 2002 or 2003. Under cross-examination, he testified he recovered fully from this injury and was able to resume sports activities, including basketball. As of October 20, 2014, he was not undergoing any treatment for or suffering any effects from the gunshot wound. He denied any other injuries to his shoulder or neck prior to October 20, 2014.

On direct examination, Petitioner testified he began working as a forklift operator for Respondent in August or September of 2013. Under cross-examination, he indicated he would not disagree with his employment records if they reflect he was in fact hired on November 11, 2013.

Petitioner testified he always worked as a forklift operator. The forklifts he operated were of the "sit down" variety. He used the forklift to "feed" and remove product from a moving assembly line that was U-shaped. He testified the line had at least twenty stations. One station, referred to as the "sub frame," involved 100 set-ups. At this station, he had to grab various items while watching the moving line. Three models of cars were being assembled along the line. He had to keep up with the pace of the work. If the assemblers working along the line ran out of product, the line would stop and an alarm would sound.

Petitioner testified that the forklifts he operated had a ball-type assembly steering wheel and four levers that were used to position and move the forks. He primarily used his left hand to steer and his right hand to operate the levers. On some occasions, he had to use both hands to raise the levers. The forklifts he operated were equipped with power steering but the battery wore down as the workday progressed, causing the power steering to become less effective. It was when the battery wore down that he used both hands to adjust the levers.

Petitioner testified he typically worked four ten-hour shifts per week. He was allowed to take a 30-minute lunch break during each shift. During the remaining 9 ½ hours, he operated a forklift continuously. He was required to watch out for co-workers and had to turn his head from side to side to check for traffic, especially when operating the forklift in reverse.

Petitioner testified he has driven cars and shifted gears while doing so. He described forklift operation as similar to changing gears while driving a car.

Petitioner testified he developed pain in his right shoulder and neck on the night of October 20, 2014, while maneuvering the forklift levers and looking backward to check for traffic. He reported the accident and went to Respondent's in-house medical clinic. At the clinic, he was asked how his pain came about. He completed a report indicating he experienced pain with lever operation.

Records in PX 1 reflect that Petitioner saw Tisha Harris, R.N., at Respondent's in-house clinic at about 11:17 PM on October 20, 2014. Harris noted that Petitioner had started working at 4:00 PM that day and had become symptomatic at about 10:00 PM. She indicated that Petitioner "aggravated right shoulder while operating lift controls." She categorized Petitioner's injury as "rep. mot." She noted no redness or swelling of the right shoulder. She described Petitioner's range of motion as "slow and stiff." She indicated that Petitioner requested an "E/O form to go see PMD after aggravating right shoulder."

Petitioner testified he did not finish his shift on October 20, 2014, due to his pain. After he left work, he drove to the Emergency Room at Presence St. Mary of Nazareth Hospital. He went to this Emergency Room because it is in his neighborhood. Records in PX 2 reflect that Petitioner arrived at the Emergency Room at 12:36 AM on October 21, 2014. Petitioner saw Dr. Walton, who recorded the following history and complaints:

> "Melvin J Young is a 30 y.o. male who presents to the ED with shoulder pain to right shoulder with repetitive motion he performs operating fork lift at job. No new fall/trauma. H/o GSW to shoulder 12+ years ago with 2 surgeries for shoulder repair. Pt. denies pain currently but after several hours of work with upper body he feels discomfort. Asking for work restrictions note."

Another history, recorded by a nurse, reads as follows: "C/o right shoulder pain. Per pt he was shot 13 yrs ago in his shoulder and he was [sic] long shifts in a factory driving fork lifts. Pt states due to him constantly using his right arm at work his shoulder started to hurt." PX 2, p. 10.

Dr. Walton described Petitioner as 5 feet, 8 inches tall and weighing 130 pounds. On examination, Dr. Walton noted a full range of motion in both shoulders and full/equal strength in both shoulders. He diagnosed "chronic right shoulder pain." He prescribed Naproxen along with Keterolac for pain. He recommended that Petitioner seek follow-up care with his primary care physician and an orthopedic surgeon. He instructed Petitioner to schedule an appointment with a physician at the Illinois Bone and Joint Institute. PX 2, p. 24.

Petitioner testified he resumed working and provided Respondent with paperwork from the Emergency Room. Records in PX 1 reflect that, on the evening of October 24, 2014, Petitioner returned to Respondent's in-house medical clinic and saw a different nurse, Dianna Vanzant-Collins, R.N. Vanzant-Collins described Petitioner as "submitting paperwork to RTW with restrictions on 10/21/14 with dx: chronic right shoulder pain signed by Rachel Pulver, PA." Vanzant-Collins described Petitioner as stating: "This is not work related, it is a personal

injury." She also described Petitioner as denying pain currently. She released Petitioner to work subject to the following restriction: "no continuous work with right arm/shoulder." She indicated this restriction started on October 21, 2014 and ran through November 3, 2014. PX 1.

On October 29, 2014, Petitioner returned to the Emergency Room at Presence St. Mary of Nazareth Hospital. Records in PX 2 reflect that Petitioner saw Dr. Winstanley. The doctor recorded the following interval history:

> "Pt is a 30 y.o. male who presents to the ED with chronic right shoulder pain. Was seen 10/21/14 for evaluation, given a note to stay off forklift work and now presents to ER so he can have his work compensation paperwork completed by provider so that he can return to work. Did not call PCP or orthopedic surgeon as instructed, was never seen since last ER visit. No new complaints. Is able to range his shoulder fully."

Dr. Winstanley also noted a past medical history of a gunshot wound to the right arm requiring two shoulder surgeries. She noted no abnormalities on examination. She recommended that Petitioner follow up with his primary care physician and an orthopedic surgeon. PX 2, pp. 30-31.

Petitioner testified he received work restrictions on October 29, 2014 and presented them to Respondent. He could not recall whether any physician prescribed medication for him on October 29, 2014.

On November 3, 2014, Petitioner saw Dr. Flores at Presence St. Mary of Nazareth Hospital. The doctor noted a complaint of right shoulder pain. She described Petitioner as having an "overuse injury (fork lift operator 8 hours a day with short breaks in between and a GSW injury 12 years ago to affected area." On examination, she noted equivocal Hawkins and Neer's signs. She indicated she ordered right shoulder X-rays but no X-ray report is in evidence. She prescribed physical therapy and Naproxen. PX 3, p. 1.

Records in PX 3 reflect that Petitioner also saw Dr. Marcin at Presence St. Mary of Nazareth Hospital on November 3, 2014. Dr. Marcin described Petitioner as complaining of right shoulder pain that had started a week earlier. She noted that Petitioner had sustained a gunshot wound to his right shoulder twelve years earlier and that he was currently working as a forklift operator at Ford, with his job involving "constant shifting of gears with his right arm and shoulder for 8 hours per day." She described Petitioner as having a "possible work related injury." She noted that Petitioner described his symptoms as aggravated by repetitive and overhead movements. She noted that a physician had prescribed Naproxen a week earlier and that Petitioner had not taken this medication. On right shoulder examination, she noted tenderness over the acromioclavicular joint, a full active range of active motion and a full passive range of motion. She described Hawkins and Neer's testing as "negative at first, then positive." She noted no abnormalities on left shoulder examination. PX 3, p. 6. She prescribed

therapy, Naproxen and a right shoulder MRI. She imposed restrictions of "left-handed work or sit down work with limited use of the right extremity." PX 3, p. 7.

On December 15, 2014, Petitioner returned to Respondent's in-house medical facility and saw another nurse, Sameka Dowell Mills, R.N. Mills described Petitioner as complaining of right shoulder pain and "requesting E/O form d/t R shoulder pain from old gunshot wound." She indicated that Petitioner "refuses assessment and treatment." She described Petitioner as stating that he was scheduled to undergo therapy the next day and wanted to rest up so that he would not be in pain when he went to therapy. She provided Petitioner with an "E/O form." PX 1. [The Arbitrator interprets "E/O" to mean "early out." See further below.]

Petitioner returned to Presence St. Mary of Nazareth Hospital on December 16, 2014 and underwent a physical therapy evaluation with Nelisa Tejada, PT. A "patient history form" in PX 2 reflects that Petitioner complained of constant right shoulder pain with associated tingling "aggravated by forklift operating." Petitioner indicated he was currently working and taking both Advil and Naproxen. He also indicated his symptoms would abate after "continuous rest." He noted that he had undergone two right shoulder surgeries "due to shattered bone caused from gunshot 10 years ago." PX 2, pp. 52-53. On examination, Tejada noted negative impingement testing but documented slight pulling at the end range of internal and external rotation "which may indicate beginning impingement." She also noted complaints of tingling in the right neck, right arm and the ulnar aspect of the hands and fingers. PX 2, p. 47. She indicated that Petitioner reported fatigue whenever his arm was up and stated he could not maintain his arm in an "up position" as "it gets tired fast." PX 2, p. 74. She recommended a home exercise program. PX 2, p. 75.

On January 2, 2015, Petitioner saw Dr. Flores at Presence St. Mary of Nazareth Hospital. The doctor noted complaints of right shoulder pain and right-sided neck pain. She described Petitioner's condition as an "overuse injury," indicating that Petitioner reported operating a forklift eight hours a day "with short breaks in between." She also noted that Petitioner had sustained a gunshot wound twelve years earlier. On right shoulder examination, she noted equivocal Hawkins and Neer's testing. She noted that Petitioner had attended one physical therapy session and was "scheduled for seven more." She also noted that Petitioner had not yet undergone the previously recommended right shoulder MRI. She imposed restrictions of left-handed work or sit down work with limited use of the right extremity. PX 3, p. 9. In a separate note, she described Petitioner's right shoulder and neck pain as a "chronic issue" of greater than three months' duration. She also described the condition as "workers' compensation," noting that Petitioner operated a forklift at Ford and performed "constant shifting gears with his right arm and shoulder for 8 hours per day." PX 3, p. 11.

On January 8, 2015, Petitioner underwent a right shoulder MRI at Presence St. Mary of Nazareth Hospital. The MRI, performed without contrast, showed no significant effusion and no labral abnormalities. The radiologist commented that he was unable to fully evaluate the rotator cuff due to "extensive artifacts . . . from metal fragments apparently representing an old gunshot injury." PX 2, pp. 64-65.

Petitioner returned to Respondent's in-house medical facility on February 16, 2015 and again saw Dianna Vanzant-Collins, R.N. Vanzant-Collins noted a complaint of right shoulder pain traveling to the right shoulder blade. She noted a history of a gunshot wound "with old surgical scar to right shoulder and upper arm in three areas." She tested Petitioner's range of motion by lifting his arms overhead. She noted that Petitioner complained of discomfort when lifting his right arm. She also noted that Petitioner described his forklift driving as aggravating his right shoulder. She indicated that Petitioner had undergone a right shoulder MRI three weeks earlier and was awaiting the results. She noted that Petitioner had started therapy on December 16, 2014 but had stopped two weeks earlier "because it was getting expensive." She also noted that Petitioner reported discontinuing Naproxen two weeks earlier. She indicated that Petitioner's primary care doctor had imposed restrictions but that a specialist took him off work for two months "and he could no longer afford to stay home." She noted that Petitioner requested an "E/O" instead of "RTW" and that she provided him with an "E/O." PX 1. [The Arbitrator interprets the term "E/O" as meaning "early out" based on a form that appears at page 22 of PX 3. This form reflects that Respondent's medical department "cannot send" Petitioner home based on its evaluation and that Petitioner was opting to leave the facility "without permission" to seek care on his own. The form also states that Petitioner would be "subject to discipline" if his physician did not "fully justify" his absence from work.]

Petitioner returned to Presence St. Mary of Nazareth Hospital on February 19, 2015 and again saw Dr. Flores. The doctor noted that Petitioner had discontinued therapy after five sessions due to "difficulty of obtaining co-pay." She also noted the MRI results. She continued the previous restrictions and referred Petitioner to Dr. Levi, an orthopedic surgeon. PX 3, pp. 14, 21.

Petitioner returned to Respondent's in-house medical facility on February 20, 2015 and again saw Dianna Vanzant-Collins, R.N. Vanzant-Collins noted that Petitioner presented work restrictions and reported he was there to return to work. PX 1. Based on the wage records offered by Respondent, it appears that Petitioner worked one hour during the week ending February 22, 2015 and 10.5 hours on one day during the week ending March 8, 2015. Petitioner did not testify concerning the work he performed on these occasions. The Arbitrator has no information as to whether Respondent accommodated his restrictions during this time.

Petitioner first saw Dr. Gabriel Levi of Orthopaedic and Rehabilitation Centers, S.C. on March 10, 2015. The doctor recorded the following history:

> "The patient states he had a gunshot wound on 10/20/2001 which needed surgery (ORIF). The patient states he recovered well from that injury and has been working full duties for several years without difficulties with the shoulder. Prior to this injury it had been several years since he even had any pain. 'Probably the last time I had shoulder pain was a few months after the surgery in 2002.'

> In October 2014 he now been [sic] driving a forklift and he began having acute shoulder pain on right shoulder pain going up to the mid shoulder and lower part of the neck.
>
> For the past 8 months he has been driving a forklift without any difficulties until this injury in October 2014. The job he has been working requires him to move his arm and neck constantly for 10 hours. He feels that the repetitive movement has led to the pain he suffers from today. On the day that he began having this pain, he was moving his arms constantly and looking over his right and left shoulder which caused him to have sudden onset of pain."

Dr. Levi noted that Petitioner rated his current pain at 4/10 and indicated the pain reached a maximum of 8/10 "after his shift." He also noted that Petitioner described the pain as "shooting down his right arm into his right small and ring fingers."

On initial right shoulder examination, Dr. Levi noted well healed scars over the superior aspect of the shoulder from the previous surgery and pain with passive external rotation with the arm at 90 degrees. On bilateral arm examination, he noted negative Tinel's at the elbow at the ulnar nerve. On cervical spine examination, he noted mildly positive Spurling's testing.

Dr. Levi obtained right shoulder X-rays. He interpreted the films as showing no fractures and a bullet fragment in the mid arm level not involving the humerus. The doctor also obtained cervical spine X-rays. He interpreted the films as showing no fractures and severe loss of lordosis "signifying a muscle spasm."

Dr. Levi diagnosed a herniated cervical disc and right-sided cervical radiculopathy. He attributed these conditions to the October 2014 work injury. He prescribed a Medrol DosePak, six weeks of physical therapy, a cervical spine MRI, topical analgesics and non-steroidal anti-inflammatory medication. He released Petitioner to light duty with no lifting and no repetitive motion of the cervical spine and right arm. PX 5, pp. 4-7.

Petitioner testified he started therapy at Orthopaedic and Rehabilitation Centers on March 17, 2015. The evaluating therapist noted that Petitioner complained of neck pain and right shoulder pain radiating into the hand towards the little finger. She also noted that Petitioner complained of intermittent right hand numbness with grasping and certain activities. PX 5.

The cervical spine MRI, performed on March 19, 2015, showed no fractures, some mild straightening and reversal of the usual curvature, "probably representing muscle spasm", posterior annular disc bulges at C4-C5, C5-C6 and C6-C7 and an incidental polyp in the left maxillary sinus. PX 5, pp. 8-9.

Petitioner returned to Respondent's in-house medical facility on March 20, 2015 and saw Katrina Harvey, R.N., MSN. Harvey described Petitioner as stating:

> "Here in medical with paperwork dated 3/10/15 stating rtw with restrictions and next appt on 4/7/15. EE states when he first reported the injury he thought it was related to his gunshot wound but he has been dx with a cervical herniated disc and will need to begin PT."

Harvey described Petitioner as "walking without difficulty" and "able to move neck up and down and side to side." PX 1.

Petitioner returned to Dr. Levi on April 7, 2015. Petitioner reported feeling better "because he has not been working for about two months." Petitioner rated his current right shoulder and cervical spine pain at 2/10, indicating this rating increased with activity or turning his head to the left side. He reported improvement secondary to physical therapy. He denied numbness or tingling in his upper extremities. On cervical spine re-examination, Dr. Levi noted pain with lateral rotation, negative Spurling's and pain with motion of the right shoulder and neck. He reviewed the MRI and diagnosed a cervical herniated disc and right-sided cervical radiculopathy. He recommended that Petitioner return to work "with the permanent restriction of no repetitive motion of the arms and neck." He prescribed a topical cream and directed Petitioner to return if his pain worsened. PX 5, pp. 14-18.

Petitioner returned to Respondent's in-house medical facility on April 10, 2015 and saw Miller Sadie, R.N. Sadie noted that Petitioner presented restrictions that had "no cut off day" and "no appt on the form." She advised Petitioner to "get an appt date or ending date for the restrictions." PX 1.

That same day, April 10, 2015, Petitioner filed an Application for Adjustment of Claim [15 WC 12060] alleging he experienced sharp pain in his right shoulder and neck on October 20, 2014 while "reacting to the fast paced environment turn left then right." RX 1.

Petitioner saw Dr. Levi again on May 5, 2015. Petitioner reported that his pain had improved but that he still had "constant numbness." The doctor did not note the location of the numbness. On right shoulder re-examination, the doctor noted a full, painless range of motion. He also noted pain in the right trapezius muscle and negative Spurling's testing. He again diagnosed a cervical strain. He indicated he did not see what more he could do to make Petitioner better. He again recommended that Petitioner avoid repetitive motions of his neck and arms and "therefore limited use of the forklift." He listed a diagnosis of "neck sprain." He released Petitioner from care on a PRN basis. PX 5, pp. 19-23.

A therapy progress note dated May 5, 2015 reflects that Petitioner complained of right-sided neck pain but indicated he felt "better than last time." PX 5, pp. 45-46. There are no

subsequent therapy notes. PX 5. Petitioner acknowledged he did not undergo any additional shoulder or neck care after May 5, 2015.

At Respondent's request, Dr. Neal, a board certified orthopedic surgeon, conducted a Section 12 examination of Petitioner on June 1, 2016. In his report of June 6, 2016, he indicated he reviewed an accident report of October 20, 2014 along with records from Respondent's in-house medical facility, Dr. Flores and Dr. Levi, along with the right shoulder and cervical spine MRI reports and therapy notes, in connection with his examination.

Dr. Neal noted that Petitioner was not working and had last worked for Respondent on February 16, 2015. He indicated that Petitioner physically demonstrated his forklift operation duties to him. He described Petitioner as showing him he used his left hand at about shoulder level to steer and flexed his right shoulder, while leaning forward, to operate the four levers. He noted a past history of a gunshot wound involving the right humerus thirteen years earlier, with that wound requiring two surgeries. He indicated that Petitioner reported injuring his neck at Respondent on October 20, 2014 and denied having any neck problems prior to that injury. He further indicated that Petitioner denied any specific event and instead attributed his injury to various tasks, including driving in reverse while looking upward for loads in his forks, he performed on October 20, 2014.

Dr. Neal noted that Petitioner primarily complained of pain in the superior aspect of his right shoulder and the lateral aspect of the right neck and sometimes experienced right biceps pain anteriorly. He also noted that Petitioner "denied any pain below either elbow." He further indicated that Petitioner complained of daily numbness in both arms, worse on the right, and numbness in his left little finger and right ring and little fingers. [The Arbitrator notes that this appears to be the first documentation of left-sided symptoms.]

Dr. Neal described Petitioner as "very thin." He noted multiple scars on Petitioner's right upper extremity. On shoulder examination he noted diminished internal rotation on the right compared to the left. He noted subjective pain with cervical spine range of motion. On hand examination, he noted diminished sensation in the left little finger pulp. He described Petitioner's subjective reported tenderness to light touch as "non-physiologic" and "non-organic." He also noted "an element of symptom magnification and/or symptom exaggeration."

Dr. Neal also indicated he reviewed two video clips of forklift operation. [The Arbitrator notes these clips are not in evidence.] He indicated that the worker shown in the clips principally used his left hand to steer and his right hand to maneuver "at least 3 knobs/levers." He also noted that one of the clips showed an operator driving backwards, while placing her right arm on an arm rest and looking over her right shoulder. He opined that "nothing about the neck and shoulder movements" shown in the clips "would cause pathoanatomy to the cervical spine or right shoulder."

Dr. Neal obtained cervical spine X-rays. He interpreted the films as showing a loss of the normal cervical lordosis and a "hint of anterior spondylolisthesis of C6 on C7 and perhaps an element of facet arthropathy in the very lowest cervical spine region."

Dr. Neal indicated he believed Petitioner's symptoms did not emanate from the shoulder joint. He opined that Petitioner's bilateral paresthesias were "consistent with bilateral ulnar nerve involvement or a lower bilateral cervical root process." He indicated the films showed cervical spondylosis, "a degenerative process of the cervical spine." He found no causal connection between this degenerative process and Petitioner's work tasks. He indicated the degenerative process could cause intermittent symptoms regardless of whether Petitioner was working or at rest. He indicated Petitioner might require care but did not attribute the need for care to "any work activity on October 20, 2014 or [Petitioner's] work activities and duties overall." He found Petitioner capable of returning to his forklift operator job but noted Petitioner "will continue to be symptomatic" if he resumed this job. He recommended a repeat cervical spine MRI given that Petitioner's symptoms had persisted since the March 19, 2015 study. He also recommended bilateral electrodiagnostic studies, a trial of over the counter anti-inflammatory medication and home exercises. He indicated Petitioner would be at maximum medical improvement if he declined to undergo the additional recommended studies. RX 4.

Records in Joint Exhibit 1 reflect that Petitioner returned to Dr. Levi on January 10, 2017 "for an initial evaluation of left hand pain" that had started "months ago". The doctor indicated that Petitioner "was not injured" and that Petitioner was experiencing numbness and tingling radiating down his arms to the ring and little fingers of both hands. The note contains no mention of any work activities. On examination, Dr. Levi noted no hypothenar wasting and positive Tinel's and flexion compression testing at the cubital tunnel. He assessed Petitioner as having left cubital tunnel syndrome. He prescribed physical therapy and a bilateral upper extremity EMG. He directed Petitioner to return in four weeks with the EMG results. He released Petitioner to unrestricted duty. Joint Exhibit 1, pp. 1-4.

Petitioner underwent the recommended bilateral upper extremity EMG/NCV studies on January 17, 2017. Dr. Kozlova, the neurologist who performed these studies, described Petitioner as complaining of pain below both elbows down to the small fingers and stating his left-sided symptoms had recently worsened. She described Petitioner as "work[ing] 12 hours/day on a forklift" with his "elbows flexed all the time." She noted that Petitioner reported previously having only right arm symptoms but now having worsening left-sided symptoms. She indicated that Petitioner "took some time off work to recover and now has to go back to work but the pain is limiting him." Dr. Kozlova noted no sensory abnormalities on examination. She interpreted the EMG/NCV results as consistent with bilateral ulnar entrapment at the elbows and suggestive of median entrapment neuropathy at the wrists bilaterally. She described the right ulnar entrapment neuropathy, or right cubital tunnel syndrome, as moderate to severe and the left cubital tunnel syndrome as mild to moderate. She indicated that Petitioner was "at high risk for development of carpal tunnel syndrome bilaterally" but noted he reported no symptoms typical of that syndrome. She also noted that

Petitioner reported neck pain and radicular symptoms. She saw no signs of active radiculopathy on the study but indicated that a cervical spine MRI "might be the study of choice." Joint Exh 1, pp. 5-11.

Petitioner returned to Dr. Levi on February 7, 2017. In his note of that date, Dr. Levi recorded the following history: "He has persistent pain and numbness in both hands, small and ring fingers since 10/21/14 when he injured himself at work driving a forklift and doing repetitive heavy activities." He noted that Petitioner rated his current pain at 2/10 and indicated he was not taking any pain medication. He also noted that Petitioner reported his pain would increase to 6/10 at night, causing him to wake up. After reviewing the EMG/NCV results, he recommended bilateral ulnar nerve transposition surgery, "right then left." He released Petitioner to light duty, indicating Petitioner could operate a forklift only six hours per day. Joint Exh 1, pp. 12-15.

Petitioner testified he presented Dr. Levi's restriction to Respondent and was placed in an accommodated "pre delivery" position. The accommodation lasted about thirty days.

Petitioner saw Dr. Levi again on March 7, 2017. Petitioner indicated he was still experiencing pain and paresthesias in both arms. On re-examination, Dr. Levi noted positive Tinel's and positive elbow compression testing bilaterally. He indicated that Petitioner described his symptoms as "persistent since the work injury of 2014." He also indicated he was awaiting authorization of the previously recommended ulnar nerve transposition surgery. Joint Exh 1, pp. 16-18. He continued the previous restriction of only six hours of forklift operation daily. Joint Exh 1, p. 19.

Petitioner testified he presented Dr. Levi's restriction to Respondent but was told he would not be accommodated.

Petitioner last saw Dr. Levi on April 18, 2017. He noted that Petitioner denied having pain but complained of ongoing numbness and tingling. He also noted that he was still recommending the bilateral ulnar nerve transposition surgery but that the adjuster was not approving this surgery. He directed Petitioner to return once his attorney obtained approval. Joint Exh 1, pp. 21-23. He indicated that Petitioner reported being able to work but being unable to operate a forklift. He released Petitioner to work with "no use of a forklift" and avoidance of excessive/repetitive movements of the arms. Joint Exh 1, pp. 24-25.

Petitioner testified he has not returned to Dr. Levi because the doctor told him he needed surgery but the surgery was not being authorized. He presented the doctor's "no use of a forklift" restriction to Respondent but Respondent "would not accept it." He presented a modified restriction on April 24, 2017. [On this modified restriction note, dated April 24, 2017, Dr. Levi indicated he could not indicate when the restrictions would end because he needed to wait to see whether the recommended ulnar nerve transposition surgery would be approved. PX 5, pp. 65-66.] At that point, "Kelly" of Respondent fired him. Then "Kelly" sent him a letter stating "you have not been terminated."

On May 31, 2017, Petitioner filed another Application [17 WC 16050] alleging bilateral cubital tunnel syndrome secondary to repetitive trauma manifesting on January 10, 2017. RX 2.

Petitioner testified that Respondent terminated him on May 31, 2017. He did not undergo any additional shoulder care after May 2017. Dr. Levi never lifted the restrictions.

At Respondent's request, Dr. Neal re-examined Petitioner on November 16, 2017. In his report of November 30, 2017, Dr. Neal indicated he reviewed updated records from Dr. Levi, along with the EMG/NCV report, in connection with his re-examination. He noted that Petitioner reported performing restricted duty at Respondent between February 17 and March 13, 2017, being fired and rehired in March 2017 and last working for Respondent on April 21, 2017. He indicated it was difficult to obtain a history from Petitioner because Petitioner "tends to talk extremely fast and then divert to statements on multiple issues." He also noted that Petitioner became very emotional at one point during the examination. He described Petitioner as having "significant life stressors" and "confounding biopsychosocial issues." He indicated that Petitioner told him he did not know when his cubital tunnel symptoms started. He noted that Petitioner attributed these symptoms to "never stopping" forklift operation. He indicated that Petitioner reported his numbness to Respondent in 2015 and 2016 and that Dr. Levi was the first physician he saw for the numbness.

On re-examination, Dr. Neal noted bilateral positive Tinel's at the cubital tunnel. He described the right side as "more significantly symptomatic" than the left. He did not appreciate any obvious intrinsic atrophy. He obtained X-rays of both elbows.

Dr. Neal diagnosed bilateral cubital tunnel syndrome. He found no causal connection between this condition and Petitioner's employment. He based this opinion in part on the fact that Petitioner did not work for approximately two years, between February 2015 and approximately February 2017. He indicated that Petitioner's records supported the conclusion that the cubital tunnel syndrome developed and was diagnosed during a time when Petitioner was not working. He noted that, while Petitioner reported "numbness" to Dr. Levi on May 5, 2015, there was no indication when this symptom started or where in his body Petitioner was experiencing numbness. He cited an American Medical Association publication for the proposition that "there are many theories about causes of cubital tunnel syndrome" and only "some evidence" suggesting a causal link between a "combination of risk factors" and the development of cubital tunnel syndrome.

Dr. Neal opined that Petitioner's forklift operator duties "did not aggravate or accelerate" his cubital tunnel syndrome and that it appeared "these conditions developed when [Petitioner] was not working." He found Petitioner's cubital tunnel syndrome treatment to be reasonable and necessary but unrelated to his occupational activities. He found Petitioner to be a candidate for bilateral ulnar nerve decompression procedures but opined that Petitioner's work activities did not bring about the need for these procedures. With respect to the bilateral cubital tunnel syndrome alone, he found Petitioner capable of resuming

forklift operation but cautioned that "this is not a statement [Petitioner] will be asymptomatic." Independent of causation, he recommended that Petitioner try wearing splints at night and/or sleeves or pads to protect his elbows. RX 5.

Petitioner testified he has no right shoulder discomfort currently. While he was undergoing treatment for his right shoulder, his pain varied. He used creams which made the pain more tolerable. He also performed home exercises as recommended by his therapists. He denied sustaining any additional injuries between October 2014 and May 2017. He currently experiences numbness and tingling in both hands, predominantly in his right hand. He did not experience these symptoms before being hired by Respondent. Between October 20, 2014 and May 2017 he worked only for Respondent.

Under cross-examination, Petitioner testified he last underwent care for his shoulder and neck on May 5, 2015. The treatment he underwent in 2017 was for numbness and tingling. He last underwent treatment for these symptoms on April 18, 2017. Respondent did not authorize the surgery that Dr. Levi recommended. He had Blue Cross/Blue Shield group medical insurance through Respondent but did not use this coverage because his condition was work-related.

Petitioner testified he would agree with records showing that Respondent hired him on November 11, 2013. He sat while operating a forklift. The forklift was equipped with power steering. He used his left hand to turn the steering wheel and his right hand to operate the levers. He leaned forward while operating the levers. He has not reviewed Dr. Neal's report in years but would agree with the report if it describes him as sitting while operating the forklift, using his left hand to steer and his right hand to operate the four levers. The forklifts he operated were not uniform. The seat height varied. The steering wheel is at shoulder level. He had to lean forward to operate the levers. He still has bullet fragments in his right arm. Petitioner acknowledged he did not actually work for Respondent on January 10, 2017. He testified he began experiencing hand symptoms earlier, while operating a forklift. He initially experienced neck and right shoulder symptoms. The hand symptoms developed later. He was unable to confirm whether he voiced left hand complaints when he returned to Dr. Levi on January 10, 2017. Respondent placed him on a 30-day suspension when he was released to full duty in January 2017. Petitioner testified he was suspended because he had brought a discrimination claim against Respondent. He did not resume full duty. On February 7, 2017, he presented a note indicating he could operate a forklift six hours per day. Respondent provided him with an accommodated position in "pre delivery." Petitioner testified he performed this position for about thirty days. After he presented the same restrictions in March 2017, Respondent told him he could not be accommodated. Petitioner testified that Respondent took the pre-delivery job away from him after conducting an "observation" of him working. Petitioner denied being offered a chassis job. He last saw Dr. Levi in April 2017. He did not pursue additional treatment thereafter because Dr. Levi told him he needed surgery that was not being authorized. On April 24, 2017, he obtained another work note because Respondent would not accept the restrictions he submitted earlier. "Kelly" of Respondent then fired him. He subsequently received a letter from Respondent stating "you have not been terminated."

He has been employed for the last eight or ten months. After he stopped working for Respondent he worked as a security guard for Securitas for a year. That job was not physically demanding. He only had to check ID cards and watch entryways. He left that job to take a better job at the Chicago Transit Authority. He drove a CTA bus on a part-time basis for a year. He worked shifts that lasted only three or four hours. He used his arms to operate the bus but primarily drove straight. He had to turn the bus only occasionally. He was "way more comfortable" driving a bus than he was operating a forklift at Respondent. As a bus operator, he had no quota to meet and was not on a production line. He resigned from the Chicago Transit Authority "in lieu of termination." After 2015, he received disability checks from Unicare for about six months. The only other payment he received from Respondent was a $30,000 settlement for the EEOC/discrimination claim he filed. He has no upcoming medical appointments with respect to his claimed work injuries.

On redirect, Petitioner testified he has not read his entire medical file or Dr. Neal's examination reports. He feels that the numbness and tingling he complained of was related to his job at Respondent. The doctor who performed the EMG studies mentioned his job duties. On October 20, 2014, he left work early, at 9:00 or 10:00 PM. He went from work to the Emergency Room. He agreed with the Emergency Room records which reflect an arrival time of 12:36 AM on October 21, 2014. He disagreed with a statement set forth in Respondent's in-house medical clinic records of October 24, 2014. The statement quotes him as saying "this is not work-related – it's a personal injury." He did not say this. The record is time-stamped October 25, 2014. He was not at Respondent's facility on October 25, 2014. Between 2014 and 2017, he occasionally performed light duty and was sometimes off work, receiving no benefits. If Respondent had offered him light duty, he would have worked. He was fired, twice, and lost his health insurance. If he had wanted Blue Cross/Blue Shield to pay for the recommended ulnar nerve transposition surgery, he is not sure the carrier would have paid.

Under re-cross, Petitioner testified he had no recollection of telling a medical provider he worked 12-hour days.

A Respondent representative was present throughout the hearing but did not testify.

Arbitrator's Credibility Assessment

Petitioner was excitable and sometimes agitated but very credible as to his job duties. He provided several detailed explanations of the pace at which he worked and the positioning of his body and arms while operating a forklift along Respondent's assembly line. No one contradicted his testimony that he frequently drove in reverse while looking backward to check for traffic, that he had to lean forward to operate the four levers with his right hand and that the batteries in the forklift's power steering mechanism began to drain as his workday progressed.

As the hearing progressed, Petitioner began voicing various grievances, indicating he had pursued a discrimination claim against Respondent and believed Respondent altered his

medical records. The Arbitrator clarifies she can only address the issues presented by the two workers' compensation claims.

Arbitrator's Conclusions of Law Relative to Both Cases

In 15 WC 12060, did Petitioner sustain an accident arising out of and in the course of his employment on October 20, 2014?

The Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment on October 20, 2014. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony concerning the symptoms he developed while operating a forklift on that date. The Arbitrator also relies on Respondent's in-house medical records, the Presence St. Mary of Nazareth Hospital records and Dr. Levi's records. The initial records from the in-house facility reflect that Petitioner "aggravated" his right shoulder "while operating [the] lift controls" of his forklift. The nurse who saw Petitioner on October 20, 2014 categorized the "visit type" as "occupational."

The Arbitrator recognizes that Petitioner is not alleging a specific event such as a fall. Under Illinois law, an "accident" can consist of the giving way of a worker's physical structure under the stress of his usual labor. See, e.g., Atlantic & Pac. Tea Co. v. Industrial Commission, 67 Ill.2d 137 (1977).

The Arbitrator also acknowledges that the in-house medical facility note dated October 24, 2014, describes Petitioner as stating that the injury was "personal" rather than "work-related." Petitioner denied stating this. The Arbitrator finds the denial credible. Petitioner testified he completed an accident report on October 20, 2014 in which he attributed his symptoms to manipulating the forklift controls. Respondent failed to offer this report into evidence (see REO Movers v. Industrial Commission, 226 Ill.App.3d 216 (1st Dist. 1992) but Dr. Neal, Respondent's examiner, described its contents in his report of June 6, 2016. The description corroborates Petitioner's testimony concerning the length of his work shifts and the pace at which he worked. RX 4, p. 2. It seems highly unlikely that Petitioner would attribute his symptoms to work activities on October 20, 2014 and then suddenly reverse himself four days later.

In 15 WC 12060, did Petitioner establish a causal connection between the accident of October 20, 2014 and any claimed current condition of ill-being? Did Petitioner establish a causal connection as to the treatment he underwent in 2014 and 2015?

In 15 WC 12060, the Arbitrator finds that Petitioner failed to establish causal connection as to any claimed current condition but did establish causation as to right shoulder and neck conditions that required treatment between October 20, 2014 and May 5, 2015.

In finding causation as to the need for treatment through May 5, 2015, the Arbitrator relies on the following: 1) Petitioner's credible and detailed description of the job duties he

performed and physical motions he made at work prior to and on October 20, 2014; 2) the fact that Petitioner successfully performed his forklift operation duties for Respondent prior to October 20, 2014; 3) the causation-related opinions expressed by Dr. Flores and the other physicians who treated Petitioner at Presence St. Mary; 4) the causation opinions expressed by Dr. Levi; 5) the fact that Petitioner's symptoms improved during periods of rest; and 6) Dr. Neal's significant concession that Petitioner would remain symptomatic if he continued performing his forklift operation job at Respondent (RX 4). The Arbitrator does not view Petitioner's remote gunshot wound as a contributing factor. None of the physicians who evaluated Petitioner attributed his symptoms to that wound. Respondent's examiner, Dr. Neal, did not even view Petitioner's symptoms as emanating from the shoulder joint. RX 4.

In finding that Petitioner failed to establish a causal relationship between the accident of October 20, 2014 and any claimed current right shoulder or neck condition, the Arbitrator notes that Petitioner last underwent treatment for his right shoulder and neck on May 5, 2015, more than six years before the hearing. On that date, Dr. Levi described Petitioner's right shoulder range of motion as full and painless. He did diagnose a cervical spine condition but recommended no treatment. The Arbitrator also notes that Petitioner successfully operated a CTA bus (on a part-time basis) in 2019 and/or 2020 and that Petitioner did not testify to any ongoing right shoulder or neck complaints at the hearing.

In 15 WC 12060, is Petitioner entitled to reasonable and necessary medical expenses?

The Arbitrator has previously found that Petitioner established causation as to the need for the treatment he underwent between October 20, 2014 and May 5, 2015. The Arbitrator views this treatment as reasonable and necessary.

The Arbitrator notes that Petitioner claimed only one unpaid medical bill at the hearing. That bill (PX 6) does not relate to right shoulder or neck care. Rather it relates to medication that Dr. Levi prescribed for Petitioner's cubital tunnel symptoms on March 7, 2017. The Arbitrator declines to award this bill (see further below).

In 15 WC 12060, is Petitioner entitled to temporary total disability and/or temporary partial disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled during seven intervals totaling "201 1/3 [sic]" weeks. He also claimed he was temporarily partially disabled during nine intervals in 2014, 2015 and 2017, with those intervals totaling 22 weeks. Respondent disputed Petitioner's entitlement to any weekly benefits based on its accident and causation defenses. The parties agreed that Respondent paid no weekly benefits under the Act and was entitled to Section 8(j) credit for $14,777.67 in other benefits. Arb Exh 1.

The Arbitrator initially notes that Petitioner failed to testify on direct examination as to the days he was off work (in 2014 and 2015) either at a doctor's recommendation or because Respondent did not accommodate his then-current restrictions. He also failed to identify any

specific days or periods in 2014 or 2015 when he was accommodated and potentially entitled to temporary partial disability benefits. The Arbitrator also notes that, while Respondent offered payroll records (RX 3), to which Petitioner did not object, no one laid a foundation for these records or explained the initial designations (e.g., "M" and "A") that appear thereon. Finally, the Arbitrator notes that, under cross-examination, Petitioner indicated he continued working for Respondent between October 2014 and February 2015, was off work between February 2015 and mid-February 2017 and last underwent neck and shoulder care on May 5, 2015. It was on May 5, 2015 that Dr. Levi noted no right shoulder abnormalities, diagnosed a cervical spine condition and indicated he had nothing more to offer, treatment-wise. Dr. Levi continued to recommend restrictions but the basis for that recommendation is not well-explained. It is also unclear whether Petitioner presented the May 5, 2015 restrictions to Respondent.

In Illinois, it has long been held that the claimant bears the burden of proving entitlement to temporary total and/or temporary partial disability benefits. It is not incumbent on an employer to disprove a claim for such benefits.

On this record, the Arbitrator finds that Petitioner was temporarily totally disabled from March 10, 2015 through May 5, 2015, a period of 8 1/7 weeks, with Respondent receiving Section 8(j) credit, per the parties' stipulation, for any short-term disability paid during this period. Dr. Levi imposed restrictions and recommended treatment on March 10, 2015. There is no evidence indicating Petitioner worked between March 10, 2015 and May 5, 2015 (RX 3) and no evidence indicating Respondent offered to accommodate Petitioner's restrictions during this period. Respondent did not obtain a Section 12 examination until June 2016. As noted earlier, Dr. Levi continued to recommend restrictions on May 5, 2015 but did not explain why he was doing so. That lack of explanation is concerning, given the paucity of examination findings and the absence of treatment recommendations. Had Dr. Levi testified or otherwise indicated that the restrictions were prophylactic in nature (i.e., that he, like Dr. Neal, believed Petitioner's symptoms would return if he resumed forklift operation), the Arbitrator might have viewed this issue differently.

In 15 WC 12060, did Petitioner establish permanent partial disability?

The Arbitrator declines to award permanency in 15 WC 12060. Petitioner last underwent shoulder and neck treatment on May 5, 2015. On that date, Dr. Levi diagnosed only a cervical strain. He recommended restrictions, without explanation, and said he had nothing to offer treatment-wise. When Petitioner next saw Dr. Levi, on January 10, 2017 (the manifestation date alleged in 17 WC 16050), he presented new, primarily left-sided hand and arm symptoms and apparently did not mention his right shoulder or neck. Dr. Levi found him capable of full duty. While Dr. Levi later imposed new restrictions relating to forklift usage, he did not link the need for those restrictions to any shoulder or neck condition. Rather, it appears he was reacting to the positive EMG findings and the cubital tunnel diagnosis. At the hearing, Petitioner did not testify to any current right shoulder or neck symptoms. There is no evidentiary basis for awarding permanency in 15 WC 12060.

In 17 WC 16050, did Petitioner establish timely notice of his claimed repetitive trauma injuries?

The Arbitrator views notice as the dispositive issue in 17 WC 16050. The Act provides, in relevant part, that notice of an accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. The notice requirement applies to employees who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident in a repetitive trauma claim is the date when the injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission v. Industrial Commission, 115 Ill.2d 524 (1987). The phrase "manifests itself" signifies "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." Belwood, 115 Ill.2d at 531. The purpose of the notice requirement is to enable the employer to investigate the employee's alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In 17 WC 16050, Petitioner alleges repetitive trauma injuries manifesting on January 10, 2017. The alleged injuries involve body parts, namely both hands and arms, wholly distinct from those involved in 15 WC 12060.

Petitioner acknowledged he did not work at Respondent between approximately February 2015 and February 2017. He did see Respondent's examiner, Dr. Neal, during this period, with the doctor (somewhat ironically) indicating he suspected ulnar nerve rather than shoulder problems, but the doctor did not link the ulnar nerve problems to Petitioner's forklift operation. RX 4. It is thus not arguable that Dr. Neal's first report put Respondent on notice of a work-related bilateral cubital tunnel condition. When Dr. Levi assessed Petitioner as having left cubital tunnel syndrome, on January 10, 2017, Petitioner had been off work for almost two years. When EMG studies confirmed bilateral cubital tunnel syndrome, on January 17, 2017, Petitioner was still off work. There is evidence that Respondent received work restrictions and provided Petitioner with accommodated pre-delivery duty for about thirty days in approximately February 2017 but no clear evidence indicating Petitioner reported new repetitive trauma injuries within forty-five days of January 10, 2017. Even if Petitioner presented Dr. Levi's work status reports of February 7, March 7 and April 24, 2017 to Respondent, those reports (Joint Exh 1, pp. 14, 19 and 24) do not describe Petitioner's bilateral cubital tunnel syndrome as work-related. They simply state the diagnosis and indicate Petitioner may only operate a forklift for six hours per day "due to his injury." An employer's mere knowledge of "some type of injury" does not establish statutory notice. White v. IWCC, 374 Ill.App.3d 907, 910 (2007). Additionally, Petitioner did not file his Application in 17 WC 16050 until May 31, 2017, well beyond the 45-day notice period. RX 2.

The Arbitrator finds that Petitioner failed to meet his burden of establishing timely notice to Respondent. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation in 17 WC 16050 is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC016050
Case Name	Melvin Young Jr. v. Ford Motor Company
Consolidated Cases	15WC012060;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0326
Number of Pages of Decision	26
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	David Froylan, Paul O'Toole
Respondent Attorney	Kirk Kuhns

DATE FILED: 8/24/2022

/s/ Deborah Baker, Commissioner

Signature

22IWCC0326

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELVIN YOUNG, JR.,

Petitioner,

vs. NO: 17 WC 16050

FORD MOTOR COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein, and notice given to all parties, the Commission, after considering the issues of accident, notice, whether Petitioner's current condition is causally related to his alleged accident, Petitioner's entitlement to medical expenses and prospective medical care, Petitioner's entitlement to temporary total disability benefits, Petitioner's entitlement to temporary partial disability benefits, and Petitioner's entitlement to permanent partial disability benefits and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that while the notice requirement was satisfied in the instant case, Petitioner failed to prove he sustained an accident under the meaning of the Act. Accordingly, all benefits are hereby denied. This case was consolidated for hearing with case number 15WC12060.

The Commission hereby incorporates by reference the findings of fact and conclusions of law contained in the Decision of the Arbitrator, except as stated below. As it pertains to the issue of notice, the Commission reverses the Decision of the Arbitrator. In the Decision of the Arbitrator, the Arbitrator found that Petitioner failed to provide notice of his alleged accident to Respondent, and found this issue to be dispositive of the instant claim. In support of this finding, the Arbitrator noted Petitioner's acknowledgement that he did not work for Respondent between February 2015 and February 2017, yet he alleged repetitive trauma injuries that manifested on January 10, 2017. Additionally, the Arbitrator noted that Petitioner's medical treatment with Dr. M. Bryan Neal

during this interim period indicated possible ulnar nerve problems, and Dr. Neal did not opine that these possible problems were linked to Petitioner's work duties as a Forklift Operator. Based on these facts, the Arbitrator found that Dr. Neal's initial report could not have reasonably put Respondent on notice of the allegedly work-related bilateral cubital tunnel injuries. Further, the Arbitrator noted that when Petitioner was placed on restricted duty in February 2017, there was still no indication that the restrictions were related to Petitioner's duties as Forklift Operator, or that Petitioner had alleged new repetitive trauma injuries within the required 45-day notice period following his January 10, 2017 diagnosis. The Arbitrator noted that Dr. Levi's work status notes do not characterize Petitioner's conditions as "work-related," but simply restrict Petitioner's use of a forklift. Lastly, the Arbitrator noted that Petitioner did not file his Application for Adjustment of Claim until May 31, 2017, well beyond the statutory 45-day notice period. For these reasons, the Arbitrator found the notice provision had not been satisfied and was dispositive of Petitioner's claim.

For the reasons set forth below, the Commission sees the evidence differently than the Arbitrator, and hereby reverses the Decision of the Arbitrator with respect to notice. The purpose of the notice requirement in the Act is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Commission*, 82 Ill. 2d 87, 95 (1980). A claim is barred only if no notice whatsoever has been given. *Silica Sand Transport Inc. v. Industrial Commission*, 197 Ill. App. 3d 640, 651 (3d Dist. 1990). Notice shall be liberally construed, so that if some notice has been given, even if inaccurate or defective, the employer must show he has been unduly prejudiced. *Gano Electric Contracting v. Industrial Commission*, 260 Ill. App. 3d 92, 96 (4th Dist. 1994).

Here, Petitioner testified that he gave the work restriction notes from Dr. Levi to Respondent. T. 49. Petitioner's February 7, 2017 work-status note and the letter sent from Dr. Levi's office to Respondent on February 13, 2017 both provided Respondent with some type of notice, albeit defective and inaccurate. The Commission notes that the February 7, 2017 note from Dr. Levi, although it attributes Petitioner's bilateral arm and hand symptoms to the October 2014 work accident (case no. 15WC12060), explicitly notes that Petitioner's injuries are related to repetitive work activities. The letter sent from Dr. Levi's office dated February 13, 2017, states that Petitioner sought medical treatment on February 7, 2017, to follow up on a recent EMG as Petitioner had persistent pain and numbness in both hands and fingers (albeit since October 2014). The letter specifically notes that Petitioner's symptoms were related to his repetitive heavy activities at work. The Commission recognizes that the February 7, 2017 work status note did not causally relate Petitioner's restrictions to a work injury, and the letter from Dr. Levi's office to Respondent related Petitioner's condition to the October 2014 accident rather than the instant-alleged January 10, 2017 manifestation date. Nevertheless, the information that Respondent received regarding Petitioner's injuries, that Petitioner had symptoms in his bilateral upper extremities due to repetitive work activities and that Petitioner was actively treating for these injuries, which were different from the injuries previously alleged in connection with the October 2014 accident, was sufficient to put Respondent on notice of the January 10, 2017 manifestation date within the statutory 45-day time period, even though the notice was inaccurate and defective. The Commission notes further that Respondent has not offered any evidence of undue prejudice.

Having found notice, the Commission is next tasked with ruling on all remaining issues relevant to this claim, beginning with accident. To obtain compensation under the Act, Petitioner

has the burden of proving, by a preponderance of evidence, all of the elements of his claim. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980). One of the elements required to prove a workers' compensation claim in Illinois is that the accidental injury both arose out of and occurred in the course of his employment, and that there is some causal relationship between the employment and the injury. *Horath v. Industrial Commission*, 96 Ill. 2d 349, 356 (1983); *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). In cases relying on the repetitive trauma theory, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. *Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 209 (1st Dist. 1993).

Here, the contemporaneous medical records do not support Petitioner's claim that he sustained repetitive trauma injuries to the bilateral arms which manifested on January 10, 2017. Petitioner last worked for Respondent performing forklift duties on February 16, 2015, and then he was placed off work due to a prior work accident in October 2014 (case no. 15WC12060). Subsequently, Petitioner treated for neck and right shoulder complaints. In fact, on April 7, 2015, Petitioner specifically denied numbness and tingling in his bilateral upper extremities to Dr. Levi. Although Petitioner did complain of numbness on May 5, 2015, the location of the numbness was not indicated in the note. The Commission finds it speculative to assume that this numbness was emanating from Petitioner's cubital tunnels. See *United Airlines, Inc. v. Illinois Workers' Comp. Commission*, 2013 IL App (1st) 121136WC 117, 129 (finding that the Commission's decision to exclude a witness's future wage projections as speculative was not against the manifest weight of the evidence). It was not until a Section 12 examination at Respondent's request with Dr. Neal on June 1, 2016, approximately 15 months after Petitioner last worked for Respondent, that Petitioner complained of bilateral upper extremity symptoms consistent with cubital tunnel syndrome.

The Commission finds that Petitioner failed to prove by a preponderance of the evidence that he sustained a work accident in the form of repetitive trauma injuries to his bilateral upper extremities which manifested on January 10, 2017. The few contemporaneous medical records that document upper extremity symptoms indicate that they are related to a previous work accident in October 2014 (case no. 15WC12060). Additionally, medical evidence shows Petitioner had no bilateral upper extremity symptoms or complaints until over 15 months after he last worked for Respondent, during the Section 12 examination with Dr. Neal. Petitioner also had no cubital tunnel syndrome diagnoses until approximately 2 years after having last worked for Respondent. For these reasons, the Commission finds that Petitioner failed to prove a compensable work accident. In accordance with this ruling, all benefits are denied.

IT IS THEREFORE FOUND BY THE COMMISSION that the Decision of the Arbitrator filed October 27, 2021 is hereby reversed, and it is found that Petitioner did provide Respondent with timely notice of the alleged repetitive trauma accident.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner has failed to meet his burden of proof regarding a repetitive trauma accident arising out of and in the course of his employment with Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that all remaining issues are moot.

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

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

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, there being no award in the instant case, no bond is set by the Commission 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.

August 24, 2022

O: 6/29/22
DJB/wde
043

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Stephen Mathis*
Stephen Mathis

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC016050
Case Name	YOUNG JR, MELVIN v. FORD MOTOR COMPANY
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Molly Mason, Arbitrator

Petitioner Attorney	David Froylan
Respondent Attorney	John Fassola

DATE FILED: 10/27/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 26, 2021 0.06%

/s/Molly Mason, Arbitrator

Signature

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

Melvin Young, Jr. **Case #** **17 WC 16050**
Employee/Petitioner

v.

Ford Motor Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2021**. 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 **01/10/2017** Respondent ***was*** operating under and subject to the provisions of the Act.

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

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner failed to establish that he provided Respondent with timely notice of his claimed repetitive trauma injuries. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

In the year preceding the injury, the Petitioner earned $**33,529.96**; the average weekly wage was $**657.45**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **1** child under 18.

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

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

ORDER

FOR THE REASONS SET FORTH IN THE ATTACHED DECISION, THE ARBITRATOR FINDS THAT PETITIONER FAILED TO ESTABLISH HE PROVIDED RESPONDENT WITH TIMELY NOTICE OF HIS CLAIMED REPETITIVE TRAUMA INJURIES. THE ARBITRATOR VIEWS THE REMAINING DISPUTED ISSUES AS MOOT AND MAKES NO FINDINGS AS TO THOSE ISSUES. COMPENSATION IS DENIED IN 17 WC 16050.

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

OCTOBER 27, 2021

Melvin Young v. Ford Motor Company
15 WC 12060 and 17 WC 16050 (consolidated)

Summary of Disputed Issues in Both Cases

Petitioner, a forklift operator with a remote history of a gunshot wound in his right upper arm, claims a work accident of October 20, 2014 [15 WC 12060] involving right shoulder and neck injuries and repetitive trauma bilateral cubital tunnel injuries manifesting January 10, 2017 [17 WC 16050]. Petitioner testified he experienced pain in his right shoulder and neck on October 20, 2014 while operating the forklift and using his right hand to maneuver the four levers on the forklift. He reported this pain and underwent care at Respondent's in-house medical facility on the evening of October 20, 2014. He underwent Emergency Room care early the following morning, after he left work. Emergency Room personnel documented the previous gunshot wound and indicated that Petitioner complained of right shoulder pain caused by "repetitive motion" from "operating fork lift at job." PX 2. Petitioner was given restrictions, which he presented to Respondent. He returned to the Emergency Room about nine days later and was again given work restrictions, which he provided to Respondent. He subsequently saw Dr. Levi, an orthopedic surgeon, and underwent physical therapy and a right shoulder MRI. The radiologist who interpreted the MRI indicated he was unable to fully evaluate the rotator cuff due to metallic fragments from the gunshot wound. He noted no labral abnormalities. A cervical spine MRI, performed on March 19, 2015, showed posterior annular disc bulges at three levels. PX 4, 5.

Petitioner acknowledged he last underwent care for his shoulder and neck condition on May 5, 2015. On that date, Dr. Levi again imposed restrictions but noted no shoulder abnormalities on examination and released Petitioner from care. At the hearing, Petitioner did not testify to any current shoulder or neck symptoms.

In the second claim [17 WC 16050], Petitioner alleges bilateral cubital tunnel syndrome secondary to repetitive trauma manifesting on January 10, 2017. Petitioner acknowledged he did not work at Respondent between February 2015 and February 2017. Petitioner did not file his Application in 17 WC 16050 until May 31, 2017. RX 2.

Dr. Neal, a board certified orthopedic surgeon, conducted two Section 12 examinations, in June 2016 and November 2017. In his first report, he noted bilateral upper extremity paresthesias and recommended EMG testing as well as a repeat cervical spine MRI but saw no connection between Petitioner's forklift operation and his symptoms. He found Petitioner capable of full duty but conceded Petitioner would remain symptomatic if he resumed working. RX 4. In his second report, he diagnosed bilateral cubital tunnel but did not causally link this condition to Petitioner's work activities. He again conceded that Petitioner would remain symptomatic if he resumed operating a forklift. RX 5.

In 15 WC 12060, the disputed issues include accident, causal connection, various periods of temporary total disability, various periods of temporary partial disability and nature

and extent. In 17 WC 16050, the disputed issues include accident, notice, causal connection, temporary total disability, temporary partial disability, prescription expenses and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he was born on October 5, 1984. He was 36 years old as of the hearing.

Petitioner acknowledged sustaining a gunshot wound in his right arm, above the elbow, in October of 2002 or 2003. Under cross-examination, he testified he recovered fully from this injury and was able to resume sports activities, including basketball. As of October 20, 2014, he was not undergoing any treatment for or suffering any effects from the gunshot wound. He denied any other injuries to his shoulder or neck prior to October 20, 2014.

On direct examination, Petitioner testified he began working as a forklift operator for Respondent in August or September of 2013. Under cross-examination, he indicated he would not disagree with his employment records if they reflect he was in fact hired on November 11, 2013.

Petitioner testified he always worked as a forklift operator. The forklifts he operated were of the "sit down" variety. He used the forklift to "feed" and remove product from a moving assembly line that was U-shaped. He testified the line had at least twenty stations. One station, referred to as the "sub frame," involved 100 set-ups. At this station, he had to grab various items while watching the moving line. Three models of cars were being assembled along the line. He had to keep up with the pace of the work. If the assemblers working along the line ran out of product, the line would stop and an alarm would sound.

Petitioner testified that the forklifts he operated had a ball-type assembly steering wheel and four levers that were used to position and move the forks. He primarily used his left hand to steer and his right hand to operate the levers. On some occasions, he had to use both hands to raise the levers. The forklifts he operated were equipped with power steering but the battery wore down as the workday progressed, causing the power steering to become less effective. It was when the battery wore down that he used both hands to adjust the levers.

Petitioner testified he typically worked four ten-hour shifts per week. He was allowed to take a 30-minute lunch break during each shift. During the remaining 9 ½ hours, he operated a forklift continuously. He was required to watch out for co-workers and had to turn his head from side to side to check for traffic, especially when operating the forklift in reverse.

Petitioner testified he has driven cars and shifted gears while doing so. He described forklift operation as similar to changing gears while driving a car.

Petitioner testified he developed pain in his right shoulder and neck on the night of October 20, 2014, while maneuvering the forklift levers and looking backward to check for traffic. He reported the accident and went to Respondent's in-house medical clinic. At the clinic, he was asked how his pain came about. He completed a report indicating he experienced pain with lever operation.

Records in PX 1 reflect that Petitioner saw Tisha Harris, R.N., at Respondent's in-house clinic at about 11:17 PM on October 20, 2014. Harris noted that Petitioner had started working at 4:00 PM that day and had become symptomatic at about 10:00 PM. She indicated that Petitioner "aggravated right shoulder while operating lift controls." She categorized Petitioner's injury as "rep. mot." She noted no redness or swelling of the right shoulder. She described Petitioner's range of motion as "slow and stiff." She indicated that Petitioner requested an "E/O form to go see PMD after aggravating right shoulder."

Petitioner testified he did not finish his shift on October 20, 2014, due to his pain. After he left work, he drove to the Emergency Room at Presence St. Mary of Nazareth Hospital. He went to this Emergency Room because it is in his neighborhood. Records in PX 2 reflect that Petitioner arrived at the Emergency Room at 12:36 AM on October 21, 2014. Petitioner saw Dr. Walton, who recorded the following history and complaints:

> "Melvin J Young is a 30 y.o. male who presents to the ED with shoulder pain to right shoulder with repetitive motion he performs operating fork lift at job. No new fall/trauma. H/o GSW to shoulder 12+ years ago with 2 surgeries for shoulder repair. Pt. denies pain currently but after several hours of work with upper body he feels discomfort. Asking for work restrictions note."

Another history, recorded by a nurse, reads as follows: "C/o right shoulder pain. Per pt he was shot 13 yrs ago in his shoulder and he was [sic] long shifts in a factory driving fork lifts. Pt states due to him constantly using his right arm at work his shoulder started to hurt." PX 2, p. 10.

Dr. Walton described Petitioner as 5 feet, 8 inches tall and weighing 130 pounds. On examination, Dr. Walton noted a full range of motion in both shoulders and full/equal strength in both shoulders. He diagnosed "chronic right shoulder pain." He prescribed Naproxen along with Keterolac for pain. He recommended that Petitioner seek follow-up care with his primary care physician and an orthopedic surgeon. He instructed Petitioner to schedule an appointment with a physician at the Illinois Bone and Joint Institute. PX 2, p. 24.

Petitioner testified he resumed working and provided Respondent with paperwork from the Emergency Room. Records in PX 1 reflect that, on the evening of October 24, 2014, Petitioner returned to Respondent's in-house medical clinic and saw a different nurse, Dianna Vanzant-Collins, R.N. Vanzant-Collins described Petitioner as "submitting paperwork to RTW with restrictions on 10/21/14 with dx: chronic right shoulder pain signed by Rachel Pulver, PA." Vanzant-Collins described Petitioner as stating: "This is not work related, it is a personal

injury." She also described Petitioner as denying pain currently. She released Petitioner to work subject to the following restriction: "no continuous work with right arm/shoulder." She indicated this restriction started on October 21, 2014 and ran through November 3, 2014. PX 1.

On October 29, 2014, Petitioner returned to the Emergency Room at Presence St. Mary of Nazareth Hospital. Records in PX 2 reflect that Petitioner saw Dr. Winstanley. The doctor recorded the following interval history:

> "Pt is a 30 y.o. male who presents to the ED with chronic right shoulder pain. Was seen 10/21/14 for evaluation, given a note to stay off forklift work and now presents to ER so he can have his work compensation paperwork completed by provider so that he can return to work. Did not call PCP or orthopedic surgeon as instructed, was never seen since last ER visit. No new complaints. Is able to range his shoulder fully."

Dr. Winstanley also noted a past medical history of a gunshot wound to the right arm requiring two shoulder surgeries. She noted no abnormalities on examination. She recommended that Petitioner follow up with his primary care physician and an orthopedic surgeon. PX 2, pp. 30-31.

Petitioner testified he received work restrictions on October 29, 2014 and presented them to Respondent. He could not recall whether any physician prescribed medication for him on October 29, 2014.

On November 3, 2014, Petitioner saw Dr. Flores at Presence St. Mary of Nazareth Hospital. The doctor noted a complaint of right shoulder pain. She described Petitioner as having an "overuse injury (fork lift operator 8 hours a day with short breaks in between and a GSW injury 12 years ago to affected area." On examination, she noted equivocal Hawkins and Neer's signs. She indicated she ordered right shoulder X-rays but no X-ray report is in evidence. She prescribed physical therapy and Naproxen. PX 3, p. 1.

Records in PX 3 reflect that Petitioner also saw Dr. Marcin at Presence St. Mary of Nazareth Hospital on November 3, 2014. Dr. Marcin described Petitioner as complaining of right shoulder pain that had started a week earlier. She noted that Petitioner had sustained a gunshot wound to his right shoulder twelve years earlier and that he was currently working as a forklift operator at Ford, with his job involving "constant shifting of gears with his right arm and shoulder for 8 hours per day." She described Petitioner as having a "possible work related injury." She noted that Petitioner described his symptoms as aggravated by repetitive and overhead movements. She noted that a physician had prescribed Naproxen a week earlier and that Petitioner had not taken this medication. On right shoulder examination, she noted tenderness over the acromioclavicular joint, a full active range of active motion and a full passive range of motion. She described Hawkins and Neer's testing as "negative at first, then positive." She noted no abnormalities on left shoulder examination. PX 3, p. 6. She prescribed

therapy, Naproxen and a right shoulder MRI. She imposed restrictions of "left-handed work or sit down work with limited use of the right extremity." PX 3, p. 7.

On December 15, 2014, Petitioner returned to Respondent's in-house medical facility and saw another nurse, Sameka Dowell Mills, R.N. Mills described Petitioner as complaining of right shoulder pain and "requesting E/O form d/t R shoulder pain from old gunshot wound." She indicated that Petitioner "refuses assessment and treatment." She described Petitioner as stating that he was scheduled to undergo therapy the next day and wanted to rest up so that he would not be in pain when he went to therapy. She provided Petitioner with an "E/O form." PX 1. [The Arbitrator interprets "E/O" to mean "early out." See further below.]

Petitioner returned to Presence St. Mary of Nazareth Hospital on December 16, 2014 and underwent a physical therapy evaluation with Nelisa Tejada, PT. A "patient history form" in PX 2 reflects that Petitioner complained of constant right shoulder pain with associated tingling "aggravated by forklift operating." Petitioner indicated he was currently working and taking both Advil and Naproxen. He also indicated his symptoms would abate after "continuous rest." He noted that he had undergone two right shoulder surgeries "due to shattered bone caused from gunshot 10 years ago." PX 2, pp. 52-53. On examination, Tejada noted negative impingement testing but documented slight pulling at the end range of internal and external rotation "which may indicate beginning impingement." She also noted complaints of tingling in the right neck, right arm and the ulnar aspect of the hands and fingers. PX 2, p. 47. She indicated that Petitioner reported fatigue whenever his arm was up and stated he could not maintain his arm in an "up position" as "it gets tired fast." PX 2, p. 74. She recommended a home exercise program. PX 2, p. 75.

On January 2, 2015, Petitioner saw Dr. Flores at Presence St. Mary of Nazareth Hospital. The doctor noted complaints of right shoulder pain and right-sided neck pain. She described Petitioner's condition as an "overuse injury," indicating that Petitioner reported operating a forklift eight hours a day "with short breaks in between." She also noted that Petitioner had sustained a gunshot wound twelve years earlier. On right shoulder examination, she noted equivocal Hawkins and Neer's testing. She noted that Petitioner had attended one physical therapy session and was "scheduled for seven more." She also noted that Petitioner had not yet undergone the previously recommended right shoulder MRI. She imposed restrictions of left-handed work or sit down work with limited use of the right extremity. PX 3, p. 9. In a separate note, she described Petitioner's right shoulder and neck pain as a "chronic issue" of greater than three months' duration. She also described the condition as "workers' compensation," noting that Petitioner operated a forklift at Ford and performed "constant shifting gears with his right arm and shoulder for 8 hours per day." PX 3, p. 11.

On January 8, 2015, Petitioner underwent a right shoulder MRI at Presence St. Mary of Nazareth Hospital. The MRI, performed without contrast, showed no significant effusion and no labral abnormalities. The radiologist commented that he was unable to fully evaluate the rotator cuff due to "extensive artifacts . . . from metal fragments apparently representing an old gunshot injury." PX 2, pp. 64-65.

Petitioner returned to Respondent's in-house medical facility on February 16, 2015 and again saw Dianna Vanzant-Collins, R.N. Vanzant-Collins noted a complaint of right shoulder pain traveling to the right shoulder blade. She noted a history of a gunshot wound "with old surgical scar to right shoulder and upper arm in three areas." She tested Petitioner's range of motion by lifting his arms overhead. She noted that Petitioner complained of discomfort when lifting his right arm. She also noted that Petitioner described his forklift driving as aggravating his right shoulder. She indicated that Petitioner had undergone a right shoulder MRI three weeks earlier and was awaiting the results. She noted that Petitioner had started therapy on December 16, 2014 but had stopped two weeks earlier "because it was getting expensive." She also noted that Petitioner reported discontinuing Naproxen two weeks earlier. She indicated that Petitioner's primary care doctor had imposed restrictions but that a specialist took him off work for two months "and he could no longer afford to stay home." She noted that Petitioner requested an "E/O" instead of "RTW" and that she provided him with an "E/O." PX 1. [The Arbitrator interprets the term "E/O" as meaning "early out" based on a form that appears at page 22 of PX 3. This form reflects that Respondent's medical department "cannot send" Petitioner home based on its evaluation and that Petitioner was opting to leave the facility "without permission" to seek care on his own. The form also states that Petitioner would be "subject to discipline" if his physician did not "fully justify" his absence from work.]

Petitioner returned to Presence St. Mary of Nazareth Hospital on February 19, 2015 and again saw Dr. Flores. The doctor noted that Petitioner had discontinued therapy after five sessions due to "difficulty of obtaining co-pay." She also noted the MRI results. She continued the previous restrictions and referred Petitioner to Dr. Levi, an orthopedic surgeon. PX 3, pp. 14, 21.

Petitioner returned to Respondent's in-house medical facility on February 20, 2015 and again saw Dianna Vanzant-Collins, R.N. Vanzant-Collins noted that Petitioner presented work restrictions and reported he was there to return to work. PX 1. Based on the wage records offered by Respondent, it appears that Petitioner worked one hour during the week ending February 22, 2015 and 10.5 hours on one day during the week ending March 8, 2015. Petitioner did not testify concerning the work he performed on these occasions. The Arbitrator has no information as to whether Respondent accommodated his restrictions during this time.

Petitioner first saw Dr. Gabriel Levi of Orthopaedic and Rehabilitation Centers, S.C. on March 10, 2015. The doctor recorded the following history:

> "The patient states he had a gunshot wound on 10/20/2001 which needed surgery (ORIF). The patient states he recovered well from that injury and has been working full duties for several years without difficulties with the shoulder. Prior to this injury it had been several years since he even had any pain. 'Probably the last time I had shoulder pain was a few months after the surgery in 2002.'

> In October 2014 he now been [sic] driving a forklift and he began having acute shoulder pain on right shoulder pain going up to the mid shoulder and lower part of the neck.
>
> For the past 8 months he has been driving a forklift without any difficulties until this injury in October 2014. The job he has been working requires him to move his arm and neck constantly for 10 hours. He feels that the repetitive movement has led to the pain he suffers from today. On the day that he began having this pain, he was moving his arms constantly and looking over his right and left shoulder which caused him to have sudden onset of pain."

Dr. Levi noted that Petitioner rated his current pain at 4/10 and indicated the pain reached a maximum of 8/10 "after his shift." He also noted that Petitioner described the pain as "shooting down his right arm into his right small and ring fingers."

On initial right shoulder examination, Dr. Levi noted well healed scars over the superior aspect of the shoulder from the previous surgery and pain with passive external rotation with the arm at 90 degrees. On bilateral arm examination, he noted negative Tinel's at the elbow at the ulnar nerve. On cervical spine examination, he noted mildly positive Spurling's testing.

Dr. Levi obtained right shoulder X-rays. He interpreted the films as showing no fractures and a bullet fragment in the mid arm level not involving the humerus. The doctor also obtained cervical spine X-rays. He interpreted the films as showing no fractures and severe loss of lordosis "signifying a muscle spasm."

Dr. Levi diagnosed a herniated cervical disc and right-sided cervical radiculopathy. He attributed these conditions to the October 2014 work injury. He prescribed a Medrol DosePak, six weeks of physical therapy, a cervical spine MRI, topical analgesics and non-steroidal anti-inflammatory medication. He released Petitioner to light duty with no lifting and no repetitive motion of the cervical spine and right arm. PX 5, pp. 4-7.

Petitioner testified he started therapy at Orthopaedic and Rehabilitation Centers on March 17, 2015. The evaluating therapist noted that Petitioner complained of neck pain and right shoulder pain radiating into the hand towards the little finger. She also noted that Petitioner complained of intermittent right hand numbness with grasping and certain activities. PX 5.

The cervical spine MRI, performed on March 19, 2015, showed no fractures, some mild straightening and reversal of the usual curvature, "probably representing muscle spasm", posterior annular disc bulges at C4-C5, C5-C6 and C6-C7 and an incidental polyp in the left maxillary sinus. PX 5, pp. 8-9.

Petitioner returned to Respondent's in-house medical facility on March 20, 2015 and saw Katrina Harvey, R.N., MSN. Harvey described Petitioner as stating:

> "Here in medical with paperwork dated 3/10/15 stating rtw with restrictions and next appt on 4/7/15. EE states when he first reported the injury he thought it was related to his gunshot wound but he has been dx with a cervical herniated disc and will need to begin PT."

Harvey described Petitioner as "walking without difficulty" and "able to move neck up and down and side to side." PX 1.

Petitioner returned to Dr. Levi on April 7, 2015. Petitioner reported feeling better "because he has not been working for about two months." Petitioner rated his current right shoulder and cervical spine pain at 2/10, indicating this rating increased with activity or turning his head to the left side. He reported improvement secondary to physical therapy. He denied numbness or tingling in his upper extremities. On cervical spine re-examination, Dr. Levi noted pain with lateral rotation, negative Spurling's and pain with motion of the right shoulder and neck. He reviewed the MRI and diagnosed a cervical herniated disc and right-sided cervical radiculopathy. He recommended that Petitioner return to work "with the permanent restriction of no repetitive motion of the arms and neck." He prescribed a topical cream and directed Petitioner to return if his pain worsened. PX 5, pp. 14-18.

Petitioner returned to Respondent's in-house medical facility on April 10, 2015 and saw Miller Sadie, R.N. Sadie noted that Petitioner presented restrictions that had "no cut off day" and "no appt on the form." She advised Petitioner to "get an appt date or ending date for the restrictions." PX 1.

That same day, April 10, 2015, Petitioner filed an Application for Adjustment of Claim [15 WC 12060] alleging he experienced sharp pain in his right shoulder and neck on October 20, 2014 while "reacting to the fast paced environment turn left then right." RX 1.

Petitioner saw Dr. Levi again on May 5, 2015. Petitioner reported that his pain had improved but that he still had "constant numbness." The doctor did not note the location of the numbness. On right shoulder re-examination, the doctor noted a full, painless range of motion. He also noted pain in the right trapezius muscle and negative Spurling's testing. He again diagnosed a cervical strain. He indicated he did not see what more he could do to make Petitioner better. He again recommended that Petitioner avoid repetitive motions of his neck and arms and "therefore limited use of the forklift." He listed a diagnosis of "neck sprain." He released Petitioner from care on a PRN basis. PX 5, pp. 19-23.

A therapy progress note dated May 5, 2015 reflects that Petitioner complained of right-sided neck pain but indicated he felt "better than last time." PX 5, pp. 45-46. There are no

subsequent therapy notes. PX 5. Petitioner acknowledged he did not undergo any additional shoulder or neck care after May 5, 2015.

At Respondent's request, Dr. Neal, a board certified orthopedic surgeon, conducted a Section 12 examination of Petitioner on June 1, 2016. In his report of June 6, 2016, he indicated he reviewed an accident report of October 20, 2014 along with records from Respondent's in-house medical facility, Dr. Flores and Dr. Levi, along with the right shoulder and cervical spine MRI reports and therapy notes, in connection with his examination.

Dr. Neal noted that Petitioner was not working and had last worked for Respondent on February 16, 2015. He indicated that Petitioner physically demonstrated his forklift operation duties to him. He described Petitioner as showing him he used his left hand at about shoulder level to steer and flexed his right shoulder, while leaning forward, to operate the four levers. He noted a past history of a gunshot wound involving the right humerus thirteen years earlier, with that wound requiring two surgeries. He indicated that Petitioner reported injuring his neck at Respondent on October 20, 2014 and denied having any neck problems prior to that injury. He further indicated that Petitioner denied any specific event and instead attributed his injury to various tasks, including driving in reverse while looking upward for loads in his forks, he performed on October 20, 2014.

Dr. Neal noted that Petitioner primarily complained of pain in the superior aspect of his right shoulder and the lateral aspect of the right neck and sometimes experienced right biceps pain anteriorly. He also noted that Petitioner "denied any pain below either elbow." He further indicated that Petitioner complained of daily numbness in both arms, worse on the right, and numbness in his left little finger and right ring and little fingers. [The Arbitrator notes that this appears to be the first documentation of left-sided symptoms.]

Dr. Neal described Petitioner as "very thin." He noted multiple scars on Petitioner's right upper extremity. On shoulder examination he noted diminished internal rotation on the right compared to the left. He noted subjective pain with cervical spine range of motion. On hand examination, he noted diminished sensation in the left little finger pulp. He described Petitioner's subjective reported tenderness to light touch as "non-physiologic" and "non-organic." He also noted "an element of symptom magnification and/or symptom exaggeration."

Dr. Neal also indicated he reviewed two video clips of forklift operation. [The Arbitrator notes these clips are not in evidence.] He indicated that the worker shown in the clips principally used his left hand to steer and his right hand to maneuver "at least 3 knobs/levers." He also noted that one of the clips showed an operator driving backwards, while placing her right arm on an arm rest and looking over her right shoulder. He opined that "nothing about the neck and shoulder movements" shown in the clips "would cause pathoanatomy to the cervical spine or right shoulder."

Dr. Neal obtained cervical spine X-rays. He interpreted the films as showing a loss of the normal cervical lordosis and a "hint of anterior spondylolisthesis of C6 on C7 and perhaps an element of facet arthropathy in the very lowest cervical spine region."

Dr. Neal indicated he believed Petitioner's symptoms did not emanate from the shoulder joint. He opined that Petitioner's bilateral paresthesias were "consistent with bilateral ulnar nerve involvement or a lower bilateral cervical root process." He indicated the films showed cervical spondylosis, "a degenerative process of the cervical spine." He found no causal connection between this degenerative process and Petitioner's work tasks. He indicated the degenerative process could cause intermittent symptoms regardless of whether Petitioner was working or at rest. He indicated Petitioner might require care but did not attribute the need for care to "any work activity on October 20, 2014 or [Petitioner's] work activities and duties overall." He found Petitioner capable of returning to his forklift operator job but noted Petitioner "will continue to be symptomatic" if he resumed this job. He recommended a repeat cervical spine MRI given that Petitioner's symptoms had persisted since the March 19, 2015 study. He also recommended bilateral electrodiagnostic studies, a trial of over the counter anti-inflammatory medication and home exercises. He indicated Petitioner would be at maximum medical improvement if he declined to undergo the additional recommended studies. RX 4.

Records in Joint Exhibit 1 reflect that Petitioner returned to Dr. Levi on January 10, 2017 "for an initial evaluation of left hand pain" that had started "months ago". The doctor indicated that Petitioner "was not injured" and that Petitioner was experiencing numbness and tingling radiating down his arms to the ring and little fingers of both hands. The note contains no mention of any work activities. On examination, Dr. Levi noted no hypothenar wasting and positive Tinel's and flexion compression testing at the cubital tunnel. He assessed Petitioner as having left cubital tunnel syndrome. He prescribed physical therapy and a bilateral upper extremity EMG. He directed Petitioner to return in four weeks with the EMG results. He released Petitioner to unrestricted duty. Joint Exhibit 1, pp. 1-4.

Petitioner underwent the recommended bilateral upper extremity EMG/NCV studies on January 17, 2017. Dr. Kozlova, the neurologist who performed these studies, described Petitioner as complaining of pain below both elbows down to the small fingers and stating his left-sided symptoms had recently worsened. She described Petitioner as "work[ing] 12 hours/day on a forklift" with his "elbows flexed all the time." She noted that Petitioner reported previously having only right arm symptoms but now having worsening left-sided symptoms. She indicated that Petitioner "took some time off work to recover and now has to go back to work but the pain is limiting him." Dr. Kozlova noted no sensory abnormalities on examination. She interpreted the EMG/NCV results as consistent with bilateral ulnar entrapment at the elbows and suggestive of median entrapment neuropathy at the wrists bilaterally. She described the right ulnar entrapment neuropathy, or right cubital tunnel syndrome, as moderate to severe and the left cubital tunnel syndrome as mild to moderate. She indicated that Petitioner was "at high risk for development of carpal tunnel syndrome bilaterally" but noted he reported no symptoms typical of that syndrome. She also noted that

Petitioner reported neck pain and radicular symptoms. She saw no signs of active radiculopathy on the study but indicated that a cervical spine MRI "might be the study of choice." Joint Exh 1, pp. 5-11.

Petitioner returned to Dr. Levi on February 7, 2017. In his note of that date, Dr. Levi recorded the following history: "He has persistent pain and numbness in both hands, small and ring fingers since 10/21/14 when he injured himself at work driving a forklift and doing repetitive heavy activities." He noted that Petitioner rated his current pain at 2/10 and indicated he was not taking any pain medication. He also noted that Petitioner reported his pain would increase to 6/10 at night, causing him to wake up. After reviewing the EMG/NCV results, he recommended bilateral ulnar nerve transposition surgery, "right then left." He released Petitioner to light duty, indicating Petitioner could operate a forklift only six hours per day. Joint Exh 1, pp. 12-15.

Petitioner testified he presented Dr. Levi's restriction to Respondent and was placed in an accommodated "pre delivery" position. The accommodation lasted about thirty days.

Petitioner saw Dr. Levi again on March 7, 2017. Petitioner indicated he was still experiencing pain and paresthesias in both arms. On re-examination, Dr. Levi noted positive Tinel's and positive elbow compression testing bilaterally. He indicated that Petitioner described his symptoms as "persistent since the work injury of 2014." He also indicated he was awaiting authorization of the previously recommended ulnar nerve transposition surgery. Joint Exh 1, pp. 16-18. He continued the previous restriction of only six hours of forklift operation daily. Joint Exh 1, p. 19.

Petitioner testified he presented Dr. Levi's restriction to Respondent but was told he would not be accommodated.

Petitioner last saw Dr. Levi on April 18, 2017. He noted that Petitioner denied having pain but complained of ongoing numbness and tingling. He also noted that he was still recommending the bilateral ulnar nerve transposition surgery but that the adjuster was not approving this surgery. He directed Petitioner to return once his attorney obtained approval. Joint Exh 1, pp. 21-23. He indicated that Petitioner reported being able to work but being unable to operate a forklift. He released Petitioner to work with "no use of a forklift" and avoidance of excessive/repetitive movements of the arms. Joint Exh 1, pp. 24-25.

Petitioner testified he has not returned to Dr. Levi because the doctor told him he needed surgery but the surgery was not being authorized. He presented the doctor's "no use of a forklift" restriction to Respondent but Respondent "would not accept it." He presented a modified restriction on April 24, 2017. [On this modified restriction note, dated April 24, 2017, Dr. Levi indicated he could not indicate when the restrictions would end because he needed to wait to see whether the recommended ulnar nerve transposition surgery would be approved. PX 5, pp. 65-66.] At that point, "Kelly" of Respondent fired him. Then "Kelly" sent him a letter stating "you have not been terminated."

On May 31, 2017, Petitioner filed another Application [17 WC 16050] alleging bilateral cubital tunnel syndrome secondary to repetitive trauma manifesting on January 10, 2017. RX 2.

Petitioner testified that Respondent terminated him on May 31, 2017. He did not undergo any additional shoulder care after May 2017. Dr. Levi never lifted the restrictions.

At Respondent's request, Dr. Neal re-examined Petitioner on November 16, 2017. In his report of November 30, 2017, Dr. Neal indicated he reviewed updated records from Dr. Levi, along with the EMG/NCV report, in connection with his re-examination. He noted that Petitioner reported performing restricted duty at Respondent between February 17 and March 13, 2017, being fired and rehired in March 2017 and last working for Respondent on April 21, 2017. He indicated it was difficult to obtain a history from Petitioner because Petitioner "tends to talk extremely fast and then divert to statements on multiple issues." He also noted that Petitioner became very emotional at one point during the examination. He described Petitioner as having "significant life stressors" and "confounding biopsychosocial issues." He indicated that Petitioner told him he did not know when his cubital tunnel symptoms started. He noted that Petitioner attributed these symptoms to "never stopping" forklift operation. He indicated that Petitioner reported his numbness to Respondent in 2015 and 2016 and that Dr. Levi was the first physician he saw for the numbness.

On re-examination, Dr. Neal noted bilateral positive Tinel's at the cubital tunnel. He described the right side as "more significantly symptomatic" than the left. He did not appreciate any obvious intrinsic atrophy. He obtained X-rays of both elbows.

Dr. Neal diagnosed bilateral cubital tunnel syndrome. He found no causal connection between this condition and Petitioner's employment. He based this opinion in part on the fact that Petitioner did not work for approximately two years, between February 2015 and approximately February 2017. He indicated that Petitioner's records supported the conclusion that the cubital tunnel syndrome developed and was diagnosed during a time when Petitioner was not working. He noted that, while Petitioner reported "numbness" to Dr. Levi on May 5, 2015, there was no indication when this symptom started or where in his body Petitioner was experiencing numbness. He cited an American Medical Association publication for the proposition that "there are many theories about causes of cubital tunnel syndrome" and only "some evidence" suggesting a causal link between a "combination of risk factors" and the development of cubital tunnel syndrome.

Dr. Neal opined that Petitioner's forklift operator duties "did not aggravate or accelerate" his cubital tunnel syndrome and that it appeared "these conditions developed when [Petitioner] was not working." He found Petitioner's cubital tunnel syndrome treatment to be reasonable and necessary but unrelated to his occupational activities. He found Petitioner to be a candidate for bilateral ulnar nerve decompression procedures but opined that Petitioner's work activities did not bring about the need for these procedures. With respect to the bilateral cubital tunnel syndrome alone, he found Petitioner capable of resuming

forklift operation but cautioned that "this is not a statement [Petitioner] will be asymptomatic." Independent of causation, he recommended that Petitioner try wearing splints at night and/or sleeves or pads to protect his elbows. RX 5.

Petitioner testified he has no right shoulder discomfort currently. While he was undergoing treatment for his right shoulder, his pain varied. He used creams which made the pain more tolerable. He also performed home exercises as recommended by his therapists. He denied sustaining any additional injuries between October 2014 and May 2017. He currently experiences numbness and tingling in both hands, predominantly in his right hand. He did not experience these symptoms before being hired by Respondent. Between October 20, 2014 and May 2017 he worked only for Respondent.

Under cross-examination, Petitioner testified he last underwent care for his shoulder and neck on May 5, 2015. The treatment he underwent in 2017 was for numbness and tingling. He last underwent treatment for these symptoms on April 18, 2017. Respondent did not authorize the surgery that Dr. Levi recommended. He had Blue Cross/Blue Shield group medical insurance through Respondent but did not use this coverage because his condition was work-related.

Petitioner testified he would agree with records showing that Respondent hired him on November 11, 2013. He sat while operating a forklift. The forklift was equipped with power steering. He used his left hand to turn the steering wheel and his right hand to operate the levers. He leaned forward while operating the levers. He has not reviewed Dr. Neal's report in years but would agree with the report if it describes him as sitting while operating the forklift, using his left hand to steer and his right hand to operate the four levers. The forklifts he operated were not uniform. The seat height varied. The steering wheel is at shoulder level. He had to lean forward to operate the levers. He still has bullet fragments in his right arm. Petitioner acknowledged he did not actually work for Respondent on January 10, 2017. He testified he began experiencing hand symptoms earlier, while operating a forklift. He initially experienced neck and right shoulder symptoms. The hand symptoms developed later. He was unable to confirm whether he voiced left hand complaints when he returned to Dr. Levi on January 10, 2017. Respondent placed him on a 30-day suspension when he was released to full duty in January 2017. Petitioner testified he was suspended because he had brought a discrimination claim against Respondent. He did not resume full duty. On February 7, 2017, he presented a note indicating he could operate a forklift six hours per day. Respondent provided him with an accommodated position in "pre delivery." Petitioner testified he performed this position for about thirty days. After he presented the same restrictions in March 2017, Respondent told him he could not be accommodated. Petitioner testified that Respondent took the pre-delivery job away from him after conducting an "observation" of him working. Petitioner denied being offered a chassis job. He last saw Dr. Levi in April 2017. He did not pursue additional treatment thereafter because Dr. Levi told him he needed surgery that was not being authorized. On April 24, 2017, he obtained another work note because Respondent would not accept the restrictions he submitted earlier. "Kelly" of Respondent then fired him. He subsequently received a letter from Respondent stating "you have not been terminated."

He has been employed for the last eight or ten months. After he stopped working for Respondent he worked as a security guard for Securitas for a year. That job was not physically demanding. He only had to check ID cards and watch entryways. He left that job to take a better job at the Chicago Transit Authority. He drove a CTA bus on a part-time basis for a year. He worked shifts that lasted only three or four hours. He used his arms to operate the bus but primarily drove straight. He had to turn the bus only occasionally. He was "way more comfortable" driving a bus than he was operating a forklift at Respondent. As a bus operator, he had no quota to meet and was not on a production line. He resigned from the Chicago Transit Authority "in lieu of termination." After 2015, he received disability checks from Unicare for about six months. The only other payment he received from Respondent was a $30,000 settlement for the EEOC/discrimination claim he filed. He has no upcoming medical appointments with respect to his claimed work injuries.

On redirect, Petitioner testified he has not read his entire medical file or Dr. Neal's examination reports. He feels that the numbness and tingling he complained of was related to his job at Respondent. The doctor who performed the EMG studies mentioned his job duties. On October 20, 2014, he left work early, at 9:00 or 10:00 PM. He went from work to the Emergency Room. He agreed with the Emergency Room records which reflect an arrival time of 12:36 AM on October 21, 2014. He disagreed with a statement set forth in Respondent's in-house medical clinic records of October 24, 2014. The statement quotes him as saying "this is not work-related – it's a personal injury." He did not say this. The record is time-stamped October 25, 2014. He was not at Respondent's facility on October 25, 2014. Between 2014 and 2017, he occasionally performed light duty and was sometimes off work, receiving no benefits. If Respondent had offered him light duty, he would have worked. He was fired, twice, and lost his health insurance. If he had wanted Blue Cross/Blue Shield to pay for the recommended ulnar nerve transposition surgery, he is not sure the carrier would have paid.

Under re-cross, Petitioner testified he had no recollection of telling a medical provider he worked 12-hour days.

A Respondent representative was present throughout the hearing but did not testify.

Arbitrator's Credibility Assessment

Petitioner was excitable and sometimes agitated but very credible as to his job duties. He provided several detailed explanations of the pace at which he worked and the positioning of his body and arms while operating a forklift along Respondent's assembly line. No one contradicted his testimony that he frequently drove in reverse while looking backward to check for traffic, that he had to lean forward to operate the four levers with his right hand and that the batteries in the forklift's power steering mechanism began to drain as his workday progressed.

As the hearing progressed, Petitioner began voicing various grievances, indicating he had pursued a discrimination claim against Respondent and believed Respondent altered his

medical records. The Arbitrator clarifies she can only address the issues presented by the two workers' compensation claims.

Arbitrator's Conclusions of Law Relative to Both Cases

In 15 WC 12060, did Petitioner sustain an accident arising out of and in the course of his employment on October 20, 2014?

The Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment on October 20, 2014. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony concerning the symptoms he developed while operating a forklift on that date. The Arbitrator also relies on Respondent's in-house medical records, the Presence St. Mary of Nazareth Hospital records and Dr. Levi's records. The initial records from the in-house facility reflect that Petitioner "aggravated" his right shoulder "while operating [the] lift controls" of his forklift. The nurse who saw Petitioner on October 20, 2014 categorized the "visit type" as "occupational."

The Arbitrator recognizes that Petitioner is not alleging a specific event such as a fall. Under Illinois law, an "accident" can consist of the giving way of a worker's physical structure under the stress of his usual labor. See, e.g., Atlantic & Pac. Tea Co. v. Industrial Commission, 67 Ill.2d 137 (1977).

The Arbitrator also acknowledges that the in-house medical facility note dated October 24, 2014, describes Petitioner as stating that the injury was "personal" rather than "work-related." Petitioner denied stating this. The Arbitrator finds the denial credible. Petitioner testified he completed an accident report on October 20, 2014 in which he attributed his symptoms to manipulating the forklift controls. Respondent failed to offer this report into evidence (see REO Movers v. Industrial Commission, 226 Ill.App.3d 216 (1st Dist. 1992) but Dr. Neal, Respondent's examiner, described its contents in his report of June 6, 2016. The description corroborates Petitioner's testimony concerning the length of his work shifts and the pace at which he worked. RX 4, p. 2. It seems highly unlikely that Petitioner would attribute his symptoms to work activities on October 20, 2014 and then suddenly reverse himself four days later.

In 15 WC 12060, did Petitioner establish a causal connection between the accident of October 20, 2014 and any claimed current condition of ill-being? Did Petitioner establish a causal connection as to the treatment he underwent in 2014 and 2015?

In 15 WC 12060, the Arbitrator finds that Petitioner failed to establish causal connection as to any claimed current condition but did establish causation as to right shoulder and neck conditions that required treatment between October 20, 2014 and May 5, 2015.

In finding causation as to the need for treatment through May 5, 2015, the Arbitrator relies on the following: 1) Petitioner's credible and detailed description of the job duties he

performed and physical motions he made at work prior to and on October 20, 2014; 2) the fact that Petitioner successfully performed his forklift operation duties for Respondent prior to October 20, 2014; 3) the causation-related opinions expressed by Dr. Flores and the other physicians who treated Petitioner at Presence St. Mary; 4) the causation opinions expressed by Dr. Levi; 5) the fact that Petitioner's symptoms improved during periods of rest; and 6) Dr. Neal's significant concession that Petitioner would remain symptomatic if he continued performing his forklift operation job at Respondent (RX 4). The Arbitrator does not view Petitioner's remote gunshot wound as a contributing factor. None of the physicians who evaluated Petitioner attributed his symptoms to that wound. Respondent's examiner, Dr. Neal, did not even view Petitioner's symptoms as emanating from the shoulder joint. RX 4.

In finding that Petitioner failed to establish a causal relationship between the accident of October 20, 2014 and any claimed current right shoulder or neck condition, the Arbitrator notes that Petitioner last underwent treatment for his right shoulder and neck on May 5, 2015, more than six years before the hearing. On that date, Dr. Levi described Petitioner's right shoulder range of motion as full and painless. He did diagnose a cervical spine condition but recommended no treatment. The Arbitrator also notes that Petitioner successfully operated a CTA bus (on a part-time basis) in 2019 and/or 2020 and that Petitioner did not testify to any ongoing right shoulder or neck complaints at the hearing.

In 15 WC 12060, is Petitioner entitled to reasonable and necessary medical expenses?

The Arbitrator has previously found that Petitioner established causation as to the need for the treatment he underwent between October 20, 2014 and May 5, 2015. The Arbitrator views this treatment as reasonable and necessary.

The Arbitrator notes that Petitioner claimed only one unpaid medical bill at the hearing. That bill (PX 6) does not relate to right shoulder or neck care. Rather it relates to medication that Dr. Levi prescribed for Petitioner's cubital tunnel symptoms on March 7, 2017. The Arbitrator declines to award this bill (see further below).

In 15 WC 12060, is Petitioner entitled to temporary total disability and/or temporary partial disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled during seven intervals totaling "201 1/3 [sic]" weeks. He also claimed he was temporarily partially disabled during nine intervals in 2014, 2015 and 2017, with those intervals totaling 22 weeks. Respondent disputed Petitioner's entitlement to any weekly benefits based on its accident and causation defenses. The parties agreed that Respondent paid no weekly benefits under the Act and was entitled to Section 8(j) credit for $14,777.67 in other benefits. Arb Exh 1.

The Arbitrator initially notes that Petitioner failed to testify on direct examination as to the days he was off work (in 2014 and 2015) either at a doctor's recommendation or because Respondent did not accommodate his then-current restrictions. He also failed to identify any

specific days or periods in 2014 or 2015 when he was accommodated and potentially entitled to temporary partial disability benefits. The Arbitrator also notes that, while Respondent offered payroll records (RX 3), to which Petitioner did not object, no one laid a foundation for these records or explained the initial designations (e.g., "M" and "A") that appear thereon. Finally, the Arbitrator notes that, under cross-examination, Petitioner indicated he continued working for Respondent between October 2014 and February 2015, was off work between February 2015 and mid-February 2017 and last underwent neck and shoulder care on May 5, 2015. It was on May 5, 2015 that Dr. Levi noted no right shoulder abnormalities, diagnosed a cervical spine condition and indicated he had nothing more to offer, treatment-wise. Dr. Levi continued to recommend restrictions but the basis for that recommendation is not well-explained. It is also unclear whether Petitioner presented the May 5, 2015 restrictions to Respondent.

In Illinois, it has long been held that the claimant bears the burden of proving entitlement to temporary total and/or temporary partial disability benefits. It is not incumbent on an employer to disprove a claim for such benefits.

On this record, the Arbitrator finds that Petitioner was temporarily totally disabled from March 10, 2015 through May 5, 2015, a period of 8 1/7 weeks, with Respondent receiving Section 8(j) credit, per the parties' stipulation, for any short-term disability paid during this period. Dr. Levi imposed restrictions and recommended treatment on March 10, 2015. There is no evidence indicating Petitioner worked between March 10, 2015 and May 5, 2015 (RX 3) and no evidence indicating Respondent offered to accommodate Petitioner's restrictions during this period. Respondent did not obtain a Section 12 examination until June 2016. As noted earlier, Dr. Levi continued to recommend restrictions on May 5, 2015 but did not explain why he was doing so. That lack of explanation is concerning, given the paucity of examination findings and the absence of treatment recommendations. Had Dr. Levi testified or otherwise indicated that the restrictions were prophylactic in nature (i.e., that he, like Dr. Neal, believed Petitioner's symptoms would return if he resumed forklift operation), the Arbitrator might have viewed this issue differently.

In 15 WC 12060, did Petitioner establish permanent partial disability?

The Arbitrator declines to award permanency in 15 WC 12060. Petitioner last underwent shoulder and neck treatment on May 5, 2015. On that date, Dr. Levi diagnosed only a cervical strain. He recommended restrictions, without explanation, and said he had nothing to offer treatment-wise. When Petitioner next saw Dr. Levi, on January 10, 2017 (the manifestation date alleged in 17 WC 16050), he presented new, primarily left-sided hand and arm symptoms and apparently did not mention his right shoulder or neck. Dr. Levi found him capable of full duty. While Dr. Levi later imposed new restrictions relating to forklift usage, he did not link the need for those restrictions to any shoulder or neck condition. Rather, it appears he was reacting to the positive EMG findings and the cubital tunnel diagnosis. At the hearing, Petitioner did not testify to any current right shoulder or neck symptoms. There is no evidentiary basis for awarding permanency in 15 WC 12060.

In 17 WC 16050, did Petitioner establish timely notice of his claimed repetitive trauma injuries?

The Arbitrator views notice as the dispositive issue in 17 WC 16050. The Act provides, in relevant part, that notice of an accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. The notice requirement applies to employees who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident in a repetitive trauma claim is the date when the injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission v. Industrial Commission, 115 Ill.2d 524 (1987). The phrase "manifests itself" signifies "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." Belwood, 115 Ill.2d at 531. The purpose of the notice requirement is to enable the employer to investigate the employee's alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In 17 WC 16050, Petitioner alleges repetitive trauma injuries manifesting on January 10, 2017. The alleged injuries involve body parts, namely both hands and arms, wholly distinct from those involved in 15 WC 12060.

Petitioner acknowledged he did not work at Respondent between approximately February 2015 and February 2017. He did see Respondent's examiner, Dr. Neal, during this period, with the doctor (somewhat ironically) indicating he suspected ulnar nerve rather than shoulder problems, but the doctor did not link the ulnar nerve problems to Petitioner's forklift operation. RX 4. It is thus not arguable that Dr. Neal's first report put Respondent on notice of a work-related bilateral cubital tunnel condition. When Dr. Levi assessed Petitioner as having left cubital tunnel syndrome, on January 10, 2017, Petitioner had been off work for almost two years. When EMG studies confirmed bilateral cubital tunnel syndrome, on January 17, 2017, Petitioner was still off work. There is evidence that Respondent received work restrictions and provided Petitioner with accommodated pre-delivery duty for about thirty days in approximately February 2017 but no clear evidence indicating Petitioner reported new repetitive trauma injuries within forty-five days of January 10, 2017. Even if Petitioner presented Dr. Levi's work status reports of February 7, March 7 and April 24, 2017 to Respondent, those reports (Joint Exh 1, pp. 14, 19 and 24) do not describe Petitioner's bilateral cubital tunnel syndrome as work-related. They simply state the diagnosis and indicate Petitioner may only operate a forklift for six hours per day "due to his injury." An employer's mere knowledge of "some type of injury" does not establish statutory notice. White v. IWCC, 374 Ill.App.3d 907, 910 (2007). Additionally, Petitioner did not file his Application in 17 WC 16050 until May 31, 2017, well beyond the 45-day notice period. RX 2.

The Arbitrator finds that Petitioner failed to meet his burden of establishing timely notice to Respondent. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation in 17 WC 16050 is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC025276
Case Name	Woodrow L Morrison v. Beelman Trucking Company
Consolidated Cases	19WC029327;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0327
Number of Pages of Decision	20
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Stephen Klyczek

DATE FILED: 8/25/2022

/s/ Deborah Baker, Commissioner

Signature

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

WOODROW MORRISON,

Petitioner,

vs. NO: 19 WC 25276

BEELMAN TRUCKING CO.,

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 whether Petitioner's current condition of ill-being is causally related to the undisputed work accidents, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, clarifies the Decision as stated below but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

This case was consolidated for hearing with case number 19 WC 29327. Both cases involve undisputed accidental injuries to Petitioner's back: 19 WC 25276 involves a February 11, 2019 accident and 19 WC 29327 involves a September 26, 2019 accident. Finding Petitioner suffered an initial low back injury and had not reached maximum medical improvement before he suffered a second low back injury, after which his symptoms worsened and still persisted as of arbitration, the Arbitrator concluded Petitioner's condition of ill-being is causally related to both work accidents and awarded benefits. Our analysis of the evidence yields the same result, however, the Commission observes identical benefits were erroneously awarded in both decisions. The Commission clarifies that, consistent with our determination Petitioner had not reached maximum medical improvement prior to the September 26, 2019 accident, all benefits are awarded under case 19 WC 25276.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2021, as clarified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $838.98 per week for a period of 88 1/7 weeks, representing January 5, 2020 through September 13, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses incurred from February 11, 2019 through September 13, 2021, as provided in §8(a), subject to §8.2 of the Act. Respondent shall have a credit of $7,249.36 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the treatment recommended by Dr. Butler as well as continued chronic pain management offered by Dr. Fletcher, as provided in §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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.

August 25, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 7/27/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC025276
Case Name	MORRISON, WOODROW v. BEELMAN TRUCKING CO
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Stephen Klyczek

DATE FILED: 9/29/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/Maureen Pulia, Arbitrator

Signature

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)

WOODROW MORRISON,
Employee/Petitioner

v.

BEELMAN TRUCKING CO.,
Employer/Respondent

Case # **19** WC **25276**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **9/13/21**. 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, **2/11/19 and 9/26/19**, 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 $**61,665.49**; the average weekly wage was $**1,258.47**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**000.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**7,249.36** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services from 2/11/19 through 9/13/21, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $7,249.36 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 reasonable and necessary medical services associated with the prospective medical care recommended by Dr. Butler and the continued chronic pain management offered by Dr. Fletcher, detailed in the Section K of this decision regarding prospective medical treatment, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $838.98/week for 88-1/7 weeks, commencing 1/5/20 through 9/13/21, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 1/5/20 through 9/13/21, and shall pay the remainder of the award, if any, in weekly payments.

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

SEPTEMBER 29, 2021

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 45 year old truck driver, sustained accidental injuries to his back that arose out of and in the course of his employment on 2/11/19 (19WC25276) and 9/26/19 (19WC29327). These cases are consolidated, and the parties have requested one consolidated decision.

Petitioner worked for respondent for about 3 ½ years on or about the first date of injury on 2/11/19. Petitioner transported commodities for respondent, but did not load or unload the truck. He was however, responsibly for sweeping out the trailer after he delivered each commodity and it was unloaded.

On 2/11/19 at approximately 4:30 am petitioner was transporting roofing granuals. As he attempted to roll back the tarp it got stuck, and petitioner climbed up onto the rail to release the tarp. As he was climbing down, he stepped down off the truck onto the ground. There was frozen ice that was on the ground, and he slipped and fell onto his back. Petitioner could not see what he was stepping down onto to because it was dark outside. Petitioner immediately felt low back and left leg pain. He reported the injury to Mike Butler between 8:00-9:00 am. Petitioner was able to complete his dispatch in Chicago.

On 2/12/19 petitioner presented to the emergency room at St. John's Hospital complaining of back and hip pain radiating to the lower spine. He rated the pain at a 10/10, worse with movement; reported some weakness; and, reported bilateral hip pain. He provided a consistent history of the accident. Petitioner was examined and x-rays were taken of the lumbar spine and pelvis that showed no evidence of fracture or dislocation. He was diagnosed with back pain. He was given a script for Toradol.

On 2/13/19 petitioner presented to Ashlie Long APRN/CNP in Dr. Steven Lewis' office at the Springfield Clinic. Petitioner reported that he fell on his back at work on 2/11/19 and was seen at the emergency room on 2/12/19. He reported significant swelling on the lumbar spine, and some pain that worsened when getting in and out of work truck. Following an examination and review of the x-rays, petitioner was assessed with lumbar back pain. He was authorized off work through 2/17/19. He was prescribed medications.

On 2/19/19 petitioner presented to Dr. Lewis complaining of mid to lower back pain. He reported that he had minimal relief with medication. He complained of excruciating pain. Following an examination, petitioner was assessed with a lumbar strain. He was prescribed Naproxen and a course of physical therapy. Petitioner began a course of physical therapy at Springfield Clinic on 2/26/19.

On 3/11/19 petitioner returned to Dr. Lewis' office. He reported that he completed the recommended physical therapy and felt that his symptoms were worsening. He complained of pain radiating to his legs

depending on his movement, as well as his legs intermittently giving out on him. An MRI was ordered and petitioner was continued in physical therapy.

On 3/25/19 petitioner underwent an MRI of the lumbar spine. The impression was mild broad-based disc bulging, arthropathy of the facet joints at L4-L5 and L5-S1 causing minimal deformity of the thecal sac. Also noted was minimal bilateral neural foramina narrowing. There was no encroachment of the exiting roots.

On 4/23/19 petitioner presented to Dr. Rohan Jain for evaluation of his back pain. He reviewed petitioner's lumbar imaging that showed evidence of mild disc degeneration at L4-L5 and L5-S1. Dr. Jain was of the opinion that clinically petitioner had left greater than right L5 radiculopathy and axial pain suggestive of degenerative disc disease. He recommended bilateral L4-L5 transforaminal epidural steroid injections.

On 5/1/19 petitioner underwent bilateral L4-L5 transforaminal epidural steroid injections performed by Dr. Jain. His post-operative diagnosis was radiculopathy of the lumbar region. On 6/3/19 Dr. Lewis refilled petitioner's Tramadol prescription. On 6/5/19 petitioner underwent a left L4-L5 interlaminar lumbar epidural steroid injection performed by Dr. Jain. Petitioner reported 60% improvement after both sets of injections. On 6/17/19 petitioner began another course of physical therapy.

On 6/18/19 petitioner returned to Dr. Jain. Dr. Jain noted that petitioner's L5 radiculopathy, left greater than right, was improved by the injections. He further noted that petitioner had L5-S1 radiculopathy, and axial pain suggestive of lumbar facet syndrome. He recommended trial lumbar epidural steroid injections targeting L5-S1 distribution, and facet injections for back pain.

On 8/20/19 petitioner underwent a Section 12 examination performed by Dr. Russell Cantrell. Petitioner provided a consistent history of the injury on 2/11/19. He complained of left-sided lumbar back pain aggravated by standing greater than sitting, but also aggravated with prolonged sitting. He described his pain as radiating into his left anterolateral thigh and into his left proximal lateral lower leg, worsened with various positions, including sitting and standing, and twisting and bending. He rated his pain at an 8/10.

Following a social history, review of systems, physical examination and review of medical records through 7/24/19, Dr. Cantrell diagnosed subjective complaints of lumbar back pain, by definition chronic in nature with associated lower extremity symptoms, primarily left-sided, for which he had no lateralizing neurologic deficits. Dr. Cantrell was of the opinion that petitioner's prognosis for recovery was guarded given the presence of multiple non-physiologic pain behaviors and the persistence of his pain complaints. Dr. Cantrell noted that petitioner was prescribed narcotics in September of 2018, and was involved in a motor vehicle accident on June of 2018. He also noted that petitioner had a cervical sprain, concussion syndrome, and lumbar sprain as part of

his assessment on 2/13/19. Dr. Cantrell noted that while petitioner may have sustained a lumbar strain or sprain as a result of the 2/11/19 injury, his subjective complaints and clinical findings did not correlate with his mechanism of injury. He was of the opinion that petitioner could return to full duty work without restrictions. He believed petitioner's treatment to date was reasonable and necessary, but did not believe that any continued procedural pain management or any other treatment, related to the injury, was necessary. He did not believe petitioner sustained any loss of function as a result of the injury on 2/11/19. He was also of the opinion that petitioner had reached maximum medical improvement.

On 9/26/19 while working light duty at Hope Thrift Store, petitioner sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent. Respondent had petitioner working light duty at Hope Thrift Store since he was released to light duty work that respondent could not accommodate. Petitioner fell on his back on a concrete floor after getting up from a table he was working at, turned around, and stepped onto some plastic coat hangers that were laying on a hard floor. He testified that he slipped and fell onto his low back and buttocks. He reported significant pain at the time of injury. Petitioner reported the injury to respondent as well as to the store manager for Hope Thrift Store.

On 10/1/19 petitioner returned to Dr. Lewis. He provided a consistent history of the injury on 9/26/19 and reported that since then he had increasing pain in his low back that radiates to his bilateral lower extremities. He reported radiculopathy in the left leg to the foot, and radiculopathy in the right leg to just below the knee. Following an examination, Dr. Lewis assessed a lumbar strain/sprain, tenderness over spinous processes. He ordered x-rays of the lumbar spine, and prescribed Meloxicam, and physical therapy. Petitioner was authorized off work. X-rays were taken that day that showed no acute osseous abnormality.

On 10/12/19 petitioner underwent an MRI of the lumbar spine. The impression was minimal degenerative disc disease at L4-L5, and mild degenerative facet arthropathy in the lower spine. No canal or foraminal stenosis was noted. On 10/17/19 he restarted physical therapy.

Petitioner continued in physical therapy, and on 10/31/19 returned to Dr. Jain. Following an examination, Dr. Jain assessed left greater than right L5 radiculopathy, which improved after injection, and L5-S1 radiculopathy. Dr. Jain ordered an EMG. He also noted that petitioner had axial pain suggestive of lumbar facet syndrome. He recommended trial lumbar epidural steroid injections targeting the L5-S1 distribution, and trial facet injections.

On 11/15/19 petitioner followed-up with Dr. Lewis for multiple problems. Petitioner complained of left lumbar pain of 8/10. He also noted that his neck pain, due to a cervical sprain, was back to baseline. Dr. Lewis

examined petitioner and was of the opinion that petitioner's lumbar radicular symptoms, along with his axial low back pain, was due to lumbar facet arthritis. He noted that petitioner was waiting for authorization for the injections recommended by Dr. Jain. He continued petitioner in physical therapy and adjusted his medications.

On 12/16/19, petitioner underwent an EMG/NCS performed by Dr. Trudeau. The impression was left S1 radiculopathy, mild to moderate; bilateral L5 radiculopathies, mild on the left side, relatively mild on the right side, left greater than right; and, no current evidence of L3 or L4 radiculopathy on either side, no entrapment neuropathy, no lumbar plexopathy, no mononeuritis multiplex, no lumbosacral radiculoplexus neuropathy, and no large fiber sensory or sensorimotor neuropathy or polyneuropathy.

On 1/6/20 petitioner underwent a repeat Section 12 examination performed by Dr. Cantrell, at the request of the respondent. Petitioner gave a history of his accident on 9/26/19, followed by increased ongoing back complaints. Dr. Cantrell performed the same type of examination and review of records. He was of the opinion that petitioner's diagnosis in reference to his work accident on 9/26/19 could be considered an exacerbation of his ongoing back complaints. He was of the opinion that petitioner's development of his left S1 radicular symptomatology began prior to the injury on 9/26/19, and not in a temporal relationship to his injury on 2/11/19. He reviewed both MRIs and saw no evidence of an acute discogenic or bony pathology that could be related to the work accidents. He was of the opinion that the findings at the disc and facet levels were degenerative in nature. He opined that petitioner's current back condition was not causally related to the injury on 9/26/19. He was of the opinion that the injury on 9/26/19 did not aggravate or exacerbate his condition related to the 2/11/19 injury. With respect to the injury on 9/26/19, Dr. Cantrell was of the opinion that petitioner had reached maximum medical improvement and did not require any additional treatment. He was of the opinion that the minimal physical therapy petitioner received after the 9/26/19 injury would not be unreasonable or unnecessary in the context of a temporary exacerbation of back pain complaints. Dr. Cantrell was of the opinion that petitioner could work full duty without restrictions as a result of the injury on 9/26/19.

On 1/7/20 petitioner was discharged from physical therapy. It was noted that petitioner improved only slightly with therapy regarding his pain complaints. Petitioner only met 2 of his long term goals. It was noted that petitioner was only making slow progress toward his long term goals. He was instructed to continue his home exercise program.

On 1/8/20 petitioner presented to Dr. David Fletcher at SafeWorks for evaluation and treatment of back pain that radiated to his left leg. This was a doctor of petitioner's own choosing. He gave a history of both injuries on 2/11/19 and 9/26/19. Petitioner complained of pain located in the back of his left leg that radiates to the left foot, that was severe. He rated his pain at a 6/10. Following an examination, Dr. Fletcher diagnosed left

side sciatica, and radiculopathy of the lumbar region. Dr. Fletcher was of the opinion that petitioner's problems were related to his work activities. He ordered a myelogram CT. He also authorized petitioner off work.

On 6/5/20 petitioner underwent a CT lumbar myelogram. The impression was a negative CT lumbar myelogram.

On 6/26/20 petitioner returned to Dr. Fletcher. He reported that his condition was unchanged. Following an examination, Dr. Fletcher noted that the myelogram CT did not show any significant pathology. He ordered a repeat EMG/NCS, and continued petitioner off work through 7/23/20.

On 7/14/20 petitioner underwent a repeat EMG/NCS. The impression was left L5 radiculopathy, mild to moderate, likely persistent/residual lesion in comparison to the previous study of 12/16/19. There was no current evidence of other radiculopathy, entrapment neuropathy, lumbar plexopathy, mononeuritis multiplex, or large fiber sensory or sensorimotor neuropathy or polyneuropathy.

On 7/28/20 petitioner followed-up with Dr. Fletcher. Dr. Fletcher noted that he reviewed the electrical studies and they showed persistent L5 radiculopathy. He examined petitioner and discussed options such as discogram/CT, spinal cord stimulator, left AFO brace, and neurology referral to include metabolic work-up. He also noted that he needed to monitor petitioner's depression. He continued petitioner off work through 8/11/20.

On 9/18/20 the evidence deposition of Dr. David Fletcher, was taken on behalf of petitioner. Dr. Fletcher is board certified in occupational and environmental medicine, and preventative medicine and public health. He noted that petitioner denied any ongoing lumbar spine issues prior to the injury on 2/11/19. Dr. Fletcher was of the opinion that the MRI of 3/25/19 showed some degenerative discogenic changes at L4-L5 that showed some improvement on the MRI performed 10/12/19. He noted that he saw no focal disc herniation on the latter MRI. Nonetheless, he was still of the opinion that the degenerative discogenic changes at L4-L5 explained why he was having radicular pain symptomatology. Dr. Fletcher was of the opinion that petitioner had some preexisting degenerative changes that were aggravated by his work injuries, when he first saw him on 1/8/20, and that his condition at that time was causally related to the injury on 2/11/19. Dr. Fletcher noted atrophy of petitioner's right calf between the visit on 1/8/20 and the visit on 6/26/20. Dr. Fletcher was of the opinion that this atrophy validated his diagnosis of lumbar radiculopathy. Dr. Fletcher was of the opinion that when he saw petitioner on 6/26/20 his complaints were consistent with more of an L5 nerve root problem, and the characteristic motor deficiency that goes along with that is weakness with heel walking and extension of the great toe, and that was what was demonstrated on the video he took, that was marked as PX4 of his deposition. Dr. Fletcher was of the opinion that the 2nd EMG/NCS petitioner underwent in 2020 showed improvement over the one performed in

December of 2019, in that it failed to show any S1 radicular complaints at L5 which was consistent with what he was looking for, which was an improvement. Dr. Fletcher was of the opinion that petitioner did not magnify his symptoms. Dr. Fletcher opined that petitioner's degenerative disc disease in some form or fashion could have been, or was aggravated by the 2/11/19 accident. He further noted that since that time petitioner's pain has not gone away.

On cross examination, Dr. Fletcher was of the opinion that diabetes cannot cause lumbar radiculopathy, but can cause polyneuropathy. He noted that none of the EMG/NCS tests showed any diabetic neuropathy. Dr. Fletcher opined that it is not possible that petitioner's preexisting degenerative disc disease changed into radiculopathy regardless of his work accident.

On 9/29/20 petitioner underwent an CT of the lumbar spine. The impression was Modified Dallas grade 4 annular tear of the L4-L5 disc.

On 10/21/20 the evidence deposition of Dr. Russell Cantrell, who specializes in physical medicine and rehabilitation, was taken on behalf of the respondent. Dr. Cantrell opined that petitioner sustained a strain/sprain as a result of the injury on 2/11/19, and all treatment he received through 8/20/19 was reasonable and necessary as it relates to the injury on 2/11/19. He opined that petitioner's bulging discs were the result of natural degeneration, and that petitioner reached maximum medical improvement as of 8/20/19. Dr. Cantrell opined that when he saw petitioner on 1/6/20 he may have had a temporary exacerbation of his ongoing back complaints, given that his level of pain before the injury on 9/26/19, and when he saw him on 1/6/20 were the same. His diagnosis was mechanical lower back pain in the setting of nonphysiologic pain behaviors. Dr. Cantrell opined that on 1/6/20 petitioner had reached maximum medical improvement as it relates to the injury he had on 9/26/19.

On cross examination Dr. Cantrell was of the opinion that the dermatome pattern of complaints in the left leg, particularly in the anterior lateral thigh, would likely be the L3 or L4 nerve root, rather than the L5-S1. Dr. Cantrell was of the opinion that the objective findings on the MRIs were degenerative. Dr. Cantrell testified that he had reviewed no medical records prior to the injury on 2/11/19, so he does not know what petitioner was taking narcotic medication for in September of 2018. Dr. Cantrell testified that it was his understanding that petitioner was working full duty prior to the injury on 2/11/19. Dr. Cantrell was of the opinion that an accident or trauma can potentially aggravate a preexisting disc bulge. Dr. Cantrell was also of the opinion that the radiofrequency ablation procedures recommended by Dr. Jain would be reasonable and necessary, but not casually related to the injury on 2/11/19. Dr. Cantrell noted that when he saw petitioner on 1/6/20 he was having localized back pain, but not necessarily any radicular symptoms. He also noted that on 7/18/19 Dr. Jain

made reference that petitioner's symptoms may be coming from S1 instead of L5, and that is why he was of the opinion that if S1 radicular symptoms were present prior to 9/26/19, this is when they were present. Although he was of an opinion that an injury can reaggravate or injure the S1 level, his neurological examination on 1/6/20 showed nothing consistent with S1 radiculopathy. Dr. Cantrell noted that he did not make a diagnosis of S1 radiculopathy when he examined petitioner on 8/20/20, but the December 2019 EMG did show objective findings relative to the S1 radiculopathy. Dr. Cantrell noted that in all the records he reviewed leading up to his deposition, there were no references in any of the records to abnormal pain behaviors or nonphysiologic pain patterns or complaints.

On 11/4/20 petitioner returned to Dr. Fletcher. He rated his pain at an 8/10. He reported no change since his last visit. He reported that he takes Lyrica and Tramadol. Dr. Fletcher noted that the discogram/CT resulted in concordant pain response in the L4 and L5 regions with spreading of the dye. He referred the petitioner to Dr. Butler. He gave petitioner scripts for Lyrica and Hydrocodone. He also authorized petitioner off work.

On 12/3/20 petitioner presented to Dr. Jesse Butler at Gibson Health of Mahomet. Petitioner complained of low back pain since the accident on 2/11/19, that occurs constantly with intermittent worsening. He reported that his pain was worse and severe. He described the pain as deep, electrical, sharp, shooting, stabbing and throbbing. He noted that his symptoms were aggravated by bending, daily activities, extension, flexion, exercise, lifting, lying/resting, rolling over in bed, running, sitting, twisting, walking, and standing. Dr. Butler examined petitioner and assessed a chronic annular tear of the lumbar disc secondary to a work-related injury with combination of mechanical back and lower extremity radicular symptoms. He instructed petitioner on increasing physical activity. He also noted that no surgery was indicated. Dr. Butler was of the opinion that a spinal fusion has a less than 50% chance of improving petitioner's overall condition and would leave him permanently with restrictions. He was of the opinion that the results of spinal fusion on radiographically normal discogenic positive patients is unacceptable. He recommended continued conservative options including core strengthening and cardio fitness, He believed petitioner's prognosis was outstanding overtime. He thought petitioner should reach maximum medical improvement with ongoing conservative treatment.

On 12/30/20 petitioner returned to Dr. Fletcher. He rated his pain at a 6/10. He noted that the pain shoots down his left leg to the knee. Petitioner was able to perform toe and heel walking. His ambulation showed some limping and weakness on the left side. He also had limited range of motion with twisting and bending. Dr. Fletcher gave petitioner a refill for Hydrocodone and Lyrica, a home exercise program, and a TENS unit. He continued petitioner off work.

On 5/14/21 the evidence deposition of Dr. Jesse Butler, an orthopedic surgeon, specializing in spine surgery, was taken on behalf of petitioner. He noted that petitioner's neurologic examination and x-rays of his lumbar spine that he performed during his examination of petitioner were normal. He noted no disk herniation or any high signal lesion in the annulus at L5, and petitioner's facets were also essentially normal, on the MRI dated 10/12/19. He was further of the opinion that the CT from 9/29/20 demonstrated some leakage of contrast that had been placed during the discogram, at the L4-L5 level. He also noted some fissures on both the right and left side of the disk. He noted no stenosis, and all other levels were normal. He opined that petitioner had a chronic annular tear secondary to his work-related injury with a combination low back and lower extremity radicular symptoms. Based on the diagnostic studies, and his physical examination of petitioner, he saw no objective basis for petitioner's ongoing subjective complaints, but did not believe petitioner was magnifying his symptoms. He continued to recommend conservative treatment, that included cardiovascular fitness, nutritional modification, weight loss, and medication, for which he would follow-up with Dr. Fletcher. Dr. Butler opined there is a casual connection between petitioner's accidents on both 2/11/19 and 9/26/19 and his current condition of ill-being as it relates to his lumbar spine, and his need for treatment.

On cross examination Dr. Butler was of the opinion that posterior lateral fissures can also be the result of degeneration, and need not only be the result of an acute injury. Dr. Butler opined that since petitioner's L4-L5 disc on the MRI was normal, it was unlikely that his annular fissures were part of a degenerative process, since he did not have a degenerative issue with his disk. Dr. Butler opined that petitioner would not improve without the need for physical therapy or other conservative treatment.

On 6/23/21 petitioner underwent a Section 12 examination performed by Dr, Timothy Van Fleet, an orthopedic surgeon, at the request of the respondent. Dr. Van Fleet took a history, performed a record review, and examined petitioner. On examination he noted that petitioner had an antalgic gait; demonstrated diminished flexion and extension; had pain with simulated truncal rotation; and, had superficial tenderness to palpation and pain with axial compression of the head and shoulders. He assessed mild lumbar degenerative disc disease at L4-L5, and chronic back pain. He opined that petitioner reached maximum medical improvement for the injury on 2/11/19 on 8/20/19, and for the 9/26/19 injury on 1/6/20. Dr. Van Fleet was of the opinion that petitioner could work full duty without restrictions.

On 7/8/21 petitioner returned to Dr. Fletcher. He reported that his pain was not improving. He rated it at 7/10. He reported no real change since his last visit. His diagnoses remained left sided sciatica; radiculopathy of the lumbar region; adjustment disorder with depressed mood; chronic annular tear of the lumbar region; and lumbar spine degenerative disease. He continued petitioner off work.

On 8/10/21 petitioner last followed-up with Dr. Fletcher. Dr. Fletcher noted that he was providing petitioner with chronic pain management. He refilled petitioner's Hydrocodone and Lyrica and continued him off work. His diagnoses and plan of care remained the same.

On 9/1/21 the evidence deposition of Dr. Van Fleet was taken on behalf of the respondent. He noted that he was an orthopedic surgeon that specializes in spinal surgery. He was of the opinion that the maximum medical improvement date of 8/20/19 for the injury on 2/11/19 coincided with the evaluation by Dr. Cantrell, and he thought that was an appropriate date. Dr. Van Fleet was initially of the opinion that petitioner's annular tear may or may not be the source of his pain. Then he noted that he did not believe petitioner had discogenic pain, and therefore he did not believe that the source of petitioner's pain was his annular tear.

On cross examination, Dr. Van Fleet testified that he had no evidence to dispute that petitioner was symptom free regarding his low back prior to 2/11/19. He also agreed that petitioner had preexisting degenerative disc disease prior to 2/11/19 that was asymptomatic. Dr. Van Fleet then agreed that following the injury on 2/11/19 petitioner had low back pain complaints that have not gone away. Although he agreed that the EMG of 12/16/19 revealed left S1 radiculopathy and bilateral L5 radiculopathy, and the EMG test is an objective test that produces objective findings, he did not think these objective findings could be the source of petitioner's pain at that time because it did not seem to him to be consistent with the evidence he saw in terms of imaging. Then he noted that he believed there was a certain degree of subjectivity in the EMG, based on the interpretation of the examiner, but admitted he had no reason to dispute the interpretations made by Dr. Trudeau as they relate to the 12/16/19 EMG. Dr. Van Fleet admitted that he offered no opinions on the causal connection between petitioner's current condition of ill-being and his injuries at work on 2/11/19 and 9/26/19, and did not offer any opinion as to the reasonableness and necessity of petitioner's treatment to the date he examined him. He also admitted that he did not review a job description for petitioner regarding his actual duties for respondent as a truck driver. Dr. Van Fleet also agreed that none of petitioner's treating physicians had placed him at maximum medical improvement.

Petitioner testified that from the date of the first accident he has lost 85-100 pounds, and now weighs around 180 pounds. He also testified that he continues to do his home exercise program, and that helps. Despite losing all this weight petitioner testified that he still has pain in his low back and legs.

Petitioner testified that after the injury on 2/11/19 his symptoms improved, but never fully went away before the injury on 9/26/19. Petitioner testified that prior to 2/11/19 he was working full duty without and had no treatment for his back leading up to the injury on 2/11/19. He also was taking no medications for his low

back leading up to the injury on 2/11/19. He denied any pain in his back or legs leading up to the injury on 2/11/19.

Petitioner testified that he is still treating with Dr. Fletcher and his next followup is on 9/28/21.

Petitioner's current complaints were low back pain radiating to his foot on the left and to his knee on the right. He complained of pain every day for a couple of hours. He reported that he cannot climb ladders, or climb on trucks now. And at home he can't pick up or move things. He has difficulty holding his grandchildren that are 2 and 4 years old. He testified at trial that he did not feel that he could return to work as a truck driver at that time. He denied that he had problems like he currently has, prior to the injury on 2/11/19.

Petitioner testified that he does stretches and exercises with a band, and walks ¼ mile a day. Petitioner testified that he has not worked since the injury on 9/26/19.

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

It is unrebutted that petitioner sustained accidental injuries that arose out of and in the course of his employment by respondent on 2/11/19 and 9/26/19. The arbitrator also finds, based on petitioner's testimony, and the lack of any credible evidence to dispute petitioner's testimony, that petitioner had no prior back or radiculopathy problems prior to 2/11/19, or that petitioner treated for his back prior to 2/11/19.

Based on the credible medical records, the arbitrator finds the complaints petitioner had following the injury on 2/11/19 had not completely resolved prior to the injury on 9/26/19; worsened thereafter; and, have continued through his last visit with Dr. Fletcher on 8/10/21.

As a part of his treatment petitioner underwent various diagnostic tests. These tests included an MRI on 3/25/19 that showed mild broad-based disc bulging; arthropathy of the facet joints at L4-L5 and L5-S1 causing minimal deformity of the thecal sac; and, minimal bilateral neural foramina narrowing. Another MRI was performed on 10/12/19 that showed minimal degenerative disc disease at L4-L5, and mild degenerative facet arthropathy in the lower spine. On 12/16/19 petitioner underwent an EMG/NCS that showed left S1 radiculopathy, mild to moderate, and bilateral L5 radiculopathies, mild on the left side, relatively mild on the right side, left greater than right. On 7/14/20 petitioner underwent a repeat EMG/NCS that showed left L5 radiculopathy, mild to moderate, likely persistent/residual lesion in comparison to the study on 12/16/19. On 9/29/20 petitioner underwent a CT of the lumbar spine that showed a Modified Dallas grade 4 annular tear of the L4-L5 disc. Petitioner also underwent bilateral L4-L5 transforaminal epidural steroid injections on 5/19/19, and a left L4-L5 interlaminar lumbar epidural steroid injection on 6/17/19. Following these injections, petitioner reported 60% improvement overall.

With respect to the issue of casual connection, opinions were offered by Dr. Cantrell, Dr. Fletcher and Dr. Butler.

Dr. Cantrell examined petitioner on 8/20/19, and 1/6/20. On 1/6/20 he was of the opinion that petitioner's diagnosis in reference to his work accident on 9/26/19 could be considered an exacerbation of his ongoing back complaints. Although petitioner had no history on any back problems or radiculopathy prior to the 2/11/19 injury, Dr. Cantrell was of the opinion that petitioner's development of his left S1 radicular symptomatology began prior to the injury on 9/26/19, and not in a temporal relationship to the injury on 2/11/19, despite the fact that petitioner had no symptomatology or treatment prior to 2/11/19. Dr. Cantrell was also of the opinion that findings at the disc and facet levels were degenerative in nature, and that his current back condition was not causally related to the injury on 9/26/19. Although he claimed all treatment petitioner received after 2/11/19 and after 9/26/19, and before his examinations was reasonable and necessary, he refused to opine that petitioner's condition was related to these injuries. He opined that petitioner's bulging discs were the result of natural degeneration, but that he might have had a temporary exacerbation of his ongoing complaints, given that his pain level before the injury on 9/26/19, and when he saw him on 1/6/20 were the same. The arbitrator questions Dr. Cantrell's opinion that petitioner only sustained a "temporary" aggravation and was at maximum medical improvement, given that petitioner's ongoing complaints are still present since the injury on 2/11/19, and he was asymptomatic prior to 2/11/19. Although Dr. Cantrell noted nonphysiologic pain patterns and complaints, he agreed that there were no other references to these pain patterns in any of the other records he reviewed.

Dr. Fletcher opined that petitioner's current condition of ill-being is causally related to his work activities. He opined that the degenerative discogenic changes at L4-L5 explained why petitioner was having radicular pain symptomatology. He also opined that although petitioner had preexisting degenerative changes in his lower spine, they were asymptomatic prior to the injuries on 2/11/19 and 9/26/19, and only become symptomatic after the injury on 2/11/19, and have remained symptomatic. Based on these facts, Dr. Fletcher opined that these preexisting degenerative changes were aggravated by his work injuries, and are causally related to his work injury on 2/11/19. Dr. Fletcher was of the opinion that petitioner showed no symptom magnification.

Dr. Butler was of the opinion that petitioner's neurologic examination was normal, and he saw no disk herniation or any high signal lesion in the annulus at L5, and essentially normal facets on the MRI dated 10/12/19. He was also of the opinion that the CT dated 9/29/20 did demonstrate some leakage of contrast at the L4-L5 level. He opined that since petitioner's L4-L5 disc on the MRI was normal, it was unlikely that his

annular fissures were part of a degenerative process, since he did not have a degenerative issue with the disc. Based on these diagnostic tests, examination, and record review, Dr. Butler opined that petitioner had a chronic annular tear secondary to his work-related injury with a combination low back and lower extremity radicular symptoms. Although he saw no objective basis for petitioner's ongoing subjective complaints, he did not believe petitioner was magnifying his symptoms. He opined a causal connection between petitioner's accidents on both 2/11/19 and 9/26/19.

Dr. Van Fleet was initially of the opinion that petitioner's annular tear may or may not be the source of his pain, then testified that he did not believe petitioner had discogenic pain, and therefore he did not believe the source of petitioner's pain was his annular tear. The arbitrator finds this waffling not very persuasive. Dr. Van Fleet testified that he reviewed no evidence to dispute that petitioner was symptom free regarding his low back prior to 2/11/19. He also agreed that petitioner had preexisting degenerative disc disease prior to 2/11/19 that was asymptomatic, and, that following the injury on 2/11/19 petitioner has had low back complaints that have not gone away. Dr. Van Fleet offered no opinions on the casual connection between petitioner's current condition of ill-being and the injury on 2/11/19 and 9/26/19.

Based on the above, as well as the credible evidence the arbitrator finds that all treaters and examiners concur that there is no credible evidence to support a finding that petitioner's preexisting degenerative disc disease in his lower back was symptomatic prior to 2/11/19. They also all concur that since 2/11/19 petitioner's low back pain and radiculopathy into the left leg has been present at various levels, depending on the results he received from the different types of treatment he had received. Based on these findings, the arbitrator finds the opinions of Dr. Fletcher and Dr. Butler more persuasive based on the credible medical evidence, than those of Dr. Cantrell and Dr. Van Fleet, which the arbitrator finds are unsupported by the credible medical evidence. For these reasons, the arbitrator finds the petitioner's current condition of ill-being as it relates to his low back and radiculopathy are casually related to the injuries petitioner sustained on 2/11/19 and 9/26/19.

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 claims the medical services that were provided to petitioner were reasonable and necessary. Respondent disputes this, claiming no liability based on its belief that there is no casual connection between the petitioner's current condition of ill-being as it relates to his low back and radiculopathy and the injuries on 2/11/19 and 9/26/19. Having found the petitioner's current condition of ill-being as it relates to his low back and radiculopathy are casually related to the injuries petitioner sustained on 2/11/19 and 9/26/19, the arbitrator

finds the medical services petitioner has received since 2/11/19 for his low back and radiculopathy were reasonable and necessary to cure or relieve petitioner from the effects of his injuries on 2/11/19 and 9/26/19.

Respondent shall pay reasonable and necessary medical services from 2/11/19 through 9/13/21, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $7,249.36 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?

Dr. Butler recommended continued conservative options including physical therapy, cardiovascular fitness, nutritional modification, medication, core strengthening, weight loss, and cardio fitness for which he would follow-up with Dr. Fletcher. Dr. Butler was of the opinion that with this treatment petitioner's prognosis was outstanding over time. Dr. Fletcher also continues providing petitioner with chronic pain management. Although the petitioner does perform home exercises, walks ¼ a day, and has lost nearly 100 pounds since his injuries, the arbitrator finds it significant that petitioner's complaints still continue. The arbitrator finds a home exercise program is not a replacement for the structure conservative treatment Dr. Butler recommended.

Having found petitioner's current condition of ill-being as it relates to his low back and radiculopathy are causally related to the injuries he sustained on 2/11/19 and 9/26/19, the arbitrator finds the petitioner is entitled to the prospective medical care recommended by Dr. Butler, and the ongoing chronic pain management offered by Dr. Fletcher.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The petitioner claims he was temporarily totally disabled from 1/5/20 through 9/13/21, 88-1/7 weeks. Respondent claims petitioner has reached maximum medical improvement based on the opinions of Dr. Cantrell and Dr. Van Fleet. Having found petitioner's current condition of ill-being as it relates to his low back and radiculopathy are causally related to the injuries he sustained on 2/11/19 and 9/26/19, and the opinions of Dr. Butler and Dr. Fletcher more persuasive than those of Dr. Cantrell and Dr. Van Fleet, the arbitrator finds the petitioner has been authorized off work since 1/5/20 through the date of trial on 9/13/21, with his most recent off work authorization being 8/10/21.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 1/5/20 through 9/13/21, a period of 88-1/7 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029327
Case Name	Woodrow L Morrison v. Beelman Trucking Company
Consolidated Cases	19WC025276;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0328
Number of Pages of Decision	20
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Stephen Klyczek

DATE FILED: 8/25/2022

/s/ Deborah Baker, Commissioner

Signature

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 Temporary Disability, Medical	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WOODROW MORRISON,

Petitioner,

vs. NO: 19 WC 29327

BEELMAN TRUCKING CO.,

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 whether Petitioner's current condition of ill-being is causally related to the undisputed work accidents, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, modifies the Decision as stated below but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

This case was consolidated for hearing with case number 19 WC 25276. Both cases involve undisputed accidental injuries to Petitioner's back: 19 WC 25276 involves a February 11, 2019 accident and 19 WC 29327 involves a September 26, 2019 accident. Finding Petitioner suffered an initial low back injury and had not reached maximum medical improvement before he suffered a second low back injury, after which his symptoms worsened and still persisted as of arbitration, the Arbitrator concluded Petitioner's condition of ill-being is causally related to both work accidents and awarded benefits. Our analysis of the evidence yields the same result, however, the Commission observes identical benefits were erroneously awarded in both decisions. The Commission clarifies that, consistent with our determination Petitioner had not reached maximum medical improvement prior to the September 26, 2019 accident, all benefits are awarded under case 19 WC 25276. Accordingly, the benefits awarded in the instant case (case 19 WC 29327) are vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the benefits awarded under case 19 WC 29327 are hereby vacated, and all benefits are instead awarded in companion case 19 WC 25276.

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.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As all benefits are awarded under consolidated case 19 WC 25276, no bond is set 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.

August 25, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 7/27/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029327
Case Name	MORRISON, WOODROW v. BEELMAN TRUCKING CO
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Stephen Klyczek

DATE FILED: 9/29/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/Maureen Pulia, Arbitrator

Signature

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)

WOODROW MORRISON, Case # **19** WC **29327**
Employee/Petitioner

v.

BEELMAN TRUCKING CO.,
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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **9/13/21**. 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, **2/11/19 and 9/26/19**, 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 $**61,665.49**; the average weekly wage was $**1,258.47**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**000.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**7,249.36** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services from 2/11/19 through 9/13/21, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $7,249.36 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 reasonable and necessary medical services associated with the prospective medical care recommended by Dr. Butler and the continued chronic pain management offered by Dr. Fletcher, detailed in the Section K of this decision regarding prospective medical treatment, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $838.98/week for 88-1/7 weeks, commencing 1/5/20 through 9/13/21, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 1/5/20 through 9/13/21, and shall pay the remainder of the award, if any, in weekly payments.

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

SEPTEMBER 29, 2021

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 45 year old truck driver, sustained accidental injuries to his back that arose out of and in the course of his employment on 2/11/19 (19WC25276) and 9/26/19 (19WC29327). These cases are consolidated, and the parties have requested one consolidated decision.

Petitioner worked for respondent for about 3 ½ years on or about the first date of injury on 2/11/19. Petitioner transported commodities for respondent, but did not load or unload the truck. He was however, responsibly for sweeping out the trailer after he delivered each commodity and it was unloaded.

On 2/11/19 at approximately 4:30 am petitioner was transporting roofing granuals. As he attempted to roll back the tarp it got stuck, and petitioner climbed up onto the rail to release the tarp. As he was climbing down, he stepped down off the truck onto the ground. There was frozen ice that was on the ground, and he slipped and fell onto his back. Petitioner could not see what he was stepping down onto to because it was dark outside. Petitioner immediately felt low back and left leg pain. He reported the injury to Mike Butler between 8:00-9:00 am. Petitioner was able to complete his dispatch in Chicago.

On 2/12/19 petitioner presented to the emergency room at St. John's Hospital complaining of back and hip pain radiating to the lower spine. He rated the pain at a 10/10, worse with movement; reported some weakness; and, reported bilateral hip pain. He provided a consistent history of the accident. Petitioner was examined and x-rays were taken of the lumbar spine and pelvis that showed no evidence of fracture or dislocation. He was diagnosed with back pain. He was given a script for Toradol.

On 2/13/19 petitioner presented to Ashlie Long APRN/CNP in Dr. Steven Lewis' office at the Springfield Clinic. Petitioner reported that he fell on his back at work on 2/11/19 and was seen at the emergency room on 2/12/19. He reported significant swelling on the lumbar spine, and some pain that worsened when getting in and out of work truck. Following an examination and review of the x-rays, petitioner was assessed with lumbar back pain. He was authorized off work through 2/17/19. He was prescribed medications.

On 2/19/19 petitioner presented to Dr. Lewis complaining of mid to lower back pain. He reported that he had minimal relief with medication. He complained of excruciating pain. Following an examination, petitioner was assessed with a lumbar strain. He was prescribed Naproxen and a course of physical therapy. Petitioner began a course of physical therapy at Springfield Clinic on 2/26/19.

On 3/11/19 petitioner returned to Dr. Lewis' office. He reported that he completed the recommended physical therapy and felt that his symptoms were worsening. He complained of pain radiating to his legs

depending on his movement, as well as his legs intermittently giving out on him. An MRI was ordered and petitioner was continued in physical therapy.

On 3/25/19 petitioner underwent an MRI of the lumbar spine. The impression was mild broad-based disc bulging, arthropathy of the facet joints at L4-L5 and L5-S1 causing minimal deformity of the thecal sac. Also noted was minimal bilateral neural foramina narrowing. There was no encroachment of the exiting roots.

On 4/23/19 petitioner presented to Dr. Rohan Jain for evaluation of his back pain. He reviewed petitioner's lumbar imaging that showed evidence of mild disc degeneration at L4-L5 and L5-S1. Dr. Jain was of the opinion that clinically petitioner had left greater than right L5 radiculopathy and axial pain suggestive of degenerative disc disease. He recommended bilateral L4-L5 transforaminal epidural steroid injections.

On 5/1/19 petitioner underwent bilateral L4-L5 transforaminal epidural steroid injections performed by Dr. Jain. His post-operative diagnosis was radiculopathy of the lumbar region. On 6/3/19 Dr. Lewis refilled petitioner's Tramadol prescription. On 6/5/19 petitioner underwent a left L4-L5 interlaminar lumbar epidural steroid injection performed by Dr. Jain. Petitioner reported 60% improvement after both sets of injections. On 6/17/19 petitioner began another course of physical therapy.

On 6/18/19 petitioner returned to Dr. Jain. Dr. Jain noted that petitioner's L5 radiculopathy, left greater than right, was improved by the injections. He further noted that petitioner had L5-S1 radiculopathy, and axial pain suggestive of lumbar facet syndrome. He recommended trial lumbar epidural steroid injections targeting L5-S1 distribution, and facet injections for back pain.

On 8/20/19 petitioner underwent a Section 12 examination performed by Dr. Russell Cantrell. Petitioner provided a consistent history of the injury on 2/11/19. He complained of left-sided lumbar back pain aggravated by standing greater than sitting, but also aggravated with prolonged sitting. He described his pain as radiating into his left anterolateral thigh and into his left proximal lateral lower leg, worsened with various positions, including sitting and standing, and twisting and bending. He rated his pain at an 8/10.

Following a social history, review of systems, physical examination and review of medical records through 7/24/19, Dr. Cantrell diagnosed subjective complaints of lumbar back pain, by definition chronic in nature with associated lower extremity symptoms, primarily left-sided, for which he had no lateralizing neurologic deficits. Dr. Cantrell was of the opinion that petitioner's prognosis for recovery was guarded given the presence of multiple non-physiologic pain behaviors and the persistence of his pain complaints. Dr. Cantrell noted that petitioner was prescribed narcotics in September of 2018, and was involved in a motor vehicle accident on June of 2018. He also noted that petitioner had a cervical sprain, concussion syndrome, and lumbar sprain as part of

his assessment on 2/13/19. Dr. Cantrell noted that while petitioner may have sustained a lumbar strain or sprain as a result of the 2/11/19 injury, his subjective complaints and clinical findings did not correlate with his mechanism of injury. He was of the opinion that petitioner could return to full duty work without restrictions. He believed petitioner's treatment to date was reasonable and necessary, but did not believe that any continued procedural pain management or any other treatment, related to the injury, was necessary. He did not believe petitioner sustained any loss of function as a result of the injury on 2/11/19. He was also of the opinion that petitioner had reached maximum medical improvement.

On 9/26/19 while working light duty at Hope Thrift Store, petitioner sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent. Respondent had petitioner working light duty at Hope Thrift Store since he was released to light duty work that respondent could not accommodate. Petitioner fell on his back on a concrete floor after getting up from a table he was working at, turned around, and stepped onto some plastic coat hangers that were laying on a hard floor. He testified that he slipped and fell onto his low back and buttocks. He reported significant pain at the time of injury. Petitioner reported the injury to respondent as well as to the store manager for Hope Thrift Store.

On 10/1/19 petitioner returned to Dr. Lewis. He provided a consistent history of the injury on 9/26/19 and reported that since then he had increasing pain in his low back that radiates to his bilateral lower extremities. He reported radiculopathy in the left leg to the foot, and radiculopathy in the right leg to just below the knee. Following an examination, Dr. Lewis assessed a lumbar strain/sprain, tenderness over spinous processes. He ordered x-rays of the lumbar spine, and prescribed Meloxicam, and physical therapy. Petitioner was authorized off work. X-rays were taken that day that showed no acute osseous abnormality.

On 10/12/19 petitioner underwent an MRI of the lumbar spine. The impression was minimal degenerative disc disease at L4-L5, and mild degenerative facet arthropathy in the lower spine. No canal or foraminal stenosis was noted. On 10/17/19 he restarted physical therapy.

Petitioner continued in physical therapy, and on 10/31/19 returned to Dr. Jain. Following an examination, Dr. Jain assessed left greater than right L5 radiculopathy, which improved after injection, and L5-S1 radiculopathy. Dr. Jain ordered an EMG. He also noted that petitioner had axial pain suggestive of lumbar facet syndrome. He recommended trial lumbar epidural steroid injections targeting the L5-S1 distribution, and trial facet injections.

On 11/15/19 petitioner followed-up with Dr. Lewis for multiple problems. Petitioner complained of left lumbar pain of 8/10. He also noted that his neck pain, due to a cervical sprain, was back to baseline. Dr. Lewis

examined petitioner and was of the opinion that petitioner's lumbar radicular symptoms, along with his axial low back pain, was due to lumbar facet arthritis. He noted that petitioner was waiting for authorization for the injections recommended by Dr. Jain. He continued petitioner in physical therapy and adjusted his medications.

On 12/16/19, petitioner underwent an EMG/NCS performed by Dr. Trudeau. The impression was left S1 radiculopathy, mild to moderate; bilateral L5 radiculopathies, mild on the left side, relatively mild on the right side, left greater than right; and, no current evidence of L3 or L4 radiculopathy on either side, no entrapment neuropathy, no lumbar plexopathy, no mononeuritis multiplex, no lumbosacral radiculoplexus neuropathy, and no large fiber sensory or sensorimotor neuropathy or polyneuropathy.

On 1/6/20 petitioner underwent a repeat Section 12 examination performed by Dr. Cantrell, at the request of the respondent. Petitioner gave a history of his accident on 9/26/19, followed by increased ongoing back complaints. Dr. Cantrell performed the same type of examination and review of records. He was of the opinion that petitioner's diagnosis in reference to his work accident on 9/26/19 could be considered an exacerbation of his ongoing back complaints. He was of the opinion that petitioner's development of his left S1 radicular symptomatology began prior to the injury on 9/26/19, and not in a temporal relationship to his injury on 2/11/19. He reviewed both MRIs and saw no evidence of an acute discogenic or bony pathology that could be related to the work accidents. He was of the opinion that the findings at the disc and facet levels were degenerative in nature. He opined that petitioner's current back condition was not causally related to the injury on 9/26/19. He was of the opinion that the injury on 9/26/19 did not aggravate or exacerbate his condition related to the 2/11/19 injury. With respect to the injury on 9/26/19, Dr. Cantrell was of the opinion that petitioner had reached maximum medical improvement and did not require any additional treatment. He was of the opinion that the minimal physical therapy petitioner received after the 9/26/19 injury would not be unreasonable or unnecessary in the context of a temporary exacerbation of back pain complaints. Dr. Cantrell was of the opinion that petitioner could work full duty without restrictions as a result of the injury on 9/26/19.

On 1/7/20 petitioner was discharged from physical therapy. It was noted that petitioner improved only slightly with therapy regarding his pain complaints. Petitioner only met 2 of his long term goals. It was noted that petitioner was only making slow progress toward his long term goals. He was instructed to continue his home exercise program.

On 1/8/20 petitioner presented to Dr. David Fletcher at SafeWorks for evaluation and treatment of back pain that radiated to his left leg. This was a doctor of petitioner's own choosing. He gave a history of both injuries on 2/11/19 and 9/26/19. Petitioner complained of pain located in the back of his left leg that radiates to the left foot, that was severe. He rated his pain at a 6/10. Following an examination, Dr. Fletcher diagnosed left

side sciatica, and radiculopathy of the lumbar region. Dr. Fletcher was of the opinion that petitioner's problems were related to his work activities. He ordered a myelogram CT. He also authorized petitioner off work.

On 6/5/20 petitioner underwent a CT lumbar myelogram. The impression was a negative CT lumbar myelogram.

On 6/26/20 petitioner returned to Dr. Fletcher. He reported that his condition was unchanged. Following an examination, Dr. Fletcher noted that the myelogram CT did not show any significant pathology. He ordered a repeat EMG/NCS, and continued petitioner off work through 7/23/20.

On 7/14/20 petitioner underwent a repeat EMG/NCS. The impression was left L5 radiculopathy, mild to moderate, likely persistent/residual lesion in comparison to the previous study of 12/16/19. There was no current evidence of other radiculopathy, entrapment neuropathy, lumbar plexopathy, mononeuritis multiplex, or large fiber sensory or sensorimotor neuropathy or polyneuropathy.

On 7/28/20 petitioner followed-up with Dr. Fletcher. Dr. Fletcher noted that he reviewed the electrical studies and they showed persistent L5 radiculopathy. He examined petitioner and discussed options such as discogram/CT, spinal cord stimulator, left AFO brace, and neurology referral to include metabolic work-up. He also noted that he needed to monitor petitioner's depression. He continued petitioner off work through 8/11/20.

On 9/18/20 the evidence deposition of Dr. David Fletcher, was taken on behalf of petitioner. Dr. Fletcher is board certified in occupational and environmental medicine, and preventative medicine and public health. He noted that petitioner denied any ongoing lumbar spine issues prior to the injury on 2/11/19. Dr. Fletcher was of the opinion that the MRI of 3/25/19 showed some degenerative discogenic changes at L4-L5 that showed some improvement on the MRI performed 10/12/19. He noted that he saw no focal disc herniation on the latter MRI. Nonetheless, he was still of the opinion that the degenerative discogenic changes at L4-L5 explained why he was having radicular pain symptomatology. Dr. Fletcher was of the opinion that petitioner had some preexisting degenerative changes that were aggravated by his work injuries, when he first saw him on 1/8/20, and that his condition at that time was causally related to the injury on 2/11/19. Dr. Fletcher noted atrophy of petitioner's right calf between the visit on 1/8/20 and the visit on 6/26/20. Dr. Fletcher was of the opinion that this atrophy validated his diagnosis of lumbar radiculopathy. Dr. Fletcher was of the opinion that when he saw petitioner on 6/26/20 his complaints were consistent with more of an L5 nerve root problem, and the characteristic motor deficiency that goes along with that is weakness with heel walking and extension of the great toe, and that was what was demonstrated on the video he took, that was marked as PX4 of his deposition. Dr. Fletcher was of the opinion that the 2nd EMG/NCS petitioner underwent in 2020 showed improvement over the one performed in

December of 2019, in that it failed to show any S1 radicular complaints at L5 which was consistent with what he was looking for, which was an improvement. Dr. Fletcher was of the opinion that petitioner did not magnify his symptoms. Dr. Fletcher opined that petitioner's degenerative disc disease in some form or fashion could have been, or was aggravated by the 2/11/19 accident. He further noted that since that time petitioner's pain has not gone away.

On cross examination, Dr. Fletcher was of the opinion that diabetes cannot cause lumbar radiculopathy, but can cause polyneuropathy. He noted that none of the EMG/NCS tests showed any diabetic neuropathy. Dr. Fletcher opined that it is not possible that petitioner's preexisting degenerative disc disease changed into radiculopathy regardless of his work accident.

On 9/29/20 petitioner underwent an CT of the lumbar spine. The impression was Modified Dallas grade 4 annular tear of the L4-L5 disc.

On 10/21/20 the evidence deposition of Dr. Russell Cantrell, who specializes in physical medicine and rehabilitation, was taken on behalf of the respondent. Dr. Cantrell opined that petitioner sustained a strain/sprain as a result of the injury on 2/11/19, and all treatment he received through 8/20/19 was reasonable and necessary as it relates to the injury on 2/11/19. He opined that petitioner's bulging discs were the result of natural degeneration, and that petitioner reached maximum medical improvement as of 8/20/19. Dr. Cantrell opined that when he saw petitioner on 1/6/20 he may have had a temporary exacerbation of his ongoing back complaints, given that his level of pain before the injury on 9/26/19, and when he saw him on 1/6/20 were the same. His diagnosis was mechanical lower back pain in the setting of nonphysiologic pain behaviors. Dr. Cantrell opined that on 1/6/20 petitioner had reached maximum medical improvement as it relates to the injury he had on 9/26/19.

On cross examination Dr. Cantrell was of the opinion that the dermatome pattern of complaints in the left leg, particularly in the anterior lateral thigh, would likely be the L3 or L4 nerve root, rather than the L5-S1. Dr. Cantrell was of the opinion that the objective findings on the MRIs were degenerative. Dr. Cantrell testified that he had reviewed no medical records prior to the injury on 2/11/19, so he does not know what petitioner was taking narcotic medication for in September of 2018. Dr. Cantrell testified that it was his understanding that petitioner was working full duty prior to the injury on 2/11/19. Dr. Cantrell was of the opinion that an accident or trauma can potentially aggravate a preexisting disc bulge. Dr. Cantrell was also of the opinion that the radiofrequency ablation procedures recommended by Dr. Jain would be reasonable and necessary, but not casually related to the injury on 2/11/19. Dr. Cantrell noted that when he saw petitioner on 1/6/20 he was having localized back pain, but not necessarily any radicular symptoms. He also noted that on 7/18/19 Dr. Jain

made reference that petitioner's symptoms may be coming from S1 instead of L5, and that is why he was of the opinion that if S1 radicular symptoms were present prior to 9/26/19, this is when they were present. Although he was of an opinion that an injury can reaggravate or injure the S1 level, his neurological examination on 1/6/20 showed nothing consistent with S1 radiculopathy. Dr. Cantrell noted that he did not make a diagnosis of S1 radiculopathy when he examined petitioner on 8/20/20, but the December 2019 EMG did show objective findings relative to the S1 radiculopathy. Dr. Cantrell noted that in all the records he reviewed leading up to his deposition, there were no references in any of the records to abnormal pain behaviors or nonphysiologic pain patterns or complaints.

On 11/4/20 petitioner returned to Dr. Fletcher. He rated his pain at an 8/10. He reported no change since his last visit. He reported that he takes Lyrica and Tramadol. Dr. Fletcher noted that the discogram/CT resulted in concordant pain response in the L4 and L5 regions with spreading of the dye. He referred the petitioner to Dr. Butler. He gave petitioner scripts for Lyrica and Hydrocodone. He also authorized petitioner off work.

On 12/3/20 petitioner presented to Dr. Jesse Butler at Gibson Health of Mahomet. Petitioner complained of low back pain since the accident on 2/11/19, that occurs constantly with intermittent worsening. He reported that his pain was worse and severe. He described the pain as deep, electrical, sharp, shooting, stabbing and throbbing. He noted that his symptoms were aggravated by bending, daily activities, extension, flexion, exercise, lifting, lying/resting, rolling over in bed, running, sitting, twisting, walking, and standing. Dr. Butler examined petitioner and assessed a chronic annular tear of the lumbar disc secondary to a work-related injury with combination of mechanical back and lower extremity radicular symptoms. He instructed petitioner on increasing physical activity. He also noted that no surgery was indicated. Dr. Butler was of the opinion that a spinal fusion has a less than 50% chance of improving petitioner's overall condition and would leave him permanently with restrictions. He was of the opinion that the results of spinal fusion on radiographically normal discogenic positive patients is unacceptable. He recommended continued conservative options including core strengthening and cardio fitness, He believed petitioner's prognosis was outstanding overtime. He thought petitioner should reach maximum medical improvement with ongoing conservative treatment.

On 12/30/20 petitioner returned to Dr. Fletcher. He rated his pain at a 6/10. He noted that the pain shoots down his left leg to the knee. Petitioner was able to perform toe and heel walking. His ambulation showed some limping and weakness on the left side. He also had limited range of motion with twisting and bending. Dr. Fletcher gave petitioner a refill for Hydrocodone and Lyrica, a home exercise program, and a TENS unit. He continued petitioner off work.

On 5/14/21 the evidence deposition of Dr. Jesse Butler, an orthopedic surgeon, specializing in spine surgery, was taken on behalf of petitioner. He noted that petitioner's neurologic examination and x-rays of his lumbar spine that he performed during his examination of petitioner were normal. He noted no disk herniation or any high signal lesion in the annulus at L5, and petitioner's facets were also essentially normal, on the MRI dated 10/12/19. He was further of the opinion that the CT from 9/29/20 demonstrated some leakage of contrast that had been placed during the discogram, at the L4-L5 level. He also noted some fissures on both the right and left side of the disk. He noted no stenosis, and all other levels were normal. He opined that petitioner had a chronic annular tear secondary to his work-related injury with a combination low back and lower extremity radicular symptoms. Based on the diagnostic studies, and his physical examination of petitioner, he saw no objective basis for petitioner's ongoing subjective complaints, but did not believe petitioner was magnifying his symptoms. He continued to recommend conservative treatment, that included cardiovascular fitness, nutritional modification, weight loss, and medication, for which he would follow-up with Dr. Fletcher. Dr. Butler opined there is a casual connection between petitioner's accidents on both 2/11/19 and 9/26/19 and his current condition of ill-being as it relates to his lumbar spine, and his need for treatment.

On cross examination Dr. Butler was of the opinion that posterior lateral fissures can also be the result of degeneration, and need not only be the result of an acute injury. Dr. Butler opined that since petitioner's L4-L5 disc on the MRI was normal, it was unlikely that his annular fissures were part of a degenerative process, since he did not have a degenerative issue with his disk. Dr. Butler opined that petitioner would not improve without the need for physical therapy or other conservative treatment.

On 6/23/21 petitioner underwent a Section 12 examination performed by Dr, Timothy Van Fleet, an orthopedic surgeon, at the request of the respondent. Dr. Van Fleet took a history, performed a record review, and examined petitioner. On examination he noted that petitioner had an antalgic gait; demonstrated diminished flexion and extension; had pain with simulated truncal rotation; and, had superficial tenderness to palpation and pain with axial compression of the head and shoulders. He assessed mild lumbar degenerative disc disease at L4-L5, and chronic back pain. He opined that petitioner reached maximum medical improvement for the injury on 2/11/19 on 8/20/19, and for the 9/26/19 injury on 1/6/20. Dr. Van Fleet was of the opinion that petitioner could work full duty without restrictions.

On 7/8/21 petitioner returned to Dr. Fletcher. He reported that his pain was not improving. He rated it at 7/10. He reported no real change since his last visit. His diagnoses remained left sided sciatica; radiculopathy of the lumbar region; adjustment disorder with depressed mood; chronic annular tear of the lumbar region; and lumbar spine degenerative disease. He continued petitioner off work.

On 8/10/21 petitioner last followed-up with Dr. Fletcher. Dr. Fletcher noted that he was providing petitioner with chronic pain management. He refilled petitioner's Hydrocodone and Lyrica and continued him off work. His diagnoses and plan of care remained the same.

On 9/1/21 the evidence deposition of Dr. Van Fleet was taken on behalf of the respondent. He noted that he was an orthopedic surgeon that specializes in spinal surgery. He was of the opinion that the maximum medical improvement date of 8/20/19 for the injury on 2/11/19 coincided with the evaluation by Dr. Cantrell, and he thought that was an appropriate date. Dr. Van Fleet was initially of the opinion that petitioner's annular tear may or may not be the source of his pain. Then he noted that he did not believe petitioner had discogenic pain, and therefore he did not believe that the source of petitioner's pain was his annular tear.

On cross examination, Dr. Van Fleet testified that he had no evidence to dispute that petitioner was symptom free regarding his low back prior to 2/11/19. He also agreed that petitioner had preexisting degenerative disc disease prior to 2/11/19 that was asymptomatic. Dr. Van Fleet then agreed that following the injury on 2/11/19 petitioner had low back pain complaints that have not gone away. Although he agreed that the EMG of 12/16/19 revealed left S1 radiculopathy and bilateral L5 radiculopathy, and the EMG test is an objective test that produces objective findings, he did not think these objective findings could be the source of petitioner's pain at that time because it did not seem to him to be consistent with the evidence he saw in terms of imaging. Then he noted that he believed there was a certain degree of subjectivity in the EMG, based on the interpretation of the examiner, but admitted he had no reason to dispute the interpretations made by Dr. Trudeau as they relate to the 12/16/19 EMG. Dr. Van Fleet admitted that he offered no opinions on the causal connection between petitioner's current condition of ill-being and his injuries at work on 2/11/19 and 9/26/19, and did not offer any opinion as to the reasonableness and necessity of petitioner's treatment to the date he examined him. He also admitted that he did not review a job description for petitioner regarding his actual duties for respondent as a truck driver. Dr. Van Fleet also agreed that none of petitioner's treating physicians had placed him at maximum medical improvement.

Petitioner testified that from the date of the first accident he has lost 85-100 pounds, and now weighs around 180 pounds. He also testified that he continues to do his home exercise program, and that helps. Despite losing all this weight petitioner testified that he still has pain in his low back and legs.

Petitioner testified that after the injury on 2/11/19 his symptoms improved, but never fully went away before the injury on 9/26/19. Petitioner testified that prior to 2/11/19 he was working full duty without and had no treatment for his back leading up to the injury on 2/11/19. He also was taking no medications for his low

back leading up to the injury on 2/11/19. He denied any pain in his back or legs leading up to the injury on 2/11/19.

Petitioner testified that he is still treating with Dr. Fletcher and his next followup is on 9/28/21.

Petitioner's current complaints were low back pain radiating to his foot on the left and to his knee on the right. He complained of pain every day for a couple of hours. He reported that he cannot climb ladders, or climb on trucks now. And at home he can't pick up or move things. He has difficulty holding his grandchildren that are 2 and 4 years old. He testified at trial that he did not feel that he could return to work as a truck driver at that time. He denied that he had problems like he currently has, prior to the injury on 2/11/19.

Petitioner testified that he does stretches and exercises with a band, and walks ¼ mile a day. Petitioner testified that he has not worked since the injury on 9/26/19.

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

It is unrebutted that petitioner sustained accidental injuries that arose out of and in the course of his employment by respondent on 2/11/19 and 9/26/19. The arbitrator also finds, based on petitioner's testimony, and the lack of any credible evidence to dispute petitioner's testimony, that petitioner had no prior back or radiculopathy problems prior to 2/11/19, or that petitioner treated for his back prior to 2/11/19.

Based on the credible medical records, the arbitrator finds the complaints petitioner had following the injury on 2/11/19 had not completely resolved prior to the injury on 9/26/19; worsened thereafter; and, have continued through his last visit with Dr. Fletcher on 8/10/21.

As a part of his treatment petitioner underwent various diagnostic tests. These tests included an MRI on 3/25/19 that showed mild broad-based disc bulging; arthropathy of the facet joints at L4-L5 and L5-S1 causing minimal deformity of the thecal sac; and, minimal bilateral neural foramina narrowing. Another MRI was performed on 10/12/19 that showed minimal degenerative disc disease at L4-L5, and mild degenerative facet arthropathy in the lower spine. On 12/16/19 petitioner underwent an EMG/NCS that showed left S1 radiculopathy, mild to moderate, and bilateral L5 radiculopathies, mild on the left side, relatively mild on the right side, left greater than right. On 7/14/20 petitioner underwent a repeat EMG/NCS that showed left L5 radiculopathy, mild to moderate, likely persistent/residual lesion in comparison to the study on 12/16/19. On 9/29/20 petitioner underwent a CT of the lumbar spine that showed a Modified Dallas grade 4 annular tear of the L4-L5 disc. Petitioner also underwent bilateral L4-L5 transforaminal epidural steroid injections on 5/19/19, and a left L4-L5 interlaminar lumbar epidural steroid injection on 6/17/19. Following these injections, petitioner reported 60% improvement overall.

With respect to the issue of casual connection, opinions were offered by Dr. Cantrell, Dr. Fletcher and Dr. Butler.

Dr. Cantrell examined petitioner on 8/20/19, and 1/6/20. On 1/6/20 he was of the opinion that petitioner's diagnosis in reference to his work accident on 9/26/19 could be considered an exacerbation of his ongoing back complaints. Although petitioner had no history on any back problems or radiculopathy prior to the 2/11/19 injury, Dr. Cantrell was of the opinion that petitioner's development of his left S1 radicular symptomatology began prior to the injury on 9/26/19, and not in a temporal relationship to the injury on 2/11/19, despite the fact that petitioner had no symptomatology or treatment prior to 2/11/19. Dr. Cantrell was also of the opinion that findings at the disc and facet levels were degenerative in nature, and that his current back condition was not causally related to the injury on 9/26/19. Although he claimed all treatment petitioner received after 2/11/19 and after 9/26/19, and before his examinations was reasonable and necessary, he refused to opine that petitioner's condition was related to these injuries. He opined that petitioner's bulging discs were the result of natural degeneration, but that he might have had a temporary exacerbation of his ongoing complaints, given that his pain level before the injury on 9/26/19, and when he saw him on 1/6/20 were the same. The arbitrator questions Dr. Cantrell's opinion that petitioner only sustained a "temporary" aggravation and was at maximum medical improvement, given that petitioner's ongoing complaints are still present since the injury on 2/11/19, and he was asymptomatic prior to 2/11/19. Although Dr. Cantrell noted nonphysiologic pain patterns and complaints, he agreed that there were no other references to these pain patterns in any of the other records he reviewed.

Dr. Fletcher opined that petitioner's current condition of ill-being is causally related to his work activities. He opined that the degenerative discogenic changes at L4-L5 explained why petitioner was having radicular pain symptomatology. He also opined that although petitioner had preexisting degenerative changes in his lower spine, they were asymptomatic prior to the injuries on 2/11/19 and 9/26/19, and only become symptomatic after the injury on 2/11/19, and have remained symptomatic. Based on these facts, Dr. Fletcher opined that these preexisting degenerative changes were aggravated by his work injuries, and are causally related to his work injury on 2/11/19. Dr. Fletcher was of the opinion that petitioner showed no symptom magnification.

Dr. Butler was of the opinion that petitioner's neurologic examination was normal, and he saw no disk herniation or any high signal lesion in the annulus at L5, and essentially normal facets on the MRI dated 10/12/19. He was also of the opinion that the CT dated 9/29/20 did demonstrate some leakage of contrast at the L4-L5 level. He opined that since petitioner's L4-L5 disc on the MRI was normal, it was unlikely that his

annular fissures were part of a degenerative process, since he did not have a degenerative issue with the disc. Based on these diagnostic tests, examination, and record review, Dr. Butler opined that petitioner had a chronic annular tear secondary to his work-related injury with a combination low back and lower extremity radicular symptoms. Although he saw no objective basis for petitioner's ongoing subjective complaints, he did not believe petitioner was magnifying his symptoms. He opined a causal connection between petitioner's accidents on both 2/11/19 and 9/26/19.

Dr. Van Fleet was initially of the opinion that petitioner's annular tear may or may not be the source of his pain, then testified that he did not believe petitioner had discogenic pain, and therefore he did not believe the source of petitioner's pain was his annular tear. The arbitrator finds this waffling not very persuasive. Dr. Van Fleet testified that he reviewed no evidence to dispute that petitioner was symptom free regarding his low back prior to 2/11/19. He also agreed that petitioner had preexisting degenerative disc disease prior to 2/11/19 that was asymptomatic, and, that following the injury on 2/11/19 petitioner has had low back complaints that have not gone away. Dr. Van Fleet offered no opinions on the casual connection between petitioner's current condition of ill-being and the injury on 2/11/19 and 9/26/19.

Based on the above, as well as the credible evidence the arbitrator finds that all treaters and examiners concur that there is no credible evidence to support a finding that petitioner's preexisting degenerative disc disease in his lower back was symptomatic prior to 2/11/19. They also all concur that since 2/11/19 petitioner's low back pain and radiculopathy into the left leg has been present at various levels, depending on the results he received from the different types of treatment he had received. Based on these findings, the arbitrator finds the opinions of Dr. Fletcher and Dr. Butler more persuasive based on the credible medical evidence, than those of Dr. Cantrell and Dr. Van Fleet, which the arbitrator finds are unsupported by the credible medical evidence. For these reasons, the arbitrator finds the petitioner's current condition of ill-being as it relates to his low back and radiculopathy are casually related to the injuries petitioner sustained on 2/11/19 and 9/26/19.

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 claims the medical services that were provided to petitioner were reasonable and necessary. Respondent disputes this, claiming no liability based on its belief that there is no casual connection between the petitioner's current condition of ill-being as it relates to his low back and radiculopathy and the injuries on 2/11/19 and 9/26/19. Having found the petitioner's current condition of ill-being as it relates to his low back and radiculopathy are casually related to the injuries petitioner sustained on 2/11/19 and 9/26/19, the arbitrator

finds the medical services petitioner has received since 2/11/19 for his low back and radiculopathy were reasonable and necessary to cure or relieve petitioner from the effects of his injuries on 2/11/19 and 9/26/19.

Respondent shall pay reasonable and necessary medical services from 2/11/19 through 9/13/21, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $7,249.36 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?

Dr. Butler recommended continued conservative options including physical therapy, cardiovascular fitness, nutritional modification, medication, core strengthening, weight loss, and cardio fitness for which he would follow-up with Dr. Fletcher. Dr. Butler was of the opinion that with this treatment petitioner's prognosis was outstanding over time. Dr. Fletcher also continues providing petitioner with chronic pain management. Although the petitioner does perform home exercises, walks ¼ a day, and has lost nearly 100 pounds since his injuries, the arbitrator finds it significant that petitioner's complaints still continue. The arbitrator finds a home exercise program is not a replacement for the structure conservative treatment Dr. Butler recommended.

Having found petitioner's current condition of ill-being as it relates to his low back and radiculopathy are causally related to the injuries he sustained on 2/11/19 and 9/26/19, the arbitrator finds the petitioner is entitled to the prospective medical care recommended by Dr. Butler, and the ongoing chronic pain management offered by Dr. Fletcher.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The petitioner claims he was temporarily totally disabled from 1/5/20 through 9/13/21, 88-1/7 weeks. Respondent claims petitioner has reached maximum medical improvement based on the opinions of Dr. Cantrell and Dr. Van Fleet. Having found petitioner's current condition of ill-being as it relates to his low back and radiculopathy are causally related to the injuries he sustained on 2/11/19 and 9/26/19, and the opinions of Dr. Butler and Dr. Fletcher more persuasive than those of Dr. Cantrell and Dr. Van Fleet, the arbitrator finds the petitioner has been authorized off work since 1/5/20 through the date of trial on 9/13/21, with his most recent off work authorization being 8/10/21.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 1/5/20 through 9/13/21, a period of 88-1/7 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC025810
Case Name	Esperanza Castillo v. Suncast Corporation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0329
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Christopher Bassmaji
Respondent Attorney	Petar Milenkovich

DATE FILED: 8/25/2022

/s/Stephen Mathis, Commissioner
Signature

DISSENT: /s/Deborah Baker, Commissioner
Signature

22IWCC0329

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ESPERANZA CASTILLO,

Petitioner,

vs. NO: 16 WC 025810

SUNCAST CORPORATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the award based upon the finding that Petitioner's average weekly wage as reflected on the Request for Hearing (AX1) is $412.27. Petitioner is married with 3 dependent children. Therefore, Petitioner is at the statutory minimum TTD rate of $330.00. The Commission modifies the award of TTD to conform to the statutory minimum and awards the weekly rate of $330.00.

Petitioner asserts that the evidence supports an award of additional TTD benefits commencing December 8, 2020, through October 20, 2021, the date of hearing. The Commission finds that while Petitioner has not worked since August 11, 2016, she has failed to meet the burden of proof that her employment status since January 14, 2020 is causally connected to her work accident. Review of the record shows that Dr. Markarian released Petitioner to return to full-duty work on January 14, 2020. It was noted that Petitioner had not, at that time completed a functional capacity evaluation.

Petitioner testified at hearing that she did not return to work in January 2020 because she was helping her daughter who was experiencing complications with her pregnancy. Following that time, the pandemic negatively affected her ability to obtain employment.

On December 8, 2020, Petitioner had a telemedicine visit with Dr. Markarian. At that time, she reported 70% improvement and Dr. Markarian released her to modified work and full shifts. She returned to Dr. Markarian on December 16, 2020, and was released to "medium" work pursuant to the restrictions on her functional capacity evaluation. Dr. Markarian discharged her from care and declared her to be at MMI. Petitioner has failed to demonstrate by a preponderance of the evidence that her continued failure to obtain employment through October 20, 2021, is the result of her work injury versus unrelated factors. For the foregoing reasons the Commission denies the extension of TTD benefits from December 16, 2020 through October 20, 2021.

IT IS THEREFORE ORDERED BY THE COMMSSION that the Decision of the Arbitrator filed December 21, 2021 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a total of 178-5/7 weeks, commencing August 12, 2016 through January 14, 2020, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 15% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any outstanding, related, reasonable and necessary medical expenses subject to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act, including the following:

Midwest Anesthesia and Pain Specialists- $11,037.43
Premium Healthcare Solutions- $4,900.00
ATI Physical Therapy- $35,569.64
Hyde Park Surgical Center- $28,125.00
Illinois Anesthesia Specialists- $2,362.00
Orthopedic Associates of Naperville/Chicago- $10,081.43
Joliet Open MRI- $2,558.00
EQMD- $10,764.06
Midwest Specialty Pharmacy- $360.50
Electronic Waveform Lab-$3,384.92
Adco Billing- $803.70
Vital Medical Network- $3,400.00
Prescription Partners- $3,758.45
Delaware Physicians- $694.14
Lakeshore Surgery Center (facility)- $11,649.20

Lakeshore Surgery Center (professional) $1,275.00
Western Touhy Anesthesia- $1,958.14
Imaging Centers of America- $1,800.00
Blue Cross/Blue Shie ld- $10, 668.00.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for any benefits paid under Section 8(j) of the Act.

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.

August 25, 2022

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SJM/msb
o-6/29/2022
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

DISSENT (IN PART)

I agree with the majority's decision to affirm the Arbitrator's findings as to causal connection and medical expenses. Additionally, I agree with the majority's decision to modify the TTD rate. However, I disagree with the majority's decision to deny Petitioner's request for additional temporary total disability (TTD) benefits.

The Arbitrator found Petitioner was entitled to temporary total disability (TTD) benefits for the time period of August 12, 2016 through January 14, 2020. The Arbitrator reasoned that during this time, Petitioner was either taken off work completely or given work restrictions for which Petitioner was not provided work accommodations. The Arbitrator declined to award TTD benefits for the time period of December 8, 2020 through October 20, 2021. The Arbitrator reasoned that "On January 14, 2020, Dr. Markarian indicated Petitioner could return to work without restrictions. Petitioner testified that she could not return to work following her full duty release because her daughter was pregnant and also because of COVID."

On review, Petitioner argues that after the August 10, 2016 work accident, Petitioner was placed off work by one of her treating physicians. On January 1, 2017, Respondent terminated

Petitioner's employment, which entitles Petitioner to continued TTD benefits as long as she has work restrictions. Petitioner's treating physicians continued to place Petitioner off work (or gave work restrictions) through January 14, 2020. Subsequently, Petitioner was released to work with restrictions on December 8, 2020 while she treated for her work injuries, and released to work with permanent restrictions on December 16, 2020. Since the work accident, Petitioner has not returned to work for Respondent, and in fact, has not worked anywhere. Respondent argues that Petitioner is not entitled to any TTD benefits whatsoever because Petitioner's condition is not causally related to the August 10, 2016 accident. Additionally, Respondent asserts "the Arbitrator notes that Dr. Pelinkovich had diagnosed Petitioner with a cervical strain and did not assign any work restrictions resulting from that diagnosis." Respondent made no other arguments as to TTD.

I find that Petitioner is entitled to TTD benefits for the additional time period of December 8, 2020 through October 20, 2021. Both the Arbitrator and the majority have found that Petitioner proved her cervical spine and right shoulder conditions are causally related to the stipulated August 10, 2016 work accident. In finding causal connection, the Arbitrator specifically relied on Petitioner's unrebutted testimony. The Arbitrator also found Dr. Markarian, Petitioner's treating physician for her right shoulder, to be more credible than Dr. Bare, Respondent's section 12 examining physician with respect to the right shoulder. Further, the Arbitrator found that Dr. Pelinkovich related Petitioner's cervical condition to the work accident, even if he disagreed as to the nature of the injury, diagnosing Petitioner with a cervical strain. I note that Dr. Pelinkovich never addressed the issue of Petitioner's work status and whether she could return to work in any capacity in either of his section 12 reports.

During the arbitration hearing, Petitioner testified that Respondent terminated her employment around December 2016 because she did not return to work after the "IME doctor" released her to full duty work. T. 28-29. Petitioner testified that she never returned to work for Respondent after the stipulated work accident. T. 25. Mr. Baunach, one of Respondent's witnesses, confirmed that Petitioner was terminated but noted that it occurred on January 1, 2017 per Respondent's "no-show" policy. T. 81-82, 90. Mr. Baunach testified that after 5 days of "no call/no show," when an employee has been scheduled to work, "we would consider that a resignation." T. 81. Mr. Baunach testified further that Petitioner did not return to work after Dr. Pelinkovic's December 4, 2016 section 12 examination addendum report. T.80. It was his understanding that Dr. Pelinkovich had released Petitioner to full-duty work in his December 4, 2016 addendum report. T. 80. Respondent's Exhibit 2 is a contract between Respondent and the Midwest Regional Joint Board (Union) which indicates that employees can be terminated after failing to return to work after a leave of absence that exceeds 6 months. Resp.'s Ex. 2, Art. 15.

The law in Illinois regarding entitlement to TTD supports Petitioner's claim for additional TTD benefits. It remains the law in Illinois that an at-will employee may be discharged for any reason or no reason. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 149 (2010). Whether an employee has been discharged for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases. *Id*. An injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge. *Id*. The proper test for determining whether an employee is entitled to TTD benefits is whether the

employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. *Id*. **An employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged--whether or not the discharge was for "cause."** *Id*. (Emphasis added.) When an injured employee has been discharged by her employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. *Id*.

I find that Petitioner could not return to work with the restrictions she had been given from December 8, 2020 through October 20, 2021 because Respondent had terminated her employment. Petitioner's testimony that she did not return to work on January 14, 2020 because she had to take care of her daughter and because of COVID does not negate the fact that Petitioner had no job to return to even if she wanted to return to work for Respondent on January 14, 2020. The evidence shows that Petitioner's treating physicians released Petitioner to work with restrictions from December 8, 2020 through October 20, 2021 (at which time she was released with permanent restrictions), however, Petitioner had no job to return to because she had been terminated by Respondent. Petitioner's condition had not stabilized during this time as she was actively treating for her work-related injuries.

Based on the established law in Illinois regarding TTD benefits as set forth above, I respectfully dissent.

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC025810
Case Name	CASTILLO, ESPERANZA v. SUNCAST CORPORATION
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Christopher Bassmaji
Respondent Attorney	Nicole Schnoor

DATE FILED: 12/21/2021

/s/Gerald Granada, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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

Esperanza Castillo
Employee/Petitioner

v.

Suncast Corporation
Employer/Respondent

Case # **16** WC **25810**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **October 20, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 10, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,438.04**; the average weekly wage was $**412.27**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

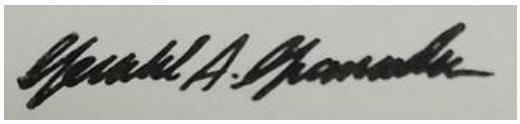
Respondent shall pay any outstanding, related, reasonable and necessary medical services set forth in the attachment to this decision, subject to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $319.00/week for 178-5/7 weeks, commencing August 12, 2016 through January 14, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $319.00/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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



Signature of **Arbitrator Gerald Granada** **December 21, 2021**

FINDINGS OF FACT

This case involves Petitioner Esperanza Castillo, who claims to have sustained injuries while working for the Respondent Sunset Corporation on August 10, 2016. Respondent disputes Petitioner's claims, with the issues being: 1) causation; 2) medical expenses; 3) TTD; and 4) nature and extent. Petitioner testified via a Spanish interpreter.

Petitioner started working for Respondent in 2015 as a machine operator and assembler. She testified that on August 10, 2016, she was working at a machine when boxes behind her fell over, causing a machine behind her to topple over and strike her on the right side of her back. Petitioner then clarified her testimony and indicated that she was struck in the back of her right shoulder. She testified that she was pinned between the machine that fell over and the machine she was working on for around ten seconds. She testified that her arms were positioned in a 90-degree fashion when the machine struck her. She also testified that the machine weighed 500 to 600 pounds.

Petitioner first sought medical care at Tyler Medical Services with Dr. Robert Long on August 11, 2016. At that time, Dr. Long noted that Petitioner reported tingling to the right side without any complaint of neck or shoulder pain. Physical examination of the neck showed pain to the right scapular area with flexion. Physical examination of the right shoulder showed limited range of motion in all planes. There was no edema or any other evidence of contusion noted on physical examination. X-rays of the right scapula were taken at that time, which were found to be normal. Petitioner was provided with light duty restrictions consisting of no lifting more than five pounds with the right arm.

Following that visit with Tyler Medical Services, the medical records reflect that Petitioner sought treatment with Dr. Mark Farag at Midwest Pain and Anesthesia starting on August 18, 2016. She reported severe neck pain at that time. Physical examination indicated decreased grip strength on the right, decreased right shoulder range of motion, and tenderness to palpation over the right anterior and posterior shoulder. The cervical spine MRI was reviewed, which showed multilevel disc bulging with moderate central and foraminal stenosis. An x-ray of the right shoulder was also found to be normal. Dr. Farag recommended an MRI of the cervical spine and right shoulder. Petitioner was taken off work at that time.

Petitioner underwent MRIs of the cervical spine and right shoulder on August 23, 2016. With regard to the cervical spine the radiologist, Dr. Amjad Safvi, noted straightening of the cervical spine, disc dehydration at C4-7, and 1 to 2 mm bulges from C5-7. It was noted that the spinal canal and neural foramina were patent at all levels. With regard to the right shoulder, the radiologist noted an intratendinous partial tear of the subscapularis tendon, supraspinatus and subscapularis tendinosis, small subacromial/subdeltoid bursal effusion, biceps tenosynovitis, and acromioclavicular joint hypertrophy.

On September 28, 2016, Petitioner saw Dr. Dalip Pelinkovic for a Section 12 Examination. At that time, Petitioner reported neck pain and right shoulder pain. Physical examination showed right paravertebral tenderness in the trapezial and scapular areas. Petitioner also reported decreased sensation to the right lateral forearm. Dr. Pelinkovic did note two positive Waddell's signs. At that time, Petitioner's cervical spine MRI was not available and he indicated that he had to review those studies. As a result, Dr. Pelinkovic provided an addendum report on December 4, 2016, where he opined that the cervical MRI showed subtle disc bulges at C5-7. He opined that Petitioner sustained a cervical strain as a result of the accident and placed Petitioner at maximum medical improvement.

Petitioner continued to follow up and treat with Midwest Pain and Anesthesia for the cervical spine and right shoulder through December of 2016. During that time, Petitioner also underwent physical therapy for the

cervical spine and right shoulder at ATI Physical Therapy. Petitioner underwent diagnostic blocks of the right cervical medial branch nerves at C3, C4, C5, and C6 at Hyde Park Same Day Surgicenter with Dr. Rakic. Dr. Racic also performed a C6-7 epidural injection on November 1, 2021. Petitioner remained off work during this time pursuant to her treating physician's recommendation.

Petitioner was then referred to Dr. Gregory Markarian at Orthopedic Associates of Naperville on December 6, 2016 for an orthopedic consultation. At that time, Petitioner reported ongoing pain in her right shoulder. Physical examination of the right shoulder showed limited range of motion, a positive O'Brien's test, a positive drop-arm test, and a positive relocation sign. Dr. Markarian reviewed the right shoulder MRI films and opined that it showed a partial thickness tear of the subscapularis and the anterodistal rotator cuff with some bursal inflammation. He recommended that Petitioner undergo an MRI arthrogram with x-rays to make sure there was no labral pathology. Dr. Markarian kept Petitioner off work at that time.

The MRI arthrogram was completed on December 27, 2016 at Joliet Open MRI. The radiologist, Dr. Amjad Safvi, noted a small collection in the subacromiodeltoid bursa, mild acromioclavicular joint arthropathy, supraspinatus tendinosis, and biceps tenosynovitis. The MR arthrogram did not reveal any indication of rotator cuff, labral, or supraspinatus tears.

Petitioner followed up with Dr. Markarian on January 17, 2017 for a right shoulder injection.

On February 7, 2017, Petitioner followed up with Dr. Markarian for ongoing right shoulder pain. Physical examination showed tenderness over the long head of the biceps and pain with belly press. She also elicited pain with resisted abduction isolating the supraspinatus. Dr. Markarian indicated that Petitioner failed conservative management and recommended a right shoulder arthroscopy, subacromial decompression, biceps tenotomy, and possible subscapularis and rotator cuff repair.

On May 10, 2017, Petitioner presented to a Section 12 Examination for the right shoulder with Dr. Aaron Bare at Northwestern Medicine. At that time, Petitioner complained of diffuse pain through the neck and right shoulder. He noted that she was lurching while sitting in the chair. She also reported pain down the right arm and shoulder, going into her third, fourth, and fifth fingers. Physical examination indicated that she was lurching to touch and grimacing with any range of motion of the right shoulder. Dr. Bare noted that she had full passive range of motion. He also noted that even light touch over the deltoid caused pain response. External rotation was noted to be grossly intact. Overall, he testified that Petitioner's clinical presentation was "bizarre". Dr. Bare reviewed the right shoulder MRI and MR arthrogram and opined that it showed normal findings. He indicated that she did have some interstitial signal in the subscapularis tendon, but there was no evidence of partial tears of the rotator cuff and no evidence of labral tears. He opined that the MRI showed age-appropriate findings. With regard to diagnosis, he opined that there were no findings to substantiate her pain complaints. He opined that her current right shoulder condition has no medical foundation. Lastly, he opined that Petitioner is not a surgical candidate and that she could return to work full duty. Petitioner was placed at MMI by Dr. Bare.

Petitioner followed up with Dr. Markarian and Midwest Pain and Anesthesia through April of 2019, pending completion of the recommended right shoulder arthroscopy. Petitioner ultimately underwent the right shoulder arthroscopy on April 15, 2019. The operative report indicates that Petitioner's subscapularis was intact. The only procedures performed were biceps tenotomy and subacromial decompression and subtotal bursectomy.

Following the April 15, 2019 procedure, Petitioner underwent a course of physical therapy at ATI Physical Therapy.

On January 14, 2020, Petitioner followed up with Dr. Markarian. She indicated that she was feeling well. Physical examination showed full range of motion. Dr. Markarian noted that Petitioner's FCE was incomplete and that she could return to work without restrictions. He also opined that Petitioner reached MMI as of that date.

Petitioner testified that she had no prior problems with either her neck or her right shoulder. She denied having any intervening accidents involving either body part. She denied having any problems with her right shoulder at the time of this hearing. She never received any TTD following her August 10, 2016 incident and she testified that she attempted to return to work for Respondent but could not do so because Respondent terminated her employment. Petitioner testified that she could not return to work following her full duty release because her daughter was pregnant and also because of COVID.

At hearing, Respondent presented two witnesses, Mr. Emmons and Mr. Baunach. Generally, they testified regarding the Suncast light duty accommodation program. Mr. Emmons testified specifically to the First Report of Injury and Petitioner's initial light duty accommodation on August 11, 15, and 16 of 2016. Mr. Baunach testified generally to Suncast's light duty accommodation program, no-show policy, and Union relations. Mr. Baunach testified that there has never been a time when light duty restrictions could not be accommodated. They both testified that there are several job positions that are available for light duty accommodation. Mr. Baunach stated that those restrictions could be accommodated on a permanent basis.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence, which show that Petitioner sustained both cervical and right shoulder/arm injuries following her undisputed August 10, 2016 work accident.

There does not appear to be any significant dispute regarding the causation between Petitioner's cervical condition and her work accident as Respondent's IME, Dr. Pelinkovic opined that Petitioner sustained a cervical injury as result of her work accident – for which he diagnosed Petitioner with a cervical strain, following his review of the MRI's showing bulging discs at C5-6 and C6-7. There was no evidence presented to show that Petitioner's cervical condition was not causally connected to her work accident.

As to Petitioner's right shoulder, the dispute on causation rests on the opinions of Respondent's IME, Dr. Bare, who opined that there were no objective findings to support an injury to Petitioner's right shoulder as the MRI results did not show any tear in the rotator cuff or the labrum and that Petitioner's bizarre behavior during her examination could not be substantiated by the clinical findings. However, the Arbitrator finds persuasive the opinions of Petitioner's treating surgeon, Dr. Markarian, who performed surgery on Petitioner's shoulder and confirmed there was no tear in Petitioner's rotator cuff, but did note that Petitioner sustained a partial tear of the subscapular tendon and tendinosis of the supraspinatus with bicipital tendinitis as well as bursal inflammation. Dr. Markarian testified that her biceps tendon was one of Petitioner's pain generators for which she underwent arthroscopic biceps tenotomy, subacromial decompression and subtotal bursectomy. Other than Dr. Bare's opinions, there was no evidence offered to show the Petitioner's right shoulder condition was not causally connected to her work accident, as Petitioner denied any prior or subsequent injuries to her shoulder. Despite Dr. Bare's testimony, the preponderance of the evidence supports the opinions and findings of Dr. Markarian on this issue.

Based on the above the Arbitrator concludes that the Petitioner's current condition of ill-being in both her cervical spine and her right shoulder/arm are causally connected to her August 10, 2016 work accident.

2. Based on the Arbitrator's conclusions regarding the issue of causation, the Arbitrator further finds that the Petitioner's medical treatment for her cervical spine and her right shoulder following her August 10, 2016 work accident has been reasonable and necessary in addressing her work-related conditions. As such, Respondent shall pay for any outstanding, related medical expenses, subject to the Fee Schedule, including the following: $11,037.43 to Midwest Anesthesia and Pain Specialists, $4,900.00 to Premium Healthcare Solutions, $35,569.64 to ATI Physical Therapy, $28,125.00 to Hyde Park Surgical Center, $2,362.00 to Illinois Anesthesia Specialists, $10,081.43 to Orthopedic Associates of Naperville/Chicago Sports Medicine, $2,558.00 to Joliet Open MRI, $10,764.06 to EQMD, $360.50 to Midwest Specialty Pharmacy, $3,384.92 to Electronic Waveform Lab, Inc., $803.70 to Adco Billing, $3,400.00 to Vital Medical Network, $3,758.45 to Prescription Partners, $696.14 to Delaware Physicians, $11,649.20 to Lakeshore Surgery Center (Facility), $1,275.00 to Lakeshore Surgery Center (Professional), $1,958.14 to Western Touhy Anesthesia, $1,800.00 to Imaging Centers of America, and $10,668.00 to Blue Cross Blue Shield. Respondent shall receive a credit for any medical expenses it may have already paid or for any expenses paid through group insurance for which Respondent is seeking a credit pursuant to Section 8(j) of the Act.

3. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the Petitioner was temporarily totally disabled from August 12, 2016 through January 14, 2020. The medical evidence show that Petitioner was either taken off work completely or else given work restrictions for which Petitioner was not provided work accommodations during this time period. On January 14, 2020, Dr. Markarian indicated Petitioner could return to work without restrictions. Petitioner testified that she could not return to work following her full duty release because her daughter was pregnant and also because of COVID. Based on these facts, the Respondent shall pay Petitioner temporary total disability benefits of $319.00/week for 178-5/7 weeks, commencing August 12, 2016 through January 14, 2020, as provided in Section 8(b) of the Act.

4. Regarding the issue of the nature and extent of the Petitioner's injuries, the Arbitrator applies the factors set forth in Section 8.1b of the Act and notes the following: (i) no AMA rating was introduced into evidence, so the Arbitrator gives this factor no weight; (ii) Petitioner was a machine operator and was ultimately released to return to work without restrictions following this accident - a factor to which the Arbitrator gives considered weight; (iii) Petitioner was 38 years old at the time of injury - a factor to which the Arbitrator gives some weight; (iv) there was no evidence of future earnings due to this injury, and the Arbitrator gives no weight to this factor; (v) there was evidence of disability which show that the Petitioner sustained an injury to her cervical spine and right shoulder resulting in bulging cervical discs, a partial tear of the subscapular tendon, tendinosis of the supraspinatus with bicipital tendinitis and bursal inflammation; and requiring lost time from work, injections, shoulder surgery involving arthroscopic biceps tenotomy, subacromial decompression and subtotal bursectomy, followed by physical therapy and resulting in an excellent recovery with little to no complaints following her surgery - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 15% loss of use of the person as a result of the October 10, 2016 work incident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC007617
Case Name	Shane Meeker v. Tradesman International, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0330
Number of Pages of Decision	31
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Julie Themer
Respondent Attorney	Paul Schumacher

DATE FILED: 8/26/2022

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHANE MEEKER,

Petitioner,

vs. NO: 19 WC 007617

TRADESMAN INTERNATIONAL, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, maintenance, medical expenses, and permanent disability, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner, Shane Meeker, sustained an accident that arose out of and in the course of his employment on February 7, 2019. The Commission further finds that Petitioner's lumbar condition is causally related to the accident and therefore awards Petitioner medical expenses, temporary total disability, and permanent partial disability. The Commission finds that Petitioner failed to prove his entitlement to maintenance and permanent total disability.

FINDINGS OF FACT

Petitioner alleged he was injured while performing his job as a journeyman electrician on February 7, 2019. On that date, the 55-year-old Petitioner was bending rigid conduit using an electric conduit bender and threading the pipe. He mounted a scissor-lift and hung the conduit, before running it into the electric panels. He also occasionally pulled wire through the conduit, lifted the conduit over his head, and carried 60-pound ladders. By lunchtime that day, Petitioner noticed he was getting sore and attributed his aches to working hard. When he arrived home that evening, he needed help getting out of the car and into his house. He called off work the following day, a Friday, noting his back pain. He also declined the offer of overtime work that weekend.

On Monday, February 11, 2019, Petitioner sought treatment at a walk-in clinic and was referred to the emergency room at Carle Clinic. There he complained of back pain since February 7, 2019, and denied having prior similar complaints or having suffered a traumatic injury. He was diagnosed with lumbar radiculopathy for his back and right leg pain and received pain medications and a referral to Carle's spine clinic.

On February 14, 2019, when he was evaluated by Dr. Johnson at the Spine Clinic, Petitioner again denied a traumatic incident was associated with the onset of his back and right leg pain. Dr. Johnson recommended physical therapy, but Petitioner found it did nothing to relieve his pain and was discharged. At his April 1, 2019 physical therapy appointment, he attributed his back and leg pain to work activities for the first time. He testified that the therapist asked detailed questions about the onset of his pain, whereas the doctors were more interested in the pain than the cause. He testified that he was unable to continue working, and Dr. Johnson provided an off-work slip, ordered a cortisone injection which did not alleviate Petitioner's pain, and sent him for an MRI. Petitioner's primary care physician prescribed Oxycodone for his back and pain.

Dr. Johnson referred him to Dr. Lichtor, a spine surgeon, for evaluation. On July 23, 2019, Dr. Lichtor recommended surgery. Petitioner subsequently sought a second opinion from Dr. Arnold, also at the Carle Spine Clinic. Dr. Arnold obtained an updated MRI and also recommended surgery. He performed a partial discectomy on January 20, 2020, and Petitioner reported an immediate lessening of pain. He began a course of post-operative physical therapy and a home exercise program. On June 8, 2020, five months after surgery, Dr. Arnold released him without restrictions. Petitioner was not working at that time. However, when Petitioner subsequently contacted the doctor and expressed his concerns about his ability to return to his prior job, Dr. Arnold provided work restrictions of no pushing, pulling or lifting more than 30 pounds. He later added a prohibition against standing for more than 30 minutes.

At arbitration on November 1, 2021, Petitioner testified that he was still in constant pain. He was taking ibuprofen almost every day and tramadol occasionally but primarily tried to handle the pain without medication. Petitioner also testified that he had phoned Respondent and left a voice message regarding his work restrictions, but Respondent did not return his call. He never returned to work for Respondent and testified that he tried to find work within his restrictions from Dr. Arnold, starting in July 2020. He introduced job logs documenting his search for employment from August 2020 through the date of arbitration.

Petitioner met with vocational rehabilitation expert, Dennis Gustafson, on January 12, 2021, by phone due to Covid restrictions. He had been conducting a job search for about six months at that time and had interviewed 10 times, resulting in only one job offer. That job was in Utah and the move was not financially feasible. Mr. Gustafson advised Petitioner to admit to his restrictions when questioned by potential employers but to expand the conversation to include what he could do for them. He recommended Petitioner focus on jobs within his restrictions, especially work in security, clerical or in an HVAC supply-house. Although Petitioner had worked as a substitute teacher for 11 years in the past, he did not think that type of work was a legitimate option, since it was sporadic and was not available on holidays or in the summer. Petitioner spoke with Mr. Gustafson again on May 6, 2021, and advised him he had followed his suggestions but had received no job offers and few interviews since their last phone call.

Petitioner met with Respondent's rehabilitation expert, Karen Kane-Thaler, in July 2021. They discussed the possibility of Petitioner updating his teaching certificate or perhaps obtaining certification in another subject, but Petitioner maintained that the cost and time involved would not be possible or worthwhile. Although he had obtained a teaching certificate and bachelor's degree in 2003, he had been unable to find a full-time teaching position at that time. He left the teaching profession in 2013 after determining he could not make a living at it as a substitute teacher. He had been unsuccessful in a couple of sales jobs during his career but had operated his own HVAC company until he could not afford to purchase and maintain the requisite equipment. Petitioner told Ms. Kane-Thaler that he had worked as an electrician and had installed solar panels, wiring, and plumbing sometimes on the side or as his main employment. However, he had not been employed anywhere since his work accident and had received no money from any source, including workers' compensation and unemployment benefits, since his alleged date of injury.

The Arbitrator found that Petitioner was not credible when he attributed his low back and leg complaints to his work activities on February 7, 2019. The Arbitrator based his credibility determination in large part on the discrepancy between Petitioner's testimony that his low back condition resulted from his work activities and the absence of any mention of work activities in the initial medical records. There was nothing in the emergency room note of February 11, 2019, although Petitioner testified that he provided the Carle staff with a work-related history of accident. Similarly, Dr. Johnson's initial office note from February 14, 2019, contains no mention of work accident, and neither does Petitioner's primary care physician's record. The Arbitrator found it "very suspect" that the first time Petitioner's medical records describe his work activities is his physical therapy evaluation on April 1, 2019, two months after his alleged date of accident. Having found Petitioner not credible, the Arbitrator concluded he had not proved that he suffered an accident that arose out of and in the course of his employment on February 7, 2019, and denied all benefits. The Commission views the evidence differently.

CONCLUSIONS OF LAW

The Commission is not bound by the Arbitrator's findings. Illinois reviewing courts have 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. Industrial Comm'n,* 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Industrial 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. Industrial Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Commission disagrees with the Arbitrator's finding that Petitioner failed to give a credible history of the alleged events. While there may be some inconsistencies between his medical records and Petitioner's testimony, those inconsistencies do not outweigh the credible evidence and Petitioner's testimony as it relates to the accident and causal connection.

Here, the evidence strongly supports that Petitioner sustained an accident arising out of and in the course of his employment on February 7, 2019. Petitioner testified that on that date, he was installing conduit, which required him to assume and hold for extended periods uncomfortable and

contorted positions, to perform work overhead while standing on ladders and lifts, and to carry 60-pound ladders into position. While at work that day, he began to develop low back complaints which worsened throughout the day, so that he was unable to get out of his car and into his house without assistance. Due to his back pain, Petitioner called off work the following day and declined the opportunity to work over-time during that weekend. The following Monday, he again called off work to seek medical attention.

Petitioner testified that he did not suffer an acute injury at work, so when his medical providers asked if his condition resulted from a work injury, he answered in the negative. Petitioner did not develop pain acutely after lifting or twisting or after a fall; rather his pain arose gradually over the course of the day, as a result of continued physical work activity. Both Petitioner's treating surgeon, Dr. Arnold, and Respondent's examiner, Dr. O'Leary, confirmed during depositions that the type of activities Petitioner was performing on February 6, 2019, could have brought about the disc herniation and pain he suffered. Petitioner admittedly had pre-existing lumbar degenerative disc disease, but there was no prior history of significant back pain and no evidence of prior treatment. Petitioner argues on review that his work activities caused his pre-existing spondylosis to become symptomatic and caused his L5-S1 disc herniation.

It is well established that a work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). 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. Employers take their employees as they find them. *Id.* at 205. Thus, even though an employee has a pre-existing 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.

Further, "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. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "[I]f 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. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, ¶ 26. "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Id.*

The evidence reveals that Petitioner had pre-existing lumbar degeneration. However, he was able to work full duty and without restrictions before this date of accident. No medical records were offered to show that Petitioner received any medical treatment prior to the accident. It was only after the accident that Petitioner sought treatment, underwent an MRI, was diagnosed with a disc herniation, and surgery was recommended and performed. Dr. Arnold then imposed light duty work restrictions. Not only did Petitioner establish causation under the chain of events theory, but

both parties' experts testified that Petitioner's work activities were competent causes of his disc herniation.

Based upon the above, the Commission finds that Petitioner established that he suffered an accident that arose out of and in the course of his employment and that his L5-S1 disc herniation is causally related to his February 7, 2019, work activities. Having established accident and causal connection, Petitioner is entitled to medical and temporary total disability benefits, as well as permanent disability.

Medical. Petitioner offered medical bills documenting treatment for his low back from Carle Foundation Hospital and Physician Group in Champaign-Urbana and Hoopeston Community Memorial Hospital in Hoopeston, Illinois as Petitioner's Exhibit 2. These bills show payments by Petitioner's group health insurer, Health Alliance Medical Plan, but no payments by Respondent. The Commission finds Respondent liable to Petitioner for all reasonable, necessary, and related medical bills, as documented in this exhibit.

According to the Request for Hearing, Arbitrator's Exhibit 1, Respondent paid an unknown amount in medical bills through its group medical plan and claims credit under §8(j) of the Act. Petitioner stipulated to this representation. The Commission, therefore, finds that Respondent is entitled to §8(j) credit for all amounts paid by its group insurer but must hold Petitioner harmless from any claims brought against him by reason of having received such payments. All remaining bills are to be paid directly to Petitioner at the lesser of the fee schedule or negotiated rate, pursuant to §8(a) and §8.1 of the Act.

Temporary Total Disability. On the Request for Hearing filed before arbitration (AX1), Petitioner claimed that he is entitled to temporary total disability from the Monday following his accident, February 11, 2019, through June 8, 2020, when Dr. Arnold released him from care, a total of 69 weeks. Petitioner's back injury and work restrictions prohibited him from returning to his job as electrician, and he remained off work through the date of his release by Dr. Arnold. The Commission finds that Petitioner is entitled to 69 weeks of temporary total disability.

Maintenance. Petitioner also sought maintenance the period following his release from care by Dr. Arnold on June 8, 2020, through November 1, 2021, the date of hearing, or 73 weeks. Awards for vocational rehabilitation are granted pursuant to §8(a) of the Act and may include, but are not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. *W.B. Olson v. Illinois Workers' Comp. Comm'n*, 2012 IL App (1st) 113129WC ¶32. An employee's self-initiated and self-directed job search may constitute a vocational rehabilitation program under §8(a), and an employer is obligated to pay maintenance benefits while a claimant is engaged in such a program. *W.B. Olson,* 2012 IL App (1st) 113129WC at ¶ 39. The employee has the duty to exert reasonable efforts to secure suitable employment, and the absence of good faith in pursuing vocational rehabilitation may justify the employer's termination of maintenance benefits. *Hayden v. Industrial Comm'n*, 214 Ill. App. 3d 749, 756 (1991).

Petitioner offered evidence of his self-directed job search by way of his job logs and testimony. PX3, PX7. He admitted that he applied for positions which were beyond his capabilities

despite both parties' experts' recommendation that he focus his efforts on positions within his work restrictions. He acknowledged that there were "help wanted" signs all over, but he had not followed up on any of those positions. He had not applied for teaching positions, even though his education and ten years of experience would appear to have qualified him for either a substitute or permanent teaching position. Instead, he appears to have focused on jobs outside of his work restrictions. The Commission finds that Petitioner failed to prove that he made a good faith effort to conduct a self-directed job search and denies Petitioner's demand for maintenance benefits.

Permanent Disability. Petitioner urges the Commission to find that he qualifies as permanently totally disabled under the "odd lot" theory of recovery, that is that no stable labor market exists for him as a result of his work injury. Both parties offered testimony from vocational rehabilitation experts.

Dennis Gustafson, Petitioner's vocational rehabilitation expert, testified at deposition that Petitioner had no transferrable skills from his prior work experience or education. Because of his work restrictions, and the lack of transferrable skills, Mr. Gustafson opined that no stable labor market existed for Petitioner.

In contrast, Respondent's expert, Karen Kane-Thaler, opined that Petitioner was not totally disabled and had numerous transferrable skills. She noted that he had at least fundamental computer skills, two associates degrees and a bachelor's degree, in addition to at least ten years of work experience as a substitute teacher in two local school districts. However, despite his qualifications and work experience, Petitioner had declined to pursue teaching positions. Petitioner also had valuable skills from his work experience in HVAC, solar panel installation, and general electrical work, which Ms. Kane-Thaler felt would make him a good candidate for sales or supply house positions, even if his work restrictions remained in effect. These skills and education provided a basis for job opportunities well within Petitioner's restrictions. Moreover, the Commission notes that Dr. Arnold's restrictions were not intended to be permanent but should be modified as Petitioner's condition changes.

The Commission finds Ms. Kane-Thaler's opinions persuasive and concludes that Petitioner failed to prove he qualified under the odd-lot permanent disability theory. His education, transferrable skills, and work experience provided adequate job options, so that, even without additional education or certifications, a stable labor market did exist.

Having found that Petitioner suffered an accident that arose out of and in the course of his employment, and having found that Petitioner failed to prove that he is permanently totally disabled, the Commission must determine the level of permanent disability under §8(d)2 of the Act.

Based upon the Arbitrator's finding that Petitioner had failed to prove accident and causal connection, he had no reason to set forth facts relevant to a determination of permanent partial disability as required by §8.1b(b) of the Act. The Commission now considers those factors in order to determine Petitioner's permanent partial disability. The Commission assigns the following weights to these factors:

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

(ii) **Employee's occupation:** *significant weight,* because Petitioner's position at the time of his accident demanded medium duty capabilities. Petitioner testified that, as a journeyman electrician, he was required to lift conduit and 60-pound ladders, perform work over his head for extended periods, bend his body into awkward positions, and stand as long as needed to accomplish his assigned tasks. His restrictions would prevent him from performing his job as an electrician and resulted in a loss of occupation.

(iii) **Employee's age:** *some weight,* because Petitioner was 56 years old at the time of his injury and will have to deal with the effects of his injury and surgery for several years. His vocational rehabilitation expert believed that his age would be a deterrent for some employers.

(iv) **Future earning capacity:** *no weight.* Petitioner attempted to prove that he was unable to find suitable employment due to his age and work restrictions. However, the Commission finds that Petitioner failed to prove that there was no stable labor market for him. Therefore, there is no evidence of loss of future earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *some weight.* Petitioner testified that he currently takes ibuprofen, tramadol, and oxycodone, as needed for pain and stiffness. Dr. Arnold provided work restrictions at Petitioner's request, because he had attempted to perform some of the tasks he would need to do if he returned to work as an electrician and he did not believe he could perform his full duty job.

Based upon the above factors and the record as a whole, the Commission concludes that Petitioner has proved that he suffered permanent partial disability, pursuant to §8(d)2, in the amount of 40% person as a whole, for his loss of occupation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on February 18, 2022, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of medical expenses is vacated. Respondent shall pay Petitioner the lesser of the negotiated or fee schedule rate for all necessary medical services incurred from Carle Foundation Hospital and Hoopeston Regional Health Center, as documented in Petitioner's Exhibit 2 and as provided by §8(a) and §8.2 of the Act. Respondent shall receive credit for payments made through its group medical plan for which credit may be allowed under §8(j) of the Act. Respondent shall hold Petitioner harmless from any claim made against him by reason of having received such payment only to the extent of such credit.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability is vacated. Respondent shall pay Petitioner the sum of $480.94 per week for a period of 69 weeks, commencing February 11, 2019 through June 8, 2020, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner $432.85 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused a 40% disability 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $121,000.00. 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.

August 26, 2022

mp/dak
o-8/4/22
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC007617
Case Name	MEEKER, SHANE v. TRADESMAN INTERNATIONAL, LLC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Julie Themer
Respondent Attorney	Paul Schumacher

DATE FILED: 2/18/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2022 0.77%

/s/ Dennis OBrien, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SHANE MEEKER
Employee/Petitioner

v.

TRADESMAN INTERNATIONAL, LLC
Employer/Respondent

Case # **19** WC **007617**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **November 1, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 7, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**10,976.25**; the average weekly wage was $**721.41**.

On the date of accident, Petitioner was **56** 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 $**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 **unknown amount** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove that he suffered an accident on February 7, 2019, which arose out of and in the course of his employment by Respondent.

Petitioner's medical condition, a herniated disc to the right at L5/S1, is not causally related to the accident of February 7, 2019.

Based on the above findings of no accident and no causal connection all other issues in dispute are deemed moot.

Benefits are therefore denied.

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

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

FEBRUARY 18, 2022

Signature of Arbitrator

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that as of the date of arbitration he was 58 years old. He said that in about 1991 he got a degree in electronic technology with some computer courses. In 2003 he received a degree in history education from Illinois State University. In 2013 he took a degree in HVAC and electrical from Parkland College to get formally certified. His work history after high school included work with the Indiana Department of Highways as a maintenance worker, followed by work as a compounder for Peterson Puritan. He then worked as a television and VCR repairman. He worked as a maintenance worker for Plastipak Packaging. It was at that point that he went to Illinois State University to get his history teaching degree. After receiving that degree he worked as a substitute teacher for Danville District 118 and Rantoul Township High School District. He said that ever since high school he had done some work on the side in electrical, HVAC and plumbing. He later got a degree in that so he could get certified on paper. He was still working on the side doing HVAC work in 2013 while also working as a maintenance man at Golf View Village in Rantoul. Following that he began work for Respondent, where he worked until the date of this incident.

He said on February 7, 2019 he was working as a journeyman electrician for Respondent, assigned to the Fed Ex shipping facility in Urbana. He had been working at that location for three weeks to a month as of that date. The job they were doing for Fed Ex involved bending rigid conduit to the proper shapes using an electric conduit bender and threading the pipe. The workers would then raise themselves in a scissor lift and hang the conduit, running it along the sides of the line, and tie them into the control boxes. They would on occasion run big two inch or more conduit, and run it into electrical panels. They would occasionally also pull wire through the conduit and terminate it at the electrical panels. He said on February 7, 2019 he was mainly hanging half inch, three quarter inch and two inch conduit, though they had a few pieces of two and-a-half inch pieces into the main panels.

Petitioner testified that ten foot lengths of half inch rigid conduit weighed ten pounds, that three quarter inch weighed 45 or 35 pounds, and two inch about 35 pounds. He said to get the conduit in the place to hang it he would sometimes lift over his head, sometimes being close to the ceiling, sometimes twisting or bending to get into weird positions. They also had to be careful when working in a scissor lift. Bending the conduit was done on the floor, not at height, the conduit would be fed into the machine, hitting a switch, and the machine would turn it to the proper angle. They would then take it and carry it to where it was to be installed. He said that in addition to the scissor lift, he also used ladders, principally an industrial fiberglass 12 foot ladder, which weighed about 60 pounds.

Petitioner said on February 7, 2019 he was to work eight hours. He said at lunch he noticed he was getting sore, attributing it to a day's hard work. He said he finished his shift that day. He said he had not had a fall that day. He said after work he went out to his car and just drove home. He said at that time he was pretty sore, but just thought he'd done a good day's work. He said he did not injure his back in any way after he left

work. He said when he arrived home he needed help getting out of the car and into the house. He said he did not work the following day, a Friday, informing work that his back was sore. He said he did not work over the weekend though overtime was available and he wanted to do it.

Petitioner said he had never sought medical treatment for back pain prior to February 11, 2019. He said he went to the walk in clinic at Christie Clinic the following Monday, February 11, 2019, where he was examined by a nurse practitioner. He said she referred him to the emergency room at Carle in Champaign. The emergency room gave him pain medications and referred him to a spine clinic.

Petitioner testified that at the Carle emergency room he denied having an injury as he thought is was just a pulled muscle and thought he'd get muscle relaxants and maybe heat. He said he just figured it was just a result of working hard and after a few days of prescriptions he would be back on the job.

He said he saw Dr. Johnson at the Spine Clinic on about February 14, 2019. He said he was hurting when he saw Dr. Johnson and had pain going down his right leg. He said Dr. Johnson recommended physical therapy. He agreed that when he saw Dr. Johnson he again denied any particular event or injury being associated with the onset of his pain, for the same reason he had denied it before, saying that he might have been in denial and still thought it was probably just a muscle issue that could be treated quickly. He said he went to physical therapy but it did not really help and he was discharged from it. He said he had been unable to continue working and that Dr. Johnson took him off work. He said they discussed cortisone shots, which were performed but did not help, and she sent him for an MRI.

Petitioner said he continued seeing his primary care physician during this period of time for pain treatment and smoking cessation. His doctor prescribed oxycodone for him and wanted to monitor him closely. He said he wanted to quit smoking because of finances, and because if he had surgery he did not want to suffer the same complications his father had following surgery which his doctor had attributed to smoking.

He said Dr. Johnson referred him to a surgeon, Dr. Lichtor, who he saw on July 23, 2019. Dr. Lichtor recommended surgery. He did not return to see Dr. Lichtor as he wanted a second opinion and because he did not feel confident with him. In part because he had not gone into spinal surgery right out of medical school, he transferred to that from psychiatry. In addition, his wife had been present and had asked some questions about the procedure and Dr. Lichtor had just ignored her, which rubbed Petitioner the wrong way. He said he therefore saw Dr. Arnold for a second opinion on October 7, 2019 Dr. Arnold wanted another MRI as it had been so long since the first one, and it was performed and he saw Dr. Arnold again on November 4, 2019. Dr. Arnold at that time recommended surgery, at least a partial discectomy. He said that surgery was performed on January 20, 2020. He said that during that surgery he also had a left bundle branch block.

Petitioner said that his pain was improved immediately after the surgery, he did not hurt as much down his left leg. After the surgery Dr. Arnold recommended physical therapy, and he received that, they taught him home exercises to do to help with the pain. He said some of the exercises helped, but it did not last. He last saw Dr. Arnold on June 8, 2020, about five months after his surgery, at which time the doctor released him from his care with restrictions of no pushing, pulling or lifting of more than 30 pounds. He said he later called the doctor and asked that the doctor clarify what he could and could not do, and the doctor added no standing of more than 30 minutes. He said when he saw Dr. Arnold in June he was not working.

Petitioner said that as of the date of arbitration he was still in constant pain, sometimes worse than others. He said he did not take pain medications, including over-the-counter Ibuprofen, Tramadol and possibly a third he was forgetting, all taken as needed. He said they were prescribed by his primary care physician, Dr. Benavides. He said he took the Ibuprofen about every day, and he took the Tramadol occasionally. He said he just tries to put up with the pain. He had considered asking Dr. Benavides about another prescription for oxycodone, but had not pursued that.

He said he advised Respondent of the restrictions he got from Dr. Arnold, though he could not recall who he spoke with. He said there were only two supervisors in that office and the secretary said neither was in so he left him to the voice mail. He said he never heard anything back. He said he had never worked for Respondent following his injury. Petitioner said that after Dr. Arnold told him this was as good as it would get he tried to find work that was within his restrictions, starting in July of 2020. He said he did not have logs for July, however, as he had saved them onto a thumb/USB drive and he misplaced the thumb/USB drive, perhaps inadvertently throwing it away while cleaning off his desk. He thought he had applied for 80 to 100 jobs during that July. He said he did not get any interviews that month.

Petitioner said he met with Dennis Gustafson around January 12, 2021, by phone, because of COVID. By that time he had been looking for a job for about six months and had about 10 interviews. He had a job offer from Park City, Utah, an HVAC job, and let them know of his restrictions, they spoke with the boss and said they would hire him and would get back in touch with him. He said he never heard any more from them and he had looked and had seen the high cost of living there and did not think it was feasible, anyway.

Petitioner said he told Mr. Gustafson that when filling out applications, when he got to the point where they asked about disability he felt he was bound by law to put it on there. He said he felt deceitful with employers and it went counter to what he had been trained. Mr. Gustafson suggested that he should say during an interview that he had restrictions but tell them what he could do. He said that while he had not told him not to pursue other jobs, Mr. Gustafson recommended he try security work, clerical work, or working in an HVAC or electrical supply house, as he was familiar with that work. He also told him to try mainly for jobs that were within his restrictions. He said he altered his efforts based upon the advice. He said they discussed substitute teaching, but Mr. Gustafson agreed that was probably not feasible given the nature of the work, as it was sporadic, that while the districts he had worked for said he could work every day, that is not what happened, he did not work for a month around Christmas.

Petitioner said he had another telephonic meeting with Mr. Gustafson on May 6, 2021, about five months after the first meeting, and was told to continue to try to find jobs that he felt he could do with the restrictions, again telling him that if he had an interview he was to still do the “yes, but” and explain his restrictions, and he said he followed that advice. He said in the months between those telephonic meetings he had four or five interviews, but no job offers other than the one in Utah.

Petitioner said he met with Ms. Karen Kane-Thaler in July of 2021. He said he did not tell her he was afraid of heights, and a dislike of heights did not play any part in the types of jobs he chose to apply for, noting that he was working at heights for Respondent. He said he did speak to her about the process and procedures to reinstate his teaching certificate, saying if was $500 or 32 university hours if he wanted to change his major. He said he told Ms. Kane-Thaler that he could not afford the $500 cost of reinstating his full teaching license. He

said he received his college degree in history education in 2003 and thereafter made an exhaustive search for secondary history teacher positions but had not been able to find one. Instead he worked as a substitute teacher in hopes that would help him get in as a history teacher. He did substitute teaching for the Danville schools for ten years and the Rantoul schools for one year. When asked if he worked full time as a substitute teacher Petitioner said "if you want to call it that," explaining that he was available whenever they needed substitute teachers, but that in the last few years of substitute teaching he was not earning a full time income, averaging 24 to 30 hours per week, as substitute teaching was a six-hour day. He said he did not work during summers, holidays, or school breaks. He said he did not have a set schedule, he would be called at 6:20 or 6:30 in the morning if he was to work. He said on a couple of occasions he would work an extended number of days at the same job, such as a time when a teacher was to have a stent put in her heart and there were complications, so he finished the school year for her. After doing a position for ten days he was paid a regular teacher's salary.

Petitioner said he left teaching in 2013, deciding he could not make it anymore, he could not make a living at it. He said he had in the past tried a couple of sales jobs, in the 80's and 90's, but did not last long at them before being let go. He said he ran his own HVAC business in the past, selling equipment to customers that was needed to resolve their problem, but he did not really engage in upselling to get clients to buy more or better products, saying he did not feel comfortable doing that.

Petitioner testified that over the years he had gone to a lot of job search seminars, about resumes and employment, and he thought that if he could get an interview he might be able to talk his way into a supervisor position, perhaps a foreman position or even a position training people in the company. He said he discussed that with Mr. Gustafson who thought it sounded reasonable. He said unless it was a federal form application he would not tell people of physical restrictions when he applied, he saved that for interviews where he could discuss it. He said he continued to apply for job through the time of the arbitration hearing. He said that since speaking with Mr. Gustafson in May of 2021 he had about four or five job interviews, but no offers.

Petitioner testified that he had not been employed anywhere since February of 2019 and had not received income from any source since that time, including temporary total disability benefits.

On cross examination Petitioner was asked to describe how he injured himself on February 7, 2019. His answer was that he was working on a scissor lift handling long pieces of rigid conduit, twisting in unusual positions, he was carrying a 12-foot ladder around, he was climbing stairs with the ladder, he was work his ladder underneath production lines which were about as high as the tables in the arbitration hearing room and then get under the production line, and then set up the ladder. He said he did not recall if he was working alone or with someone else at that time. He said they had helpers, but he did not recall if he had a helper that day or not. He said he did not recall if he had ever worked with Anthony Cenzano, but it was possible he had done so. When asked if he told Mr. Cenzano of pain while working with him, Petitioner said he might have mentioned something having worked hard that day, but nothing more.

Petitioner said he could not remember the names of the two supervisors or which one he gave notice to, but said on the Friday he might have called in and said his back was sore, and he believed he spoke with them directly at that time, and probably on the following Monday as well. Petitioner said he told the doctor he just worked too hard. He agreed that his first visit at Carle was on February 11, 2019, but he could not recall if he provided a work related history at that time, though he imagined he did, though he may have told them it was

just a pulled muscle, as that was what he thought at the time. He agreed he probably told them of having had back pain for five days and of pain radiating down the back of his leg with numbness and tingling. He said if the records did not reflect a work-related version of what took place the records would be incorrect.

He said he had x-rays taken on February 14, 2019, and he could not recall if he mentioned how he got hurt at that time. He said when he saw Dr. Johnson at Carle on February 15 he advised her that he had developed lumbar spine pain a week earlier. He did recall telling her that he did not recall any particular event or injury associated with the onset of his discomfort, saying he did not tell her of any one event as he could not be sure.

Petitioner testified that when he saw his primary care physician, Dr. Benavides-Martinez, on February 25, 2019 he advised him he had experienced back pain for three weeks but did not say anything about work. He said that was because he was his family doctor and all he discussed with him was pain.

Petitioner agreed that he first mentioned that something happened at work to his physical therapist, on April 1, 2019. He said there he was asked more detailed questions about what led up to therapy. He testified that he would not say that April 1 was the first time he ever mentioned anything about work, just that he had not previously gone into any detail, just that he had a pulled muscle or something, though he did not know if he had said the pulled muscle was from work.

Petitioner said Respondent's examining physician, Dr. O'Leary, asked him how he hurt himself and he thought he might have mentioned work, though he could not recall. He then said he told that doctor that he was not qualified to say if a specific thing had happened at work to cause it as he was not a doctor.

Petitioner testified that he might have been having a good day on April 30, 2020 when he advised a medical provider that his pain was 3 out of 10. He said he was under Dr. Arnold's care until he was ultimately released by him. He agreed that he left a message for Dr. Arnold on June 5, 2020 stating, "I saw Dr. Arnold yesterday and discussing my limitations and concerns about returning to work in my trade as a journeyman electrician. He said that if I did not feel that I could return to work that he would be happy to fill out any necessary forms at that time." He said Dr. Arnold did thereafter fill out his current restrictions. Petitioner said he had never returned to any type of gainful employment. He said he had not undergone a functional capacity evaluation to determine his physical limitations. He said Dr. O'Leary's numerous questions and examination in his office were about as close to anything like that that he had.

Petitioner said he never applied for unemployment, that if he was not aware he could get it. He said that he began doing a job search in July or August of 2020 and that his job logs did note that he was applying for jobs involving maintenance and installation, jobs which were beyond his restrictions. He said Mr. Gustafson later told him he should not focus his entire job search on jobs beyond his restrictions in hopes of getting hired as a supervisor, foreman, or trainer. He agreed Mr. Gustafson told him that he should not immediately discuss his physical restrictions while at an actual interview, but said he could mention it at the end of an interview.

He said Ms. Kane-Thaler talked to him about job opportunities he might have because of his past work experience. He agreed he was a high school graduate and had an Associate's degree in electronic technology, a Bachelor's degree in teaching, he previously had a teaching certificate, which had expired, and another

Associate's degree in HVAC. He had worked for 11 years as a substitute teacher, had owned an HVAC company, had worked as an electrician and had installed solar panels and wiring.

When asked if substitute teachers as of the date of arbitration did not need a teaching certificate, Petitioner said he was not sure as he had not pursued that since 2013. He said that Ms. Kane-Thaler recommended that he get his teaching certificate. He said he was aware that there were jobs available for substitute teachers in Danville and in Urbana. He said he was aware that there were signs everywhere seeking to hire people, including restaurants and department stores, but he had plenty of friends who told him they had tried to get those jobs but they had not materialized. He said he had seen television stories saying there were 10.5 million jobs available in the United States but people just were not working.

Petitioner said he was not interested in going back to doing a substitute teacher job which did not require a certificate as he could not make a living at it. He agreed that there were jobs available for substitute teachers.

On redirect examination Petitioner said his Associate's degree in electronic technology was no longer relevant due to technological advances, his knowledge was out of date.

MEDICAL EVIDENCE

Petitioner was seen in the emergency room at Carle Foundation Hospital on February 11, 2019, four days after the alleged accident of February 7, 2019. The history he gave at that time was of "back pain since Thursday, worse with movement. Denies injury. * * * No specific injury that he can recall." The pain at that time radiated down his right leg with numbness and tingling over the right thigh, and he said the pain was moderately severe and constant. Physical examination revealed a positive straight leg raise on the right. Dr. Davis felt this was most consistent with right-sided lumbar radiculopathy. The record does not address work restrictions. (PX 1 p.1-3)

Petitioner was seen by Dr. Johnson on February 15, 2019 upon Dr. Davis's referral. He advised Dr. Johnson that he did not recall any particular event or injury. Again, the pain was going down the right leg to his mid thigh. He rated his back pain as 5/10. A work history as an electrician was taken, but no history of that work being the cause of this problem was given. Straight leg raising was mildly positive on the right. Dr. Johnson's impression was lumbar spondylosis with radiculopathy, with back pain being worse than leg pain. Dr. Johnson explained to Petitioner that he had degenerative disc disease, and Petitioner acknowledged that his two pack per day smoking made that worse. He was referred to physical therapy. The record does not note work restrictions being given. (PX 1 p.4-6)

Petitioner saw his primary care physician, Dr. Benavides-Martinez, on February 25, 2019. He advised he had experienced back pain for three weeks. Petitioner advised the doctor that he had low back pain into his legs which was exacerbated by walking, and said he had not had an injury. Straight leg raising was again positive on the right. Dr. Benavides-Martinez spoke with Petitioner about his degenerative disc disease, Norco was prescribed for pain, and he was encouraged to keep his physical therapy appointment. The record does not reflect any restrictions from work. (PX 1 p.7-10)

On March 26, 2019 Dr. Johnson prescribed work restrictions of no lifting of over 5 pounds, no repetitive bending, no climbing ladders, and no chronic bent positions for the spine, noting these restrictions were in effect

until June 1, 2019. There are no medical records introduced indicating Dr. Johnson having seen on this date or any date since February 15, 2019. (PX 1 p.12)

On March 31, 2019 Dr. Johnson authored a note stating that Petitioner's March 26, 2019 restrictions were also in effect from March 4, 2019 to March 26, 2019. There are no medical records introduced indicating Dr. Johnson seeing Petitioner on any date since February 15, 2019. (PX 1 p. 13)

Petitioner began physical therapy at Carle Therapy Services on April 1, 2019 with complaints of right low back and right leg pain down to the knee. The history provided to the therapist was of the pain beginning "while performing a significant amount of overhead work with repetitive twisting motions at work. He noticed during his lunch break that day that his back was bothering him and says the pain has become progressively worse since that date." He told them that he had experienced sore muscles before but this was a "deep ache that radiates down my leg," and this did not feel like sore muscles. The therapy plan was to see Petitioner two times per week for eight weeks. When next seen on April 4, 2019 Petitioner reported no significant change in his symptoms, though there was increased soreness following his earlier therapy session. He advised them he had tried to get a cane on his way to therapy, but Walgreens was out. He reported that his hip pain was worse, especially with driving. On that date he was very limited in therapy due to his inability to tolerate any prolonged position and pain when changing positions. They therefore thought in inappropriate for him to continue in therapy. (PX 1 p.14,17,19,20)

Dr. Johnson saw Petitioner for the second time on April 9, 2019. On that date she noted he had been unable to tolerate therapy, had considerable back and right leg pain and was ambulating with a cane. On this occasion he had bilateral straight leg raising tests. An MRI was ordered, and completed on April 18, 2019. The report for that test notes a history from Petitioner that on February 8 he came home with no injury, just pain in his back radiating down the right leg and hip to the knee. The radiologist interpreted the MRI as showing spondylotic changes most notable at L5/S1 as well as disc bulging at that level with a right paracentral disc protrusion slightly abutting the right S1 nerve. A central annular tear was seen as was mild bilateral foraminal stenosis. (PX 1 p.21-24)

Dr. Johnson reviewed the MRI with Petitioner on April 23, 2019 and it was agreed he should undergo an epidural steroid injection on the right at L5/S1. That injection was performed by Dr. Melnytsky on May 20, 2019. Petitioner returned to Dr. Johnson on June 11, 2019 and reported that the injection did not give him significant relief from his symptoms, he continued to have back and right leg pain. On this date his right straight leg raising test was markedly positive but his left straight leg raising test was negative. Dr. Johnson referred Petitioner to Neurosurgery. (PX 1 p.25,28,29,35)

Petitioner was receiving pain medication through Dr. Benavides-Martinez, getting Tramadol at his June 4, 2019 visit. When seen on July 12, 2019 Petitioner reported that the Tramadol was not helping his pain. A prescription for Oxycodone was therefore given. (PX 1 p.32,36,38)

Dr. Lichtor saw Petitioner for a neurosurgical consult on July 23, 2019. Petitioner told Dr. Lichtor that he developed low back and right leg pain in February of 2019, but the records do not reflect that he mentioned his work to Dr. Lichtor at that time. Dr. Lichtor noted that Petitioner had diminished sensation over the proximal aspect of his right leg. After reviewing the MRI study Dr. Lichtor assessed Petitioner as having right

S1 radiculopathy. After discussing his options Petitioner advised the doctor that he would like to undergo a right L5/S1 microdiscectomy. Dr. Lichtor restricted Petitioner from all work at that time. (PX 1 p.40-42)

Petitioner again saw Dr. Lichtor on October 7, 2019. At that time his low back and leg exam was normal with the exception of some decreased strength in the right plantar flexion which the doctor said could be pain related. Because Petitioner's MRI was more than 6 months old Dr. Lichtor wanted to repeat the scan. The new MRI was performed on October 17, 2019 The radiologist's interpretation on this occasion was very similar to that of April 23, 2019, with the exception that in this newer MRI there was no finding of a central annular tear at L5/S1 or of the small right central disc protrusion abutting the right S1 nerve.. (PX 1 p.43)

Petitioner was examined at Respondent's request by Dr. O'Leary on October 10, 2019. His examination findings and opinions are contained in his deposition summary, below. (RX 1)

Petitioner saw Dr. Arnold on November 4, 2019. He noted that the new MRI did show a herniated disc to the right at L5/S1. Petitioner again chose to have an L5/S1 microdiscectomy, but by Dr. Arnold. No mention of work restrictions in Dr. Arnold's records for that date. (PX 1 p.47)

Dr. Arnold performed the right L5/S1 hemilaminotomy and discectomy surgery on January 28, 2020. During the surgery Dr. Arnold observed a moderate sized herniated disc which he opened with a scalpel and then removed. (PX 1 p.56,57)

Petitioner was seen by Dr. Benavides-Martinez on February 11, 2020. Petitioner reported minimal lumbar spine pain and minimal radiation to the right leg. (PX 1 p.68)

Petitioner was seen by Nurse Practitioner Shills in neurosurgical follow up on February 14, 2020, reporting some mild back pain but no leg symptoms. His physical examination was normal with the exception of generalized weakness of both legs. Petitioner was told to increase his walking and not to lift more than 20 pounds. (PX 1 p.72-74)

Dr. Arnold saw Petitioner on March 23, 2020, two months after the surgery, and found Petitioner's strength to be intact and Petitioner advised him he was feeling much better, with his pain almost completely resolved. A short period of physical therapy was to be undertaken. (PX 1 p.75)

Petitioner went to Carle Therapy Services on April 2, 2020 for an evaluation. He advised them that his pain was much improved since last they saw him, he was no longer having pain down his leg, but he had some left sided discomfort in the low back. He said his pain was currently 2-3/10. While his goal the first time he was in physical therapy in April of 2019 was to get as good as he could and to return to work, his goal in April of 2020 was to get back to normal household activities. By April 15, 2019 Petitioner was reporting that he still had low back pain but that his legs had gotten a lot stronger. He said he began therapy on that date in more pain due to a bumpy bus ride to therapy. On April 30, 2020 Petitioner advised therapy that his pain was 3/10 at best, that he had some difficulty getting up a ladder, his legs had gotten a lot stronger and that he felt he was ready to be discharged after therapy as he thought his pain level was "the best its going to be." They therefore discharged him from physical therapy. (PX 1 p.15,76,77,84,85,88,89)

Petitioner saw Dr. Arnold on June 8, 2020, five months after his surgery. He reported that his pain was much improved, though he said he had some back pain if he stood for a long period of time. Dr. Arnold

reported that "(i)t is not clear whether he will be able to go back to work as electric shin (sic)." Petitioner was released on that date on a prn basis. (PX 1 p.90)

On June 9, 2020 Petitioner wrote an email to Dr. Arnold's nurse quoting Dr. Arnold as having told him on June 8, 2019 that if he did not feel he could return to work the doctor would be happy to fill out forms to that effect. Petitioner in the email noted that his job included heavy lifting, standing, working from ladders and man lifts, crouching for long periods, pulling wire through conduit and hanging conduit overhead. The nurse emailed Petitioner upon her return to her office on June 12, 2020 noting that Dr. Arnold would issue a restriction letter. She advised Petitioner that his only restriction would be a weight restriction of 20 pounds. (PX 1 p.93)

A work restrictions letter was issued by Dr. Arnold on June 12, 2020 stating he could only lift, pull or push 30 pounds, 40 hours per week. Another letter was issued on June 22, 2020, without benefit of seeing Petitioner in the interim, adding a limitation of no standing for longer than 30 minutes. (PX 1 p.91,92)

Petitioner was examined at Respondent's request by Dr. O'Leary on August 31, 2020. His examination findings and opinions are contained in his deposition summary, below. (RX 2)

DEPOSITION TESTIMONY OF DR. PAUL ARNOLD

Dr. Arnold testified by deposition on behalf of the Petitioner on October 30, 2020. He testified that he was a board certified neurosurgeon and had treated Petitioner commencing on October 7, 2019. He was unaware of the fact that Dr. Lichtor had seen Petitioner prior to his seeing him. He said if Petitioner told him how he came about having symptoms, he did not make note of it. Dr. Arnold's description of his findings and diagnoses while treating Petitioner were consistent with the medical summary, above. (PX 8 p.4,6,7,10,11-17)

Dr. Arnold testified that the restrictions he placed on Petitioner in June of 2020 would not necessarily have been permanent, they could have been changed if he got better and could go back and work full-time or, if his pain got worse. He said he did not know if Petitioner would get better or worse, or if the pain would completely resolve, though he would have expected Petitioner to improve prior to his last being seen five months after his surgery. (PX 8 p.17-19)

Dr. Arnold, after being asked a hypothetical question generally describing Petitioner's work on February 7, 2019, but which included minimal quantitative or definitive description of the work, testified that Petitioner's activities could have caused Petitioner's disk herniation which he performed surgery upon, but he went on to say, "I'm sure there's some contribution to it, but I wouldn't say that everything was normal the day before, and then he did all this work on the day in question, and then he herniated this disk, ant that's the reason for it. He was also asked if these activities could have caused Petitioner's degenerative disk disease to become symptomatic and Dr. Arnold stated that was "a little more unlikely, given that you're talking about one day in a guy who's 57 years old and so any one day is unlikely to be any worse than the rest in terms of the total sort of timeline of lumbar degenerative disease." (PX 8 p.21-23)

On cross-examination Dr. Arnold said that while it was customary for doctors to take a history from a patient of what was causing their pain when first seen, which would be transcribed in the medical chart for the

date of that visit, he could not remember if Petitioner gave him a history of the cause of his back pain when first seen by him on October 7, 2019, but he did not have it documented in his office note. He said that while he had the opportunity to review the records of Petitioner's prior physicians, he did not do so. He said that the prior medical records he reviewed during the deposition made no mention of any injury in February of 2019 and Petitioner's telling them he could not recall how he started to have back pain. (PX 8 p.24-27,32)

DEPOSITION TESTIMONY OF DR. PATRICK O'LEARY

Dr. O'Leary testified by deposition on behalf of the Respondent on November 3, 2020. He testified he was a board certified orthopedic surgeon who only treated spinal conditions, from the neck to the sacrum, performing 300 to 350 surgeries per year. He said he performs independent medical examinations and medical record reviews. (RX 3 p.4,5,7)

Dr. O'Leary said he performed an independent examination of Petitioner on October 10, 2019, thereafter preparing a report which was introduced into evidence. He testified that Petitioner advised him that his injury occurred while at work. When Dr. O'Leary asked for more information on his injury or activities that might have caused his pain he said Petitioner was unable to give him an exact time or moment or activity, saying he was just doing his normal activity of hanging conduit and working on a scissor lift. (RX 3 p.8-10)

During his examination he found Petitioner to be stooped forward, to have a positive straight leg raise on the right, causing back pain as well as pain in his butt and the back of his leg to the knee. He found nothing wrong with his hips, nor did he find any muscle weakness or neurological abnormalities. Dr. O'Leary said he reviewed medical records, and summarized them. He noted he did not have an MRI to view, but he felt Petitioner had a component of lumbar right lower extremity radiculopathy, an irritated nerve root in the lumbar spine, as well as lumbar spondylosis and possibly a component of lumbar spinal stenosis at L5/S1, a narrowing in the spinal canal. He thought a micro decompression surgery on the right at L5/S1 would be appropriate. (RX 3 p.10-15)

Dr. O'Leary said he was not able to make a connection between Petitioner's condition and need for surgery and his alleged work incident in large part because the story was mostly inconsistent as no moment in time for when this occurred was provided. He said Petitioner could not tell him how he thought his work had caused the onset of his problem. He noted this was a degenerative process and that most problems of this sort presented without injury, without trauma, without any notable physical event. (RX 3 p.15)

Dr. O'Leary said he was provided with additional medical records at a later date, and he summarized those as well. These included the records of Dr. Arnold, who performed surgery on Petitioner in January of 2020. He said those additional records did not change his opinions, as Dr. Arnold's records also were devoid of any specific injury or connection between Petitioner's work activities and the development of these symptoms. (RX 3 p.20-22)

On cross-examination Dr. O'Leary said he performed one or two independent medical examinations per week, and on occasion, none were performed. He said he might perform one medical record review every other month. He said 95 percent of his practice was devoted to the treatment of patients. When asked a hypothetical question containing a general description of Petitioner's work with no specificity on amount of time for those

activities on the day he began having back pain at lunch time which worsened throughout the day, and whether those types of activities could have contributed to Petitioner's onset of pain, Dr. O'Leary said he felt that kind of activity could bring about the onset of a lumbar disc herniation. (RX 3 p.24-27)

DEPOSITION TESTIMONY OF DENNIS GUSTAFSON

Mr. Gustafson testified by deposition on June 17, 2021 as a witness for Petitioner. He testified that he was a vocational rehabilitation counselor and consultant, and first spoke with Petitioner by telephone on January 12, 2021. His testimony on direct examination was consistent with his vocational report and supplemental vocational report, Petitioner Exhibits 5 and 6. He said he reviewed Petitioner's educational history with him, as well as his work history. He said the physical demands for an electrician were that of medium work, he had to be able to occasionally lift 50 pounds, frequently lift 25 pounds and constantly lift 10 pounds, with occasional climbing, balance, stooping, kneeling, crouching, crawling and fingering. While he had not done the same analysis and included it in his report, he said HVAC work had similar requirements. Petitioner told him his restrictions were no lifting, pulling, or pushing of more than 30 pounds, and no standing of more than 30 minutes at a time. He interpreted the standing restriction as meaning Petitioner needed to change positions. Petitioner told him he thought he would have to sit half the time to work. He said electricians had to be on their feet al of the time. He said light jobs also required a person not to sit other than in certain situations. (PX 10 p.4-11)

Mr. Gustafson said he reviewed Petitioner's job search records and felt them to be pretty extensive. He noted that while Petitioner had several telephone interviews, he had not had any in person interviews. He said a number of the jobs Petitioner applied for were not consistent with his physical limitations and he which jobs he might realistically be able to perform and which would be well beyond what he could do. (PX 10 p.11,12)

He said there was one job Petitioner had done before which he could still do with his physical limitations, substitute teaching, which while performed standing would also allow him to sit down. He said that job did not exist on a full time basis, it existed periodically or on-call. He felt Petitioner could still do that job if it were available for him. He said other than substitute teaching Petitioner did not have transferable skills. He said Petitioner had a Bachelor's degree and good communication skills so he made suggestions for jobs where that might make sense. (PX 10 p.12-14)

Mr. Gustafson met with Petitioner for an hour approximately four months later, on May 6, 2021. He said he spent his time during this meeting trying to motivate Petitioner. On this occasion he reviewed the job logs and found that some of the jobs Petitioner had applied for were consistent with Petitioner's physical abilities. As a result of this meeting he said his assessment changed from it being an extremely difficult job search to a belief that Petitioner's likelihood of successful employment was going to be poor as he had no transferrable job skills, and would have to enter the workforce at the entry level, his medical condition and his age. (PX 10 p.14-18)

On cross examination Mr. Gustafson again said that Petitioner's only transferable job skill was substitute teaching. He said Petitioner had no transferrable skills from being an electrician. He said a job at Menard's for instance, was not a skill transfer, it would be a knowledge transfer. (PX 10 p.22-26) Mr.

Gustafson said he spoke with Petitioner for 1.2 hours on the telephone on the first occasion and met with him for 1 hour on the second occasion. On cross-examination Mr. Gustafson while talking about meeting with Petitioner, offered that "you can't do much in an hour." He said there was no such thing as a permanent substitute, they were all on-call, though such a job could be steady if a teacher was going to be off for two, three, or four months, but that was the exception, not the standard situation. He said substitute teaching was light work and would allow Petitioner to sit down. He agreed that his report noted several times that substitute teaching was within Petitioner's restrictions and experience. He said Petitioner was concerned that he might not get hired as he had not done it in the last eight years. Mr. Gustafson said that he specifically suggested to Petitioner that he check with all school districts. He said he talked to Petitioner about his getting his license back as a substitute teacher and registering with the local school districts. He said he recommended looking for substitute teaching positions when he spoke with him in January of 2021, and that when he met with Petitioner in May of 2021 Petitioner had not obtained his license, so he told him to go to the regional superintendent of education and get his substitute teaching license which he could than take to school districts and make them aware of his availability. He said he did not tell Petitioner to do that, he suggested he do so, that it would be a good thing to do based on his prior teaching experience. (PX 10 p.30-36,40,41,80)

Mr. Gustafson said that if Petitioner were to apply for a teaching position he would not be required to disclose that he had a prior work injury, and that if the job met his physical requirements there was no reason to worry about that, it would not be an issue for teaching. He said he had recommended Petitioner get his teaching license renewed, it was not something he needed assistance doing as he had done it before. Mr. Gustafson said that when he spoke to Petitioner last he had not done so. He assumed Petitioner would not even need a teaching certificate to teach in the Catholic schools. He had no idea if there were a lot of openings in the Catholic schools. He said Petitioner should apply for work that he thought he could handle, even if it was part-time. Mr. Gustafson said he did not provide Petitioner with jobs to apply for, Petitioner saw jobs himself, mainly on Indeed. When asked if it would be helpful if Respondent or Genix had sent him or wanted to send him jobs he could apply for that were withing his restrictions and currently available, Mr. Gustafson said it was always better to hire a professional to get assistance. (PX 10 p.45,46,48,51,52,54-56)

Mr. Gustafson said he recommended to Petitioner that he look for jobs driving, pharmaceutical and medical specimen pick-up and delivery type jobs, and he though Petitioner had done that early on in the process. While initially doubtful of Petitioner performing a driving job because of his job description and problems he might have sitting, he admitted he did not know of any restrictions Petitioner might have involving driving, but then said most people who had back injuries did not want to sit for extended periods of time. (PX 10 p.61,65,66)

Mr. Gustafson said he did not try to help Petitioner to find a job as that was not what he was hired to do, and while he had done that in the past, it is not what he currently does, as after 47 years he was slowing down. He said job search assistance would be helpful for Petitioner. (PX 10 p.81,84)

Mr. Gustafson on many occasions during his testimony said that the odds of Petitioner being hired to any job were small, and he would not succeed, citing his age, his restrictions, his lack of transferable job skills, the area where he lived, that nobody would hire him, even as a substitute teacher, as he was not a desirable candidate, that they would not hire him unless they could not get anybody else. Yet he said he kept telling

Petitioner to "apply for anything that he thinks he can handle." Even when he was asked about a job that was within Petitioner's restrictions, driving to deliver blood samples, for example, Mr. Gustafson said, "it's not a good idea to take chances on a job that could make your back condition worse or any other matter." (PX 10 p. 16,17,18,22,33,34,35,45,48,56,66,70,71,85,91)

On redirect examination Mr. Gustafson said that in his opinion Petitioner's getting his substitute license reinstated would not likely result in Petitioner's obtaining reliable full-time employment. Nor did he think he would get hired to teach in a trade school. Nor did he think he would be hired at a private school. He did not think driving a truck as a career would be realistic for Petitioner. (PX 10 p.87-98)

On recross examination Mr. Gustafson said that although he did not feel Petitioner would find a full time job teaching or at a trade school, he had recommended those to him in his January 2021 telephone call and in his May 2021 meeting. He said that whether Petitioner followed his recommendations was up to him, he leaves it up to the individual to focus where they want to as long as it meets the physical requirements. He said employers were not interested in hiring someone after age 55 unless the person had specific skills they could use, that they were not interested particularly in an entry level job where they could hire a younger person who might have physical stamina, they hire retirees and older people into part-time jobs. He said Petitioner would be more likely to find a part-time job with his skills than a full time job, at companies like Menard's where they like to hire tradesmen part time as they are reliable but may not have the stamina for full-time work. (PX 10 p.89,91,93)

DEPOSITION TESTIMONY OF KAREN KANE-THALER

Ms. Kane-Thaler testified by deposition on October 19, 2021 as a witness for Respondent. She testified that she was employed by Genex Services and its predecessors in interest for 16 years and with Broadspire or its predecessor in interest prior to that. Altogether she said she had been a vocational consultant for a total of 31 years. She identified the vocational assessment she drafted on August 19, 2021 and which was also introduced into evidence by Respondent as Respondent Exhibit 4. She said she drafted that report after meeting with Petitioner on July 22, 2021. The report listed all of the documents she reviewed, including job search logs and medical records, as well as her summary of the depositions she reviewed of Dr. O'Leary and Dr. Arnold and information she received from Petitioner, including his work and education history. She said Petitioner's attorney was present at the beginning and at the end of her interview of Petitioner. (RX 5 p.5-12)

Ms. Kane-Thaler said she spoke to Petitioner about getting his teaching certificate and he told her he would need to pay $500 and take some classes and that due to his financial condition he could not pursue that. She said he did have a substitute teaching certificate and all he had to do was contact the Regional Education Office in his region and do an application and he could work as a substitute teacher. She said she had a teaching certificate herself and when she reinstated it she had to pay the fee and take nine hours of college credit. She said to substitute teach all he had to do was reach out to the regional office, complete an application, submit the paperwork and then reach out to the school districts he wanted to apply to and they would help complete the process so they could retain him as a substitute teacher. She said to reinstate to become a full-time teacher he had to either pay $500 or take the nine semesters of course work to get his teaching certificate fully reinstated. She said Petitioner was aware of those things but had not pursued them. She said he also advised her he was aware of what was needed to start substitute teaching, but he only talked about the lack of a full teaching

certificate, but she clarified with him what it took to be a substitute teacher. She said substitute teaching was outlined in her labor market survey contacts. (RX 5 p.14-17)

Petitioner told her he had discussed substitute teaching with Mr. Gustafson about teaching, but he had not started that by the time she met with him in July, 2021, he had not contacted the regional office to get substitute teaching requirements or to renew his teaching certificate. She reviewed Petitioner's job search logs with him and told him that some of the jobs exceeded his physical restrictions, and told him what kind of jobs he might look for to use his knowledge of HVAC, etc.. (RX 5 p.18-21)

Ms. Kane-Thaler explained how she evaluated Petitioner's abilities on reasoning development, mathematics and language and then used software to determine the right work category and jobs for Petitioner. She said a partial list, which noted jobs such as teacher, automotive salesperson, insurance clerk, credit clerk and sales collection, was a sampling of job titles Petitioner would be qualified for, it was not all inclusive. She said she conducted a labor market survey of jobs available within Petitioner's individual physical abilities, again giving a sampling of ten available jobs. Included in that list was substitute teacher positions in the Danville public schools, where the schools indicated they had sufficient opportunities for substitutes to be full-time, every day, and they were regularly posting for applicants. She said those positions did not require a $500 fee or 8 or 9 hours of classes to qualify. The Urbana School District advised her they wanted Petitioner to apply, that they could work with people to resolve teaching certificate problems, that they had district-wide opportunities, including full-time substitute teaching, paying $110 to $140 per day to start, but again, Petitioner had never applied for employment with either the Danville or Urbana school districts. She said school districts were having a hard time getting substitute teachers, that retired teachers are being called by districts in hopes of them do substitute work, so they are seeking teachers who are 55 to 60 years of age. (RX 5 p.23-25,30-37,62-64; RX 4 p.16-24,41,42)

Petitioner had several positive assets in obtaining employment according to Ms. Kane-Thaler, he had experience as a skilled worker, knowledge of things such as customer service, installation and repair, two Associate's degrees, a Bachelor's degree in teaching, and these skills would help him assimilate into other positions. She said she also identified barriers and problems, including a problem with his drivers license which should be resolved in October of 2021, but would make showing up to work difficult, as well as his applying for jobs that are not within Dr. Arnold's restrictions. (RX 5 p.47-50)

Ms. Kane-Thaler said that in her opinion Petitioner should be able to be hired to maintain full-time gainful employment based upon his transferrable skills and knowledge, and that based on her labor market survey types of positions exist in the available labor market that he would be considered for if he made a good faith employment to interact with employers for appropriate positions. She said she felt he was applying for HVAC positions that were beyond Dr. Arnold's restrictions, and he could not do those jobs even if he got an interview. She said he also applied for managerial and computer IT administrator jobs he was not qualified for and for which he had no experience. (RX 5 p.55-58)

Ms. Kane-Thaler said she disagreed with Mr. Gustafson in regard to Petitioner's employability at Menard's, saying she went into Menard's daily and had placed people with the company and and stores like that did not use age as a factor in hiring, and Petitioner would not have a hard time with that company if he made a good faith effort to obtain employment with them. (RX 5 p.79,80)

On cross examination Ms. Kane-Thaler said that since 2005 her employer had elected to only work with employers, so 100 percent of her work was done for employers. (RX 5 p.84,85)

Ms. Kane-Thaler said Petitioner told her that Mr. Gustafson had advised him to advise employers of what his restrictions were, to tell them he had restrictions, even if the job was within his physical abilities. When asked if Mr. Gustafson's advice was discretionary and different vocational experts might feel differently about it, Ms. Kane-Thaler said she did not consider it discretionary if you were making a good faith effort to obtain employment, that there was a time and a place to do it, and the onset of a contact with a potential employer was not the time, and if you were applying for a job within your physical abilities there was no reason to present your restrictions. unless you were asking for accommodations. She said if you are doing it upfront, you are not making a good faith effort to obtain employment. She said while vocational experts may do things differently, they all adhere to the same principles, they are supposed to be placing a person in a job, and should be explaining to the person how to present themselves and seek jobs within their abilities. (RX 5 p.107-111)

Ms. Kane-Thaler said that schools are usually closed in the summers and teachers are not teaching. She said there has consistently been a teacher shortage and a substitute teacher shortage, with schools having difficulty even before COVID. She said the courses which might be required to regain his teaching certificate would cost $125 to $300 per hour depending on the university, the closest university was the University of Illinois, but he might be able to take the classes on-line. (RX 5 p.117-119)

Ms. Kane-Thaler testified that she did not know how many Catholic schools were in the area. She said religious requirements for schools varied by school, that people she knew who were not Catholic taught at Catholic schools, while there were other schools where all of the teachers were Catholic, it depended on the schools. She also said she had placed individuals into teaching positions and had evaluated people for reinstating teaching certificates over her 30 years of working in the field, though she had not in the previous five years, placed anyone into a substitute teacher position. (RX 5 p.143-145)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner's testimony at arbitration was that at noon on the date of accident and at the end of the day his back was sore, worse upon arriving home and exiting his vehicle. He said that when seen in the emergency room four days later, on February 11, 2019, he did not tell the medical staff of an injury as he thought it was just a pulled muscle. On cross examination Petitioner said he imagined he gave the Carle staff a work-related history of accident, and that if such a history was not in the records, the records were incorrect. The emergency room records, however, indicate Petitioner was not only having a sore back, he had pain radiating down his right leg with numbness and tingling over the right thigh, and the pain was moderately severe and constant. Petitioner said he did not tell Dr. Johnson at the Spine Clinic of an injury on February 14, 2019 as he again thought it was a muscle issue and could be treated quickly. Dr. Johnson's records indicate no history linking the back problem to work was given, Petitioner's pain was 5/10, and straight raise testing was positive on the right. When he went to his primary care physician to get Norco prescribed for pain he again was complaining of pain into his legs exacerbated by walking, he again did not mention the pain being work related, stating that

there had been no injury. The radicular symptoms and numbness and tingling were far more than "sore muscles." It was not until April 1, 2019 that Petitioner gave a work related history. Petitioner's testimony in regard to injuring himself while working is very suspect.

Petitioner's alleged attempt to return to work for Respondent is indicative of no real desire to work for them, or perhaps ever again, as after being released by Dr. Arnold with restrictions Petitioner testified he called a left a voice mail for a supervisor whose name he could not remember, and never got a return call. Nor, it seems, did he make any further attempt to return to work with Respondent. Petitioner's job search efforts are also suspect, as he "lost" his initial records of search attempts, he applied for jobs which exceeded his restrictions on multiple occasions (Petitioner Exhibits 3 and 7), despite being advised not to do so by two vocational consultants, and he applied for jobs which he obviously was not qualified for by training or experience, jobs which would require both. In his initial physical therapy sessions in April of 2019 he noted that his goal was to get as good as he could and to return to work, while during the second set of therapy sessions in April of 2020 his goal was to get back to normal household activities. Returning to work did not seem to be a goal. Petitioner also appeared to have been sabotaging his job search efforts by telling anyone who would communicate with him of his having physical limitations, seemingly raising a red flag warning to them not to hire him. The most telling evidence of his not actually wanting to get hired and work was his utter refusal to seek work as a substitute teacher, a job he was qualified for, had over ten years of experience at, and a job where there was a great demand, very close to his home. He had been strongly recommended to do so by both vocational consultants, one of whom noted that full-time substitute positions were available. His excuse was that it did not pay well, and was not 12 months a year. Petitioner was represented by experienced counsel and, should he have pursued that employment would have been eligible for wage differential payments, but the Arbitrator was convinced by Petitioner's testimony and appearance at arbitration, by the testimony of both vocational consultants about substitute teaching, and Petitioner's knowing refusal to apply for said positions, that despite his testimony to the contrary, he did not wish to return to an employed status. The Arbitrator finds Petitioner to not be a credible witness.

Dr. Arnold and Dr. O'Leary both testified in a forthright manner, answering all questions put to them with no apparent effort to evade questions posed by or argue with either attorney. Their objective physical examination findings were similar, only their opinions were different, and neither's opinions appeared to be unsupported by their examinations and experience. The Arbitrator finds both doctors to be credible witnesses.

Mr. Gustafson spoke or met with Petitioner on two occasions for a total of 2.2 hours. He testified that he had not been fired to help find Petitioner a job, to help place him in a position. His opinions appeared to be based on his judgment that Petitioner had no transferrable skills and nobody would want to hire him for numerous reasons. He even discounted Petitioner's ability to be hired as a substitute teacher, and did not appear to know of great demand for substitute teachers. He did agree that Petitioner was applying for inappropriate jobs and should not be telling employers of restrictions at the beginning of contacts with them. While his opinions would not necessarily have been accepted, it appeared he answered all questions honestly. The Arbitrator finds Mr. Gustafson to be a credible witness.

Ms. Kane-Thaler met with Petitioner on one occasion. Her report and testimony appeared to be more thorough than that of Mr. Gustafson, and she shared in his opinions in regard to the inappropriateness of

Petitioner applying for jobs exceeding his abilities and/or restrictions as well as also encouraging him to apply for substitute teaching positions. She was much stronger in her opinions in regard to Petitioner's inappropriateness in advising employers immediately of his restrictions and felt his doing so amounted to a bad faith job search effort. Like Mr. Gustafson, she, too, appeared to answer all questions honestly. The Arbitrator finds Ms. Kane-Thaler to be a credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on February 7, 2019, and whether Petitioner's current condition of ill-being, a herniated disc to the right at L5/S1, is causally related to the accident of February 7, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein

The Arbitrator's credibility assessments, above, are incorporated herein.

Accidents are generally classified as being either those arising from a single identifiable even or those cause by repetitive trauma. Edward Hines Precision Components vs. Industrial Commission, 356 Ill.App.3rd 186,194, 825 N.E.2nd 773,780, 292 Ill.Dec. 185 (2005). Here Petitioner did not attempt to prove a repetitive trauma, the only questions asked of the doctors were in regard to the activities of one day, February 7, 2019. Further, the other evidence submitted, including Petitioner's testimony at arbitration, does not support such a claim. Instead, Petitioner claimed that he felt he was sore at lunch due to "a day's hard work." He went on to say he was sore when he finished work and had a hard time getting out of his car when he got home. He specifically stated that he had not suffered a fall that day. He did not point to any specific event as precipitating his injury. Much like the Petitioner in Steve McCullough vs. Chicagoland Refreshments and Hartford Accident and Indemnity Co., 20 IWCC 0144, he did not know what had happened, he just knew he was sore and in pain.

As noted above, Petitioner did not advise any of his several medical providers of his problem being related in any way with his work until April 1, 2019 when he mentioned it to his physical therapist. Instead, he told all of his prior medical providers that he had not had an injury of any sort.

Dr. Arnold, Petitioner's neurosurgeon, does not appear to have ever received a history of accident from Petitioner. He could not remember getting one, no such history was included in his records, and he testified that placing histories of that sort in the records is the normal procedure if such a history is given. In response to a hypothetical question Dr. Arnold said that the activities described could have caused a disk herniation. That begs the question, however, whether one of those specific activities was a triggering event which cause an injury. As the Supreme Court noted in Mathiessen & Hageler Zinc Co. vs. Industrial Board, 284 Ill. 378, 120 N.E. 249 (1918), an injury is something traceable to a definite time, place and cause which occurs in the course of employment, unexpectedly. It is not good enough to say that "something must have happened," as an accident cannot be the product of speculation, it must be "traceable to a definite time, place and cause." Laclede

Steel Co. vs. Industrial Commission, 6 Ill.2d 296,230(1955). Here Petitioner did not point to any definite time, any definite place or any definite cause.

Dr. Arnold also noted that "I wouldn't say that everything was normal the day before, and then he did all this work on the day in question, and then he herniated this disk, and that's the reason for it." He was asked if the activities in the hypothetical could have caused Petitioner's degenerative disk disease to become symptomatic, and to that he said that it was "a little more unlikely, given that you're talking about one day in a guy who is 57 years old and so any one day is unlikely to be any worse than the rest in terms of the total sort of timeline of lumbar degenerative disease."

Dr. O'Leary, Respondent's Section 12 examiner, was asked a similar hypothetical on cross-examination and said that the kind of activity described could bring about the onset of a lumbar disc herniation. But he said that he was not able to make a connection between Petitioner's condition and his need for surgery and an alleged work incident in large part because Petitioner's story had been quite inconsistent and no moment in time for when this occurred had been provided to anyone. He noted that what Petitioner had was a degenerative process, and that most problems of this sort presented without injury, without trauma, without any notable event.

The Arbitrator finds that Petitioner has failed to prove that he suffered an accident on February 7, 2019, which arose out of and in the course of his employment by Respondent.

The Arbitrator further finds that Petitioner's medical condition, a herniated disc to the right at L5/S1, is not causally related to the accident of February 7, 2019. These findings are based upon the testimony of Petitioner and the records of his medical treaters showing a denial of any injury precipitating his pain, as well as the opinions of Dr. Arnold and Dr. O'Leary, above. Petitioner's testimony in regard to his general work bringing on his soreness is found to not be credible based upon his presentation at arbitration and his repeatedly stating to his medical providers that he had not suffered an injury.

Based on the above findings of no accident and no causal connection all other issues in dispute are deemed moot.

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC017980
Case Name	Katie Harvey v. Country Financial
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	22IWCC0332
Number of Pages of Decision	7
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Fred Johnson
Respondent Attorney	Jack Shanahan

DATE FILED: 8/26/2022

/s/Stephen Mathis, Commissioner

Signature

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATIE HARVEY,

Petitioner,

vs. NO: 12 WC 017980

COUNTRY FINANCIAL,

Respondent.

DECISION AND OPINION ON REVIEW SECTIONS 8(a),19(l) and 19(k)

Timely Petition for Review under section 8(a) having been filed by Petitioner and notice given to all parties, the Commission, after considering the issues of further medical benefits, and penalties pursuant to sections 19(l) and 19(k) of the Act, grants the 8(a) petition and grants the petition for penalties for the reasons set forth below.

Petitioner sustained severe work-related traumatic injuries on June 7, 2011, which caused multiple fractures, traumatic brain injury, and a spinal cord injury that rendered her a paraplegic. The parties entered into a settlement contract on March 20, 2013, which kept Petitioner's Section 8(a) rights open. Subsequently, the parties executed additional stipulations which continued to keep Section 8(a) rights open.

Petitioner first filed a Section 8(a) petition on December 24, 2019, seeking payment for past and prospective physical therapy. Petitioner lives independently in her home with her now 12 year old daughter. Petitioner is 33 years of age at present. She is largely confined to a wheelchair but occasionally can use a walker to stand and perform limited household tasks such as washing dishes.

Hearing on Petitioner's 2019 Section 8(a) petition was conducted before Commissioner Simpson on March 13, 2020. Evidence at that hearing included deposition testimony from Dr. Sanjiv Jain, Petitioner's treating physician who specializes in physical medicine and rehabilitation. Dr. Jain testified that among Petitioner's significant medical challenges and disability that she suffers from severe spasticity and flexion contractures of her hips which produce intractable pain. The spasticity and contractures are caused by increased tone secondary to her spinal cord injuries and paralysis.

Dr. Jain recommended a physical therapy regime targeted at improving Ms. Harvey's range of motion and stretching to decrease spasticity and painful contractures. Dr. Jain testified that physical therapy with a skilled practitioner also helps to build strength and optimize Petitioner's ability to make transfers and improve her balance to aid in her ability to stand with her walker.

On July 31, 2020, the Commission issued its Decision which provided for the payment of past and prospective physical therapy pursuant to Dr. Jain's care plan. Respondent did not appeal the Commission's award of benefits and prospective physical therapy as prescribed by Dr. Jain. Dr. Jain's plan of care anticipated physical therapy several times per week to reduce pain, improve range of motion, and optimize function. Since her condition is permanent, she will continue to require physical therapy for the foreseeable future.

Petitioner underwent a Section 12 evaluation at the request of Respondent by Dr. Cantrell on June 9, 2021. Dr. Cantrell noted significant bilateral hip flexion contractures and spasticity and acknowledged Petitioner's need for ongoing physical therapy. He noted the impact of these conditions on Petitioner's activities of daily living. Dr. Cantrell stated the opinion that Petitioner did not require physical therapy 2-3 times per week but would benefit from physical therapy on a once-every-other-week basis to maintain range of motion. Dr. Cantrell emphasized the need for Petitioner to strictly adhere to a home exercise program to help maintain her range of motion and control spasticity. Thus, the issues on review currently are the frequency of physical therapy services and penalties. Petitioner filed the currently pending Section 8(a) petition on March 3, 2022, which additionally seeks penalties pursuant to Section 19(l)and 19(k) of the Act.

Petitioner was receiving physical therapy 2-3 times per week in accordance with Dr. Jain's recommendation until August 26, 2021. On that date, Respondent's claims adjustor notified ATI that based upon the report of Section 12 provider Dr. Cantrell only 26 physical therapy sessions were necessary annually and that no further visits would be authorized for the remainder of calender year 2021.

At the hearing conducted before Commissioner Mathis on March 1, 2022, Petitioner testified that due to Respondent withholding authorization she did not have any physical therapy from August 26, 2021, through November 2, 2021. She testified that she needs the forceful

stretching she receives in therapy to relieve the painful muscle contractures she experiences. Petitioner filed the currently pending Section 8(a) petition on March 3, 2022, which additionally seeks penalties pursuant to Sections 19(l)and 19(k) of the Act.

Petitioner testified that although she performs her home exercise program daily, she is unable to exert the stretching force on her own that is required to relieve the contractures. Without the frequent stretching at physical therapy Petitioner's function has deteriorated. She was unable to stand with her walker to perform household chores. The hip tightness caused her back to arch and she was unable to lie flat to sleep. She experienced back pain of such severity that Dr. Jain prescribed oxycodone. Petitioner testified that she took the oxycodone rarely due to side effects and fear of dependency.

Petitioner testified that since November 2, 2021 she receives only one session of PT every 14 days instead of 2-3 times per week as she had prior to August 26, 2021. She now experiences increased cramping leg pain. Her pain can no longer be managed by over-the-counter Tylenol or Ibuprofen. Her sleep is now disturbed by pain at night that causes her back to arch. She now experiences painful muscle spasms and twitching. Her pain score has increased, and her function has deteriorated since the decrease in physical therapy.

When Petitioner was receiving physical therapy 2-3 times per week, her pain was less and she did not require any prescription pain medication; her sleep was not interrupted by spasms, and her overall function was better. Petitioner never required oxycodone when she was receiving PT 2-3 times per week.

Dr. Jain testified by evidence deposition taken on December 7, 2021. Dr. Jain had last seen Petitioner on October 19, 2021. Dr. Jain testified that Ms. Harvey continues to require physical therapy secondary to her spasticity, contractures, tone, and decreased mobility both for transfers and ambulation. Petitioner sustained multiple fractures of the thoracic spine and a spinal cord injury with resultant spasticity. She is unable to straighten her lower legs due to contractures. She requires ongoing aggressive range of motion and stretching 2-3 times per week to enable her to bear weight and do activities in a standing position.

Petitioner is not able to do these therapies on her own. The therapy requires a passive stretch that she cannot perform independently because of her spinal cord injury and weakness in her legs. Dr. Jain's recommendation is that physical therapy be given 3 times per week. Therapy could at some point be reduced to twice per week in the future provided Petitioner is able to maintain her gains. Her need for therapy will continue into the foreseeable future. Attempts at decreasing the frequency of PT for Petitioner in the past have resulted in increased pain and loss of function. PT is critical to maintaining her function, and level of independence.

During the period when Petitioner's physical therapy was suspended due to lack of authorization she regressed in her function and independence in activities of daily living. Dr. Jain testified that Petitioner is a young woman with a young child and that she is trying to stay active.

In Dr. Jain's opinion it is not in Petitioner's best interests to decrease the frequency of therapy. If therapy continues at the decreased frequency advocated by Dr. Cantrell Petitioner is at risk for increased pain, increased contractures, and decreased functional mobility.

The evidence deposition of Section 12 examiner Dr. Cantrell was taken on February 16, 2022. He performed an evaluation of Petitioner at the request of Respondent in June 2021. Dr. Cantrell acknowledged that an argument could be made for weekly physical therapy sessions for Petitioner as being beneficial. It's his opinion however, that physical therapy every 14 days is appropriate for a "maintenance" level of therapy. Petitioner reported to Dr. Cantrell that she could do her exercises at home by herself, but she is not able to do the sustained stretching that the therapist performs.

Dr. Cantrell admitted on cross examination that he has not seen any of Petitioner's medical records since June 2021, and he did not review Dr. Jain's December 2021 deposition. He has no knowledge of the basis for the opinions Dr. Jain expressed in his December 2021 deposition. Dr. Cantrell's report does not state any medical basis for his opinion that physical therapy every 14 days is appropriate for Petitioner.

Dr. Cantrell admitted to having no knowledge as to what impact not having physical therapy for a 14-day period had on Petitioner in 2021. The Commission notes that Dr. Cantrell's lack of knowledge concerning the impact the suspension of physical therapy services had on Petitioner's condition and functionality seriously undermines the credibility of his opinion regarding the recommended frequency of physical therapy services. Furthermore, the Commission finds that Dr. Jain's explanation as to why Petitioner requires multiple physical therapy sessions on a weekly basis is more persuasive and compelling.

The Commission notes that Petitioner sustained a severe and permanent injury at an early age and that the welfare and well-being of both Petitioner and her young daughter mandate the utilization of reasonable and necessary physical therapy to restore and maintain her function and independence to the degree medically possible. The Commission further finds that Petitioner did not require the use of oxycodone to control her pain when she was receiving physical therapy at the frequency recommended by Dr. Jain prior to August 24, 2021. For the foregoing reasons the Commission finds that Dr. Jain's plan of care for physical therapy sessions 2-3 times per week is reasonable and necessary. Dr. Jain was persuasive in his testimony that Petitioner's constellation of injuries, dictate the need for ongoing physical therapy at the frequency prescribed by his plan of care for the foreseeable future. On that basis the Commission finds that ongoing physical therapy 2-3 times per week should be authorized and paid for by Respondent.

Petitioner asserts that the failure of Respondent to authorize and pay for therapy at the frequency recommended by Dr. Jain has been without good cause, is vexatious, intentional, and deliberate and that penalties under Sections 19(l) and 19(k) are warranted. The Commission is troubled by Respondent's reliance on Dr. Cantrell's Section 12 report of June 9, 2021, in justifying the decrease in frequency of physical therapy benefits to Petitioner to one session

every 14 days. Dr. Cantrell's report stops short of *recommending* a decrease in the frequency of Petitioner's physical therapy sessions. He does not state any basis or medical justification for the decrease in frequency of physical therapy. He does not state an opinion that Petitioner will in anyway benefit from the decrease in services. Ironically, he makes his statement in the context of his commentary concerning the severity of Petitioner's "continued significant hip flexor spasticity" and the adverse impact on her activities of daily living.

Having carefully considered the entire record, the Commission gives greater weight to the opinions of Dr. Jain and finds that Petitioner is entitled to past and prospective physical therapy on the basis of 2-3 sessions per week as recommended by Dr. Jain to restore and maintain her function and manage her pain. Such an award of ongoing medical and palliative care is within the Commission's statutory authority, See *Gordon v. Tri-County Personnel,*98 WC30323, 2010 Ill. Wrk.Comp. LEXUIS 1017, aff'd, *Tri-County Personnel Mgmt. v. Ill. Workers' Comp. Comm'n.,* 2012 IL App (3d) 110609WC-U.

Petitioner seeks penalties and fees pursuant to sections 19(l) and 19(k) of the Act be imposed upon Respondent for its failure to authorize and pay for ongoing physical therapy for Petitioner. The Commission finds that Respondent's claims adjustor, without concern for the potential detriment to Petitioner, contorted the letter as well as the spirit of Dr. Cantrell's report s and intentionally and vexatiously withheld authorization for physical therapy to Petitioner for a period of ten weeks.

Petitioner is a young woman with a young child entirely dependent upon her. This unfortunate action adversely impacted the health and safety of a vulnerable young mother who is confined to a wheelchair for the rest of her life. Respondent's failure to authorize physical therapy caused Petitioner to suffer additional pain for which she was prescribed oxycodone, a highly addictive opiate which she did not require while she was receiving physical therapy per Dr. Jain's plan of care. The Commission finds that the decision to withhold physical therapy was intentional and vexatious and does rise to a level that compels the imposition of penalties and fees on Respondent in accordance with sections 19(l) and 19(k) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay outstanding physical therapy bills in evidence pursuant to Sections 8(a) and 8.2 of the Act. To the extent Medicare has paid any of the physical therapy bills, Respondent shall hold Petitioner harmless from any claims for reimbursement by Medicare.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and provide prospective physical therapy, 2-3 sessions per week, as prescribed by Dr. Jain, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Section 19(k) penalties in the amount of 50% of the sum of unpaid medical expenses pursuant to the fee schedule or negotiated rate.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties pursuant to Section 19(l) in the amount of $10,000.00.

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 injury.

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

August 26, 2022

SJM/msb
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014732
Case Name	Jennifer Pentz v. JB Hunt
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0333
Number of Pages of Decision	15
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Brenton Schmitz, Matthew Jones
Respondent Attorney	Michael Jasper

DATE FILED: 8/29/2022

/s/ Thomas Tyrrell, Commissioner

Signature

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

JENNIFER PENTZ,

Petitioner,

vs. NO: 20 WC 14732

JB HUNT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of current condition, medical services, medical care, 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 11, 2021, 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 $62,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 29, 2022
o072622
TJT/ldm
051

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

/s/*Maria E. Portela*
Maria E. Portela

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014732
Case Name	PENTZ, JENNIFER v. JB HUNT
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Michael Jasper

DATE FILED: 6/11/2021

INTEREST RATE FOR THE WEEK OF JUNE 8, 2021 0.04%

/s/ Stephen Friedman, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Pentz
Employee/Petitioner

v.

JB Hunt
Employer/Respondent

Case # **20** WC **14732**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **May 10, 2021**. 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 15, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**86,164.00**; the average weekly wage was $**1,657.00**.

On the date of accident, Petitioner was **45** 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 $**8,840.40** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**8,840.40**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,104.67/week for 51 3/7 weeks, commencing May 16, 2020 through May 10, 2021, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $8,840.40 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $5,125.33 to Bolingbrook Adventist Hospital, $1,038.00 to Illinois Emergency Medicine Specialists, $239.00 to Suburban Radiologists, $7,375.00 to Premier Occupational Health, and $298.00 to Chicago Hand and Orthopedic Surgery, 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 or adjustments made.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Papierski including an arthroscopic rotator cuff repair with visualization of the long head of the biceps with subacromial decompression, any post-operative treatment, 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

JUNE 11, 2021

ICArbDec19(b)

Statement of Facts

Petitioner Jennifer Pentz testified that she is employed by Respondent JB Hunt as a truck driver. She has been employed by Respondent for 5½ years. She has been a truck driver for 23 years. She has taken DOT physicals every 2 years and never had any issue with clearance with regard to her left arm. She drives a tractor-trailer 18-wheeler to deliver junk mail. Her job requires climbing in and out of the tractor, opening and closing the trailer doors, switching the trailers which is unhooking it from the tractor and cranking the landing gears. She must climb inside the trailer to secure loads if they seem unstable. When she arrives at a delivery site she must get out of the tractor, check in, open the doors, back in and usually unhook the trailer, hook up to another trailer. There is a lot of physical work in cranking, opening, getting in and out of the tractor. Cranking takes both arms. The crank is about waist high. Opening and closing the back door requires unlatching the latches and pulling the door open to bring it to the side, and latch it to the trailer. This is at shoulder level or above. She did not have any injuries, medical treatment, of problems with her left arm prior to May 15, 2020.

Petitioner testified that she was working for Respondent on May 15, 2020. She worked the night shift. She was at her last stop and got done checking in. She already had her trailer ready to go, and was climbing into the tractor. It was a little bit after midnight. There are handrails on the door and on the tractor. There are three steps. It is about four feet tall high when you get to the top step. You have to hold on, grab, and step. The last step was to get into the tractor itself. That is where you have the steering wheel to get in. It was pouring rain. She thinks that is what caused her to slip. As she got to the last step and reached up to pull herself into the tractor, she lost her grip and fell to the pavement on her left side. She grabbed the steering wheel and then slipped. She was facing the inside with her back and it seemed like she fell back and then twisted. Her left arm and head hit the ground. She landed directly on her shoulder. She did not have her hand outstretched. Immediately after that happened, she noticed severe pain in her left shoulder and her head which started swelling. She could not even move her whole left arm. It was really sore.

Petitioner testified that she drove the truck 15 miles back to home base. It took longer than normal because it was raining out and she was driving basically with one arm, and going really slow. She used mostly her right hand. She could not lift her left arm. She was able to scoot the seat so she could hold the bottom of the steering wheel while shifting and using her right hand to shift gears and do the turn signals. Petitioner testified that she reported the accident and went to the ER at Adventist Bolingbrook Hospital.

Petitioner was seen at Adventist Bolingbrook Hospital on May 15, 2020 at 13:52 (PX1). She provided a history of having fallen last night around midnight while climbing into semi-truck. She complained of left shoulder and forehead pain. CT scan of the head was negative. X-rays of the left shoulder noted no acute fracture or dislocation. Minimal degenerative changes are noted in the AC joint. Glenohumeral joint space and subacromial distance are normal. There is a Hill-Sachs deformity in the humeral head (PX 1). Petitioner was diagnosed with acute head injury without loss of consciousness and injury to the left shoulder. She was prescribed Flexeril and Tramadol and referred to Premier Occupational Health (PX 1).

Petitioner filled out a Medical History at Premier on May 15, 2020 denying any prior joint or musculoskeletal problems or disorders (PX 4). She was seen by Dr. Gorovitz, giving a consistent history of slipping and falling while getting up on her tractor, landing on her left arm and hitting her head. Physical examination noted pain on motion and palpation with abnormal range of motion and strength. She was diagnosed with a contusion to the head and left shoulder and released to sit down work only with no truck driving (PX 4).

Petitioner underwent an Electrodiagnostic Functional Assessment (EFA) at Respondent's request on May 20, 2020 (RX 2). This was compared to a baseline test done 8/27/2018. Both evaluations demonstrated chronic changes as evidenced by bilateral inappropriate muscle usage and limited recruitment of type II motor units (RX 2).

Dr. Mary Reaston testified by evidence deposition taken March 24, 2021 (RX 1). She testified that she is the CEO and founder of Emerge Diagnostics. She has a Ph.D. in psychology and has a certificate in electro diagnostics. Emerge developed and sells the EFA program to insurance companies, employers, and physicians. She testified that the EFA is a combination of medical technologies which are electromyography, range of motion, and functional assessment combined into one reproducible test. It combines five accepted medical parameters making them more objective and reproducible. To perform the test, sensors are placed on the muscles. You can monitor many muscle groups together and monitor how the muscles function in combination and with range of motion. The baseline test is performed by an EMT. The second test is under the supervision of a physician. The interpretation is by a board-certified physician. The test measures muscle function and activity, ischemic changes, range of motion and functional assessment. The baseline is compared to the test after an injury (RX 1).

Dr. Reaston testified that the EFA technology is FDA approved and has been peer reviewed. She identified RX 4 and RX 5 as Peer reviewed articles published, and RX 3 as an independent opinion of the applicability of EFA in the medical setting by Dr. Ernest Chiodo prepared in other litigation involving the use of EFA. She testified that EFA has been utilized in other litigation (RX 1).

Dr. Reaston testified that in Petitioner's case, the testing showed chronic changes. These were unchanged from the baseline test. There was no acute pathology. She testified that the inappropriate muscle usage indicates a long-standing problem. It is caused by compensation patterns, guarding or chronicity. In acute injuries, there is a frequency response that was not seen in this case. She testified that the baseline test is not read. It is not looked at until the second test is performed. The lifting testing is done with both arms, not just one. She testified that the test tells that the rotator cuff was torn at the time of the baseline testing due to the chronic changes listed. Petitioner had a shoulder and cervical problem when she was tested for the baseline. There were no acute signs on the second test. Dr. Feinzimer, board-certified in emergency medical read the results.

On May 29, 2020, Dr. Gorovitz ordered an MRI of the left shoulder. The June 9, 2020 MRI impression was a complete thickness tear of the supraspinatus tendon with retraction of the tendon, mild tenosynovitis of the long head of the biceps brachii, subacromial bursitis, mild degenerative changes of the acromioclavicular joint, mild degenerative changes in the glenohumeral joint and joint effusion. The radiologist noted that the findings were indeterminate to chronic in etiology (PX 4). On June 12, 2020, Dr. Gorovitz, referred Petitioner to Dr. Papierski for evaluation and treatment. He continued Petitioner's restrictions.(PX 4).

Petitioner was seen by Dr. Papierski on June 22, 2020. After physical examination and review of the MRI, Dr. Papierski assessed a traumatic complete tear of the left rotator cuff and bursitis of the left shoulder. He states that although there are degenerative changes on the MRI, they are not significant. He states the rotator cuff tear is most likely a result of the injury as she was asymptomatic previous to this. He recommends left shoulder arthroscopy with rotator cuff repair. He agreed with the Premier work restrictions and ordered physical therapy. (PX 5). Petitioner's initial therapy evaluation was June 24, 2020. It noted limited left shoulder range of motion and strength (PX 4). Petitioner attended physical therapy with some reported improvement through July 29,

2020. She had additional follow up appointments with Dr. Gorovitz, who noted continued work restrictions and Dr. Papierski's surgical recommendation (PX 4).

Petitioner was examined at Respondent's request by Dr. Hythem Shadid on August 12, 2020 (RX 6, Ex. 2). Dr. Shadid reviewed the treating records, diagnostics and the EFA report. He documents Petitioner's complaints of pain and decreased range of motion. His physical exam notes 90 degrees of flexion and 45 degrees of external rotation. He notes 5/5 strength. He finds positive Empty Can, Neer's and Hawkins tests, and positive impingement sign. He notes left shoulder weakness with flexion and external rotation. His diagnosis is a resolved left shoulder contusion and a chronic pre-existing rotator cuff tear (RX 6, Ex 2). Dr. Shahid provided an addendum report on September 4, 2020 stating the reasons for his causation opinion were: Petitioner's ability to get up and drive her truck is inconsistent with an acute rotator cuff tear; Petitioner lacked the mechanism of injury for an acute rotator cuff tear; the EFA shows no evidence of an acute injury; and the MRI shows findings consistent with chronic pre-existing degenerative changes in the left shoulder (RX 6, Ex 3).

Dr. Papierski prepared an addendum report on November 1, 2020 (PX 5). He diagnosed a traumatic rotator cuff tear based on the history of injury He states Petitioner was asymptomatic before the injury and subsequently developed pain and limited function. He states that a degenerative rotator cuff tear in someone in their 40s is rare. He states that the lack of atrophy and fatty infiltration on MRI indicates an acute rather than chronic tear. He states that the mechanism of injury is described as falling backward and landing on the left shoulder. Individuals will try to brace themselves creating fast firing of muscles. He continues to recommend arthroscopic rotator cuff repair with visualization of the long head of the biceps with subacromial decompression followed by physical therapy. He restricted Petitioner to one handed duty. He notes that EFA relies on the voluntary activity of the individual being studied and that cooperation can be altered by pain. EMG/NCV and functional capacity evaluations are generally accepted in the field of orthopedic surgery (PX 5).

Petitioner continued follow up visits at Premier Occupational Health through April 16, 2021 without improvement. She was continued on restrictions of sit-down work only and no truck driving (PX 4).

Dr. Papierski testified by evidence deposition on February 5, 2021 (PX 7). He testified to his June 22, 2020 examination of Petitioner, noting tenderness and loss of motion, his review of the MRI showing a full thickness rotator cuff tear of the supraspinatus, and his surgical recommendation. He only saw Petitioner one time. He does not have any firsthand information of her condition thereafter. He testified to his November 2020 addendum and his opinion that the diagnosis being caused by the accident and the basis. He noted that the longer the rotator cuff tear has been present the more advanced fatty infiltration will become. The lack of atrophy of fatty infiltration indicates a pretty recent rotator cuff tear. While there was some degeneration of the AC joint and mild degeneration of the glenohumeral joint, there was no degenerative changes described for the rotator ligaments or glenoid labrum. Therefore, the rotator cuff tear would not be degenerative. He testified that Dr. Gorovitz not specifying the tear as traumatic would be inconsistent with is diagnosis. He testified that it is not impossible for somebody in their 40s could develop a rotator cuff tear. Most rotator cuff tears are degenerative as opposed to traumatic. He speculated that she may have stretched her arm out. If she landed directly on her shoulder it would be less likely to cause a tear (PX 7).

Dr. Papierski recommended surgery and opined that the surgery was causally related to the accident. Petitioner was restricted to one-handed work. He testified he is familiar with EMG/NCV and functional capacity evaluations and uses those in his practice. He was not familiar with electrodiagnostic functional assessment. He noted that patient cooperation can skew the results. He did not find anything in the publications attached to

the Emerge report to explain how the testing could show whether the rotator cuff tear was acute or chronic. He opined that electrodiagnostic functional assessment is not generally accepted in the field of orthopedic surgery (PX 7).

Dr. Shadid testified by evidence deposition taken April 14, 2021 (RX 6). He testified to his August 12, 2020 examination including the records he reviewed. He opined that the mechanism of injury described would not be sufficient to cause a rotator cuff tear. His physical examination noted active flexion to 90 degrees and external rotation of 45 degrees. Strength was 5/5. Petitioner had some rotator cuff findings with the empty can test, an impingement sign, and a Neer's test. He noted the EFA showed no acute pathology. The MRI showed a complete tear of the supraspinatus tendon. He testified it takes a while for a tendon to retract. It takes muscle atrophy to develop over time. It takes months to years. Petitioner's would have taken longer than several weeks. The radiologist noting indeterminate to chronic indicates he did not find acute findings. Dr. Shadid agrees with that assessment (RX 6).

Dr. Shadid testified that he is familiar with EFA studies. The technologies are well accepted in the field. He opined that Petitioner's condition was pre-existing and not related to the fall. He diagnosed a shoulder contusion related to the accident. He would place Petitioner on restrictions of no overhead use of the arm for the pre-existing rotator cuff tear, but no restrictions related to the accident. She needs no further treatment related to the accident (RX 6).

Dr. Shadid testified that a rotator cuff tear can be asymptomatic or extremely painful. An asymptomatic tear can become symptomatic by trauma, but usually a traction injury, not blunt trauma. Fatty infiltrates would be seen in an old chronic tear. Dr. Shadid is not aware of Petitioner seeing any doctor or complaining about her shoulder before May 15, 2020. He testified an acute tear would be extremely painful, and she would have only one arm to drive her truck. It is possible she did that. Dr. Shadid became aware of EFA about 2 years ago. The surgery recommended by Dr. Papierski is reasonable and necessary but not causally related to the accident. Dr. Shadid's diagnosis is a contusion that temporarily exacerbated a pre-existing rotator cuff. It is hard to comment on when the contusion resolved, but historically contusions tend to resolve within days to several weeks (RX 6).

Petitioner testified she wants to have the surgery. She currently has a dull pain while sitting. It gets worse depending on what she does. She will get sharp pain if she tries to pull or push with any kind of pressure or moving her arm quickly overhead. She has issues sleeping. She testified she could not pull herself into the tractor-trailer safely. She needs help getting dressed. She takes Tramadol when she absolutely needs it, maybe once every three weeks. She has not gone back to work. She wants to go back to her job.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial*

Comm'n, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). 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 accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being. *Lopez v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130355WC-U, P25 (Ill. App. Ct. 3d Dist. 2014).

Petitioner suffered an undisputed accident on May 15, 2020 when she lost her grip while climbing into the tractor and fell to the pavement, striking her head and left shoulder. She sought immediate treatment for injuries including to her left shoulder. The undisputed evidence including her testimony, the medical histories and the records of her family physician confirm that she had no prior injuries, complaints, or treatment for the left shoulder before her accident. She has continued treatment since the accident for the condition of ill-being in her left shoulder including Dr. Papierski's surgical recommendation to repair the rotator cuff tear. Dr. Papierski testified that the Petitioner suffered a traumatic rotator cuff tear and that her current condition of ill-being and need for surgery are causally related to the accident.

Respondent has disputed this based upon the findings of the EFA performed showing chronic changes unchanged from the baseline test with no acute pathology, and the opinion of Dr. Shadid that the mechanism of injury described would not be sufficient to cause a rotator cuff tear and his diagnosis of a contusion and temporary exacerbation of the pre-existing rotator cuff tear.

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.

Petitioner has raised objection to the admissibility of the EFA testing on the basis that it is not generally accepted by the relevant scientific community. The objection is to the admissibility of RX 2, 3, 4, and 5. Petitioner's objection is raised pursuant to *Frye v US* which governs admissibility of expert testimony in Illinois as well as hearsay objections to RX 3, 4, and 5.

The "*Frye*" standard, testimony is admissible only when it is generally accepted by the relevant scientific community, has been applied in Illinois by *Donaldson v. Central Illinois Public Service Company*, 199 Ill.2d 63, 767 N.E.2d 314 (2002), which noted that "The *Frye* standard, commonly called the "general acceptance" test, dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Donaldson,* 767 N.E.2d at 324, citing *Frye v. US*, 293 F at 1014. *Donaldson* differentiated between methodology and conclusion. "First, "general acceptance" does not concern the ultimate conclusion. Rather, the proper focus of the general acceptance test is on the underlying methodology used to generate the conclusion. If the underlying method used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion – despite the novelty of the conclusion rendered by the expert." *Donaldson*, 767 N. E.2d at 324. "(G)eneral acceptance does not require that the methodology be accepted by unanimity, consensus or even a majority of experts." "(O)nce a principle, technique or test has gained general acceptance in the particular scientific community, its general acceptance is presumed in subsequent litigation." Id. at 324-325. EFA tests have been admitted into evidence in a variety of state and federal courts. (See, e.g., Geressy v. Digital Equipment Corporation (980 F.Supp.640 (1997) finding that testimony of Dr. Reaston would have been admitted as expert testimony in support of the Court's finding overturning verdict and ordering new trial; Smith v. The Atlantic Group (2004 MOWCLR Lexis 79 (Mo) admitting Dr. Reaston's testimony as expert testimony; Church v. City of Cedar Rapids (2002 IA Wrk Comp Lexis 468); Marten Transport v. Industrial Commission of Arizona (2018 WL 1162927 (2018).

Based upon the testimony of Dr. Reaston and Dr. Shadid, the Arbitrator finds evidence of this testing is admissible and that it meets the requirements espoused in *Frye*. The Arbitrator admits RX 4 and RX 5, the Peer reviewed articles, not for the truth of the documents, but only as corroboration that EFA has been peer reviewed. RX 3, Dr. Chiodo's report containing his opinions on EFA in an unrelated matter, is rejected as hearsay. It will be kept with the record as a rejected exhibit.

While the methodology used in performing the EFA of an EMG and functional capacity examination are well established, the Arbitrator does not find that the conclusion drawn, that because the baseline and post-accident testing both show chronic changes as evidenced by bilateral inappropriate muscle usage, that therefore Petitioner's post-accident condition is unchanged and unrelated to the accident, credible or supported by the credible medical records. The treating records from the emergency room, Dr. Gorovitz and Dr. Papierski all document loss of motion and strength and find Petitioner is unable to perform the work activities that she had been able to perform for the intervening years without difficulty or complaint. Dr. Shadid's physical examination confirms positive Empty Can, Neer's and Hawkins tests, and positive impingement sign. He notes left shoulder weakness with flexion and external rotation. The conclusions drawn from the testing by Dr. Reaston and Dr. Shadid do not conform to the undisputed medical facts in this matter based upon the credible treating records and credible and unrebutted testimony of Petitioner. The Arbitrator finds the conclusions drawn from the EFA testing not credible and unpersuasive.

The Arbitrator observed the Petitioner's testimony and has reviewed the medical evidence including the treating records, the EFA, and the deposition testimony of Dr. Reaston, Dr. Shadid and Dr. Papierski. The Arbitrator finds the Petitioner's testimony credible and supported by the treating medical records.

The Arbitrator notes that there is no dispute that Petitioner currently has a complete tear of the supraspinatus. Whether this was a traumatic tear as opined by Dr. Papierski or a pre-existing tear which was rendered symptomatic by the accident as opined by Dr. Shadid, the Petitioner's credible testimony which supports the chain of events theory is that following the accident, she now has significant symptoms and limitations which preclude her from performing her job and multiple activities of daily living.

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. *Nanette Schroeder v. The Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017). Whether Petitioner had a new traumatic or pre-existing rotator cuff tear, the accident either caused or aggravated that condition. The Arbitrator notes that Dr. Papierski's causation opinion, while he speculated that Petitioner may have stretched her arm out and if she landed directly on her shoulder it would be less likely to cause a tear, was based primarily on the facts and results of the fall, being immediate significant pain and loss of function in a previously asymptomatic left shoulder.

The Arbitrator finds the opinion of Dr. Shadid that the work injury was a temporary aggravation not credible in light of the Petitioner's persuasive testimony concerning her symptoms and the treating medical evidence. The Arbitrator finds Dr. Shadid's the four reasons listed in his addendum report for his causation opinion unpersuasive. Petitioner explained how she managed to drive to her truck, which the Arbitrator finds credible given the time of night and conditions. The Arbitrator has already addressed the lack of persuasiveness of the EFA conclusions. Dr. Shadid's conclusions concerning the mechanism of injury and the degenerative findings on MRI fail to reconcile to the undisputed facts that Petitioner was able to fully perform her physically demanding job duties before her fall and thereafter has been unable to return to them in light of documented pathology on MRI and objective medical evidence of loss of motion and strength coupled with credible complaints of pain.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being in the left shoulder is causally connected to the accidental injury sustained on May 15, 2020.

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

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner would be entitled to recover all reasonable and necessary treatment related to the condition of ill-being of her head and left shoulder.

Petitioner submitted medical bills in PX 1-5 showing bills to:

1. Adventist Bolingbrook Hospital (PX 1) with a total $5,125.33,

2. Illinois Emergency Medicine Specialists (PX 2) with a total $1,038.00 with a balance owing $41.19 after insurance payment and adjustment,
3. Suburban Radiologists (PX 3) with a total bill of $239.00 with a balance owing of $16.83 after insurance payment and adjustment,
4. Premier Occupational Health (PX 4) with a total bill of $7,375.00,
5. Chicago Hand and Orthopedic Surgery (PX 5) with a total bill of $298.00.

Arb. Ex 1 states that Respondent has paid $1,139.40 in medical, but no evidence was offer of the exact payments made or if the payments reflected in PX 2 and PX 3 were made by Respondent or some other carrier. The Arbitrator notes that Petitioner testified that she had group insurance through Respondent for the initial period after the accident, but the parties stipulated that no credit is claimed under Section 8(j) of the Act. Having reviewed the medical treatment records offered, the Arbitrator finds that the treatment reflected by these bills was reasonable, necessary, and causally connected to the accidental injury sustained on May 15, 2020.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $5,125.33 to Bolingbrook Adventist Hospital, $1,038.00 to Illinois Emergency Medicine Specialists, $239.00 to Suburban Radiologists, $7,375.00 to Premier Occupational Health, and $298.00 to Chicago Hand and Orthopedic Surgery, 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 or adjustments made.

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

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner would be entitled to recover all reasonable and necessary prospective treatment related to the condition of ill-being of her left shoulder.

There is no medical dispute that Petitioner has a complete tear of the supraspinatus tendon in the left shoulder. Dr. Papierski has recommended arthroscopic rotator cuff repair with visualization of the long head of the biceps with subacromial decompression. Dr. Shadid, while disputing causal connection, agreed that the surgery recommended by Dr. Papierski is reasonable and necessary.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Papierski including an arthroscopic rotator cuff repair with visualization of the long head of the biceps with subacromial decompression, any post-operative treatment, 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, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). Based upon the Arbitrator's findings with respect to Causal Connection and Prospective Medical, the Petitioner has not yet reached maximum medical improvement. Dr. Gorovitz and Dr. Papierski has continued her on restrictions which preclude her return to her job as a truck driver. Dr. Shadid agrees that she has restrictions of no overhead use of the arm. Based on Petitioner's testimony as to her job duties, this would also prevent her return to regular work.

Petitioner's unrebutted testimony was that she has been off work since the day of the accident and has not returned to work or been offered any work within the restrictions.

Based upon the record as a whole and the Arbitrator's findings with respect to Causal Connection and Prospective Medical, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability commencing May 16, 2020 through May 10, 2021, the date of the hearing, a period of 51 3/7 weeks. Respondent shall be given a credit of $8,840.40 for temporary total disability benefits that have been stipulated to have been paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017441
Case Name	Rebecca M Barker v. JBS USA
Consolidated Cases	19WC017442;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0334
Number of Pages of Decision	29
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Lisa Azoory

DATE FILED: 8/29/2022

/s/ Kathryn Doerries, Commissioner

Signature

22IWCC0334

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REBECCA M. BARKER,

Petitioner,

vs. NO: 19 WC 17441

JBS USA,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 6-7, last sentence, to strike "May 28, 2010", to replace with "May 28, 2019".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 18, third paragraph, third sentence, to strike "mush", to replace with "must".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 18, fifth paragraph, third sentence, to strike "hind", to replace with "hand".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 20, fifth paragraph, first sentence, to strike "the", to replace with "they", and, to strike "work", to replace with "woke".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, in the section entitled "Arbitrator's Credibility Assessment" on page 21, paragraph 1, fifth sentence, to strike "Petitioern's", to replace with "Petitioner's".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 2021, is, otherwise, 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.

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.

August 29, 2022

o- 7/12/22
KAD/jsf

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Maria E. Portela

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017441
Case Name	BARKER, REBECCA M v. JBS USA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Lisa Azoory

DATE FILED: 9/9/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 8, 2021 0.05%

/s/ Dennis OBrien, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

REBECCA M. BARKER
Employee/Petitioner

v.

JBS USA
Employer/Respondent

Case # **19** WC **17441**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **June 25, 2021**. 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 **Effect of Panel of Physicians**

FINDINGS

On **May 17, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**$6,097.30 (10 weeks)**; the average weekly wage was $**609.73**.

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

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

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

ORDER

Petitioner sustained a compensable repetitive trauma accident on May 17, 2019 which arose out of and in the course of her employment by Respondent. The Arbitrator finds that Petitioner's medical condition, tendinopathy of her extensor carpi ulnaris tendon resulting in a. stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft is causally related to the accident of May 17, 2019.

Petitioner gave timely notice of the accident of May 17, 2019 to Respondent.

Petitioner was not temporarily totally disabled as a result of the accident of May 17, 2019 for the period claimed by Petitioner.

Petitioner did not receive any medical treatment until after the date of her second claimed injury to the same area of her body on May 24, 2019, the subject of 19 WC 017442. Medical benefits, if any, will be awarded in 19 WC 017442.

Based upon the testimony of Petitioner and the alleged accident involving the same injury of May 24, 2019, 19 WC 017442, Petitioner had not reached maximum medical improvement prior to May 24, 2019 and permanent partial disability, if any, will be awarded in 19 WC 017442.

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 9, 2021

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified her highest level of education was the 12th grade, that she was divorced and had no children under 18. She said Respondent JBS is a hog slaughterhouse and that she began employment with Respondent in February of 2019. Her initial job was building cardboard boxes to be placed on the line. She worked that job for approximately two months before moving to a different position on the loin line in the middle of May, 2019.

Petitioner said the loin line was similar to an assembly line, with five people, including herself, standing and boxing loins. She said there were two conveyor belts in front of her as she stood to perform her work, one on top and one on bottom. The higher belt was at about her waist level and the lower belt was down in the area of her knees. The top belt moved from the right to the left, and the lower belt moved from the left to the right. She said pork loins came down the line and they would pick them up and place them in boxes. She said she would grab a loin with both of her hands and just place them in the box. She said she was never trained on that job.

Petitioner said that how she put the loins in the boxes depended on the size of the loins, as she was putting between 6 and 20 loins in a box. She said they were slippery as they had already been bagged and labeled. The loins were put in the box in layers. She would grab a loin from the upper conveyor belt to her left with both hands and place it in the box which was on a rolling table in front of her which was below waist level. When the box was full she would shove the box onto the lower conveyor box and start filling a new box. She said this was her sole job task, and between 10,000 and 20,000 loins came down the line per shift, and she would box one fifth of the loins which came down the line, 2,000 or more a day. Petitioner said she worked an eight-hour shift six days per week.

Petitioner said the other four employees working the loin line were doing the same work. She said the conveyor belt moved pretty fast. She said the average weight of a loin coming down the line was between 7 and 10 pounds, but some weighed more, up to 12 to 15 pounds. When full the boxes weighed at least 60 to 70 pounds. She said that when the conveyor belt stopped, which happened about every other day, she would have to lift the boxes. While on the line she said she would be using her hands during her entire shift. She a 15-20 minute break in the mornings and a half hour lunch break.

Petitioner said she worked on the loin line for about three weeks. She said while working the loin line she noticed she had burning and stinging, like needles were going through her hands. She said this started while on the loin line, at the beginning of the third week she was working on the loin line.

Petitioner said she had carpal tunnel in 2011 and had received a full duty release after she had surgery, with no symptoms. She said that at no point after her surgery did she have symptoms in her right wrist similar to the symptoms she said started while working on the loin line in May of 2019. Petitioner said she was not

having any right wrist problems when hired by Respondent and she did not notice any right wrist problems when working the job making boxes. Petitioner said that prior to starting work in February of 2019 Respondent had her undergo a pre-employment physical, and she was cleared to work.

Petitioner said that after noticing her symptoms she reported this to her trainer, Jules, who reported it to their supervisor, Dave. She said she gave the notice to him when it was happening, when she noticed her symptoms, when it was getting worse. She said Jules took her over to the on-site nurse's station where they massaged it, put a cold pack on it, which did not work. After having seen the nurse she tried to continue working on the line but it continued to get worse. Upon return to the loin line she said she was doing the same job she had described, with the same amount of loins per shift and loins of the same weights. At that point Jules contacted the supervisor and he said Petitioner should be sent home. Petitioner said she did not ask to see a doctor.

Subsequent to the initial visit with the nurse Petitioner said she saw the nurse twice. She said she was not referred to a doctor. She said she went to see her doctor because it was getting worse and she could not take it anymore. Petitioner said she eventually was seen at Springfield Clinic on June 3, 2019, seeing Nurse Practitioner Jared Whetstone. She said she described her problem to him and she was examined and given a brace for her wrist. She said the brace did not help at all. NP Whetstone gave her light duty restrictions, and she called somebody at Respondent and advised them of the light duty restriction. She said she was not offered a light duty position by Respondent, she was told there was no light duty. When she asked about a job putting labels on loins she was advised that job was already taken.

Petitioner said she returned to see NP Whetstone on June 7, 2019, and an MRI was ordered, and her light duty restrictions continued. The MRI arthrogram was performed on June 21, 2019, and she followed up with NP Whetstone on July 9, 2019. She was told to stay on light duty restrictions and she was referred to Dr. Greatting.

Petitioner saw Dr. Greatting on July 18, 2019. She said she told him of her symptoms, and the symptoms had not changed. He reviewed the MRI with her, gave her an injection and maintained her restrictions. She said the injection did not help.

Petitioner said that when she next saw Dr. Greatting on August 21, 2019 he continued her restrictions and recommended surgery for her. That surgery was performed on September 20, 2019. She said that following the surgery her wrist still did not feel right, she still had problems with the wrist burning, pinching and throbbing.

Petitioner said she was next seen by Dr. Greatting's assistant on October 4, 2019 and then saw Dr. Greatting on October 16, 2019. Physical therapy was ordered and he continued to keep her off work. Petitioner said she went to one physical therapy session but had no transportation to go to more as she no longer had her truck. They had given her paperwork on exercises to do, and she continued to do them.

Petitioner said she then saw Respondent's examining physician, Dr. Biafora, on November 12, 2019. She said her visit with that doctor was not very long and that he did not examine her, just looking at the wrist because she was still in a cast as it was seven weeks after her surgery.

Petitioner said she returned to see Dr. Greatting on November 14, 2019 and December 12, 2019. He continued to keep her off work and she said she continued doing the home exercise program. She said that when she saw Dr. Greatting on January 22, 2020 he gave her light duty restrictions. At that point she said she really had not noticed any improvement in her right wrist in the three months following surgery. She said when she saw Dr. Greatting on March 4, 2020 the doctor recommended a second surgery, and he took her off work again at that point. The second surgery was performed on May 28, 2020. She said that while Memorial Medical Center records may show her going to the emergency room two days following that surgery, she could not remember why she went to the emergency room.

Petitioner testified that she saw Dr. Greatting on June 10, 2020 and he gave her light duty restrictions at that time. She saw him again on August 20, 2020, and at that point she was complaining of the right wrist being deformed. She noted the deformity at the arbitration hearing, and the parties agreed that the area she pointed to was the radial process, the bump on the outside of her wrist, which she noted was sticking out more than it previously had, and that area was numb. She said Dr. Greatting continued to recommend physical therapy, but she still did not have a truck, so she just continued her home exercise program, which she said helped. She said she got a little bit better after the second surgery.

Petitioner said she continued to improve and saw Dr. Greatting on October 7, 2020. She agreed that as of that date Dr. Greatting wanted to return her to full duty work effective October 12, 2020.

Petitioner said she last saw Dr. Greatting on December 10, 2020, when he released her from his care.

Petitioner testified that she no longer worked for Respondent, that she was currently working at Memorial Medical Center as of February of 2021, in the Environmental Services department, doing housekeeping. She said she is earning $15 an hour at Memorial and is working 50 to 60 hours a week, including overtime.

Petitioner testified that as of the date of arbitration her right wrist felt fine, though she still had numbness in the lateral wrist, where the surgery had been. She said she had motion and no pain at all. She said she only noticed a little problem with range of motion and strength. She said she was able to do all of her work duties for Memorial, and the wrist did not affect her at all on a day to day basis as of the date of arbitration.

Petitioner said she did not believe she would be able to perform the duties of the loin line as of the date of arbitration as that was too repetitive with the wrist and because she cannot lift as much with the right arm as she used to because of the two surgeries.

Petitioner said she was right hand dominant.

On cross-examination Petitioner said her initial job for Respondent was constructing empty boxes on the 6 a.m. to 3 p.m. shift, and she had no wrist or hand pain while doing that job. She said the pain started after she began work on the loin line, on the afternoon shift. She said if the attendance records for Respondent showed she only worked nine days on the loin line, she would not be sure if that was right or wrong, though nine days did sound about right. She agreed that she started on the loin line in the middle of May, 2019, and the last day she worked on that line was May 28, 2010, when she took a leave of absence.

Petitioner said she told Dr. Greatting that the loins weighted between 10 to 15 pounds. She said if someone from the company were to testify that the loins weighed up to seven pounds she would disagree with that. She agreed she was considered a new hire on the job of boxing loins.

She agreed she was allowed to see a nurse, and said she did not fill out an accident report, that she was not allowed to do so. She agreed that she had a prior accident with Respondent and had filled out an accident report as well as demonstrate how she fell. She said she did not recall filling out an accident report for her wrist injury.

Petitioner agreed that while her current name was Barker, she had previously had Hashman and Abbott as last names as well as her maiden name of Ailers. She identified Respondent Exhibit 5 as a post-offer medical history Petitioner had filled out and signed for Respondent. She said she did not recall answering "no" to a question asking if she had prior workers' compensation injuries for which she received compensation, as she was rushing through the forms. She agreed she had a prior workers' compensation settlement with DOT Foods. She said she did not have a settlement with Marriott in 1998, she did not recall getting over $7,000 from them, though after looking at Respondent Exhibit 10B she agreed in 1998 her name was Rebecca Hashman and she was working for Courtyard Marriott at that time. When asked if she hired attorney Warren Danz for that case she said they did not follow through with that, but she could not remember that far back. She said she worked in housekeeping, but the job did not involve a lot of repetitive hand use as she was an assistant manager. She said her last name was Abbott when she settled her case with DOT Foods.

Petitioner said that after she stopped working on the loin line for Respondent her pain remained about the same as when she was working. She agreed that she told Physician's Assistant Whetstone on June 7, 2019, two weeks after ceasing to work for Respondent, that she was crying and in extreme pain.

Petitioner said that she had not had any problems with her right arm before this accident, and could not remember being in the emergency room in 2012 complaining of right arm pain. She said she also did not recall being in the emergency room on August 20, 2015 in regard to her right arm and right elbow.

When asked if she currently smoked Petitioner said she did, about half a pack a day as of the date of arbitration, but noted that she had previously smoked three packs a day while working for Respondent.

Petitioner said that she had no lingering symptoms in her right hand except for when she was lifting and noted that the numbness in the area where the surgery occurred was still present. She said it only affected her activities of daily living if she lifted a lot.

On redirect examination Petitioner said the weight of the loins on the line varied. She said that as part of her application process she did tell Respondent verbally of her prior work comp cases before she was hired, telling them of the surgery she had while working for DOT Foods. She said she also informed them on the post-offer medical history of her prior carpal tunnel syndrome surgery in 2010.

Michelle Ellis

Ms. Ellis testified that she is Respondent's Occupational Health Manager and had worked for Respondent for about 14 years. She said he manages the nurses' station at Respondent's plant and is familiar

with the injury reporting paperwork and incident reporting. She said that after an injured employee fills out an ESI they are taken care of in nursing and they also send them to panel physicians. She identified Respondent Exhibit 3 as an attendance record for Petitioner. She noted that the exhibit showed that Petitioner punched in and out of work nine times between May 13, when she started working the loin line, and May 28, working approximately eight hours per day. She said that Petitioner was a union employee, as all workers there longer than 45 days became part of Local 431.

Ms. Ellis said employees are made aware of the panel agreement during orientation, as part of a power point presentation, and they then sign off on that during orientation. Ms. Ellis said Respondent had a panel of physicians agreement that had been approved by the Illinois Workers' Compensation Commission. She said Dr. Greatting was not part of the panel of physicians, that the upper extremity specialists on the panel were Dr. Maender and Dr. Wolters.

In response to Petitioner's testimony that she had called regarding her wanting to work light duty, Ms. Ellis said that HR would have notified her if Petitioner had made such a call as she helps them in the process finding a person a light duty job. She said they typically accommodate people even after surgery if it is a work related injury, even accommodating one pound lifting restrictions or no use restrictions.

Ms. Ellis said Petitioner never filled out an accident report for her May 2019 work injury. She then identified Respondent's Exhibit 9 as being an accident report Petitioner previously filled out on March 28, 2019 for a different accident.

On cross-examination Ms. Ellis was asked if it was her understanding that if a workers' compensation case for an employee of Respondent was denied or disputed that the employee could at that point go off the panel for treatment, and she said that was not her understanding. She said that if a panel physician no longer wanted to treat an employee the employee could then get a second opinion, again, off the panel.

Ms. Ellis said she did not know if Respondent would accommodate light duty if the injury was not considered to be a work related injury, it was out of her realm, as she only works with work related injuries, and she did not know what HR did, and it was their decision.

Ms. Ellis said that a long time before the arbitration hearing she had reviewed Dr. Biafora's IME report, and she knew he denied the case was work related and that the job duties caused any aggravation in her condition.

Ms. Ellis testified that an accident report was not necessarily filled out when somebody reported they were in pain. She said the jobs they had were not easy jobs, and all new hires are going to have soreness, and that isn't something they would fill out a report for, but they would help them get through it. She was asked if that meant that just because she filled out an incident report in March of 2019 did not mean that she would necessarily have to fill one out when she presented with complaints when starting on the loin line, Ms. Ellis said if Petitioner had objective findings she would have been required to fill out an accident report. She said if she had an injury and/or pain she would have had to fill out an accident report.

Ms. Ellis was shown Respondent Exhibit 4, notes from weekly touchpoint meetings where is said Petitioner did present to somebody with pain and soreness when she started the loin line. Ms. Ellis said they do this with people in new jobs, they check on them, and people always have soreness and pain when they are

starting a new job, and they come to nursing who help them get through the soreness and break-in pains from the new job. In those instances an accident report is not always filled out. They fill it out, according to Ms. Ellis, when it goes from soreness to pain. She said that none of their jobs is easy, they are very repetitive jobs. She did not think they had any jobs which were not repetitive.

Ms. Ellis said the attendance reports indicated that while working the loin line job Petitioner worked full eight hour days.

On redirect examination Ms. Ellis said it was typical for new employees to be seen in nursing in the first 45 days, they actually have a policy to see them at 10, 24 and 45 days.

Ms. Ellis said that for a non-work related injury HR was the appropriate entity to be contacted for light duty work and HR would call nursing to discuss that with them to make sure a job description fit with the restrictions, so if Petitioner had contacted HR, Ms. Ellis would come to know about it, even if it were a non-work injury.

James Lanier

Mr. Lanier was called as a witness for Respondent. He said he was the loin boning supervisor on the second shift. He had been employed by Respondent for approximately three and-a-half years. He was Petitioner's direct supervisor on the loin line in May of 2019. That shift worked from 3:15 to 12:15. He said Petitioner was only working for him for about two weeks, she worked nine or ten days. He said that in a typical day he would see her about ten times as he was at least walking through the area, as he was also a general operator at the back end of the loin boning line.

Mr. Lanier said pork loins weighed between two and seven pounds, there are specifications and weight classifications for the loins. He said none of the loins weighed more than seven pounds. Most boxes contained six loins, though some could contain eight.

Mr. Lanier said that new hires such as Petitioner are in a probationary period and start by working with a person qualified to perform the job, with the trainee working on the line for 10 to 15 minutes at a time, doing a rotation with the qualified trainer. He said new hires do not box as many lines as a regular employee, only putting 40 to 60 loins in boxes in an hour. He disagreed with Petitioner's testimony that she would handle 2,000 loins per shift. He said new hires would box an average of 50 loins per hour, so approximately 400 loins per day. Regular employees would do about 80 boxes per hour, with six to eight loins per box, for eight hours, while a new hire would fill 80 to 100 boxes during an entire shift. His description of how loins were picked off the conveyor and placed in the box was similar to Petitioner's description, though he noted a worker could use one or both hands to put a loin in a box.

Mr. Lanier said there was no lifting involved in the job other than picking up the loins, so he disagreed with her testimony that Petitioner would be required to lift boxes weighing approximately 60 pounds. He said pinching is not required to pick up and box the loins.

Mr. Lanier said new hires would work actually get on the line and work in 15 to 20 minute intervals, and when they were not working on the line they would be watching and stretching as the qualified person did the

job. He said there were scheduled breaks at 6:00 and 8:30. He said the purpose of stretching and watching for new hires was for them to get used to it, like working out, they have to stretch and train their body for the process. He said in the nine days Petitioner worked the job she was mostly watching and stretching.

Mr. Lanier said he did not fill out Respondent Exhibit 4, the weekly touchpoint meeting document that had his name on the top as Petitioner's supervisor. He said it was filled out by the qualified trainer, but he would review it after it was filled out by the other worker. These were filled out weekly for new hires, and the company keeps them. He agreed that Petitioner's first week was May 13. He also agreed that Petitioner was having pain or soreness in her forearm by the second week on the job. The report for the third week noted that Petitioner missed work four days that week, which was consistent with his memory.

Mr. Lanier reviewed Deposition Exhibit 3 of Respondent Exhibit 1 and said it was a job task performance description for the boxing loins job, and that it was a fair and accurate representation of the job. He says they go over those descriptions with all employees starting a new job.

On cross-examination Mr. Lanier said he was not on the floor monitoring Petitioner at all times. When asked if there was any record of the count of loins Petitioner took off the line while working Mr. Lanier said all there was for that was Petitioner having been instructed on the count. No document is given to new hires such as Petitioner advising them what their count is to be, the trainers were to go over that with them. When asked if Petitioner was trained on the job, Mr. Lanier said the document showed the trainer followed up with Petitioner on her job. He said the training consisted of the trainer taking the worker to the area, advising them on what PPE they needed, give them the count, and show them the job. The training was to continue until they were in the job for 45 days. He said Jules was Petitioner's trainer, and he was present at the hearing.

Mr. Lanier was asked about the contents of Respondent Exhibit 4 and said that percentage of pull, 40 percent, would be the count the trainer gave Petitioner, what she was to do each hour, and in week two it was 55. Mr. Lanier said Petitioner missed one day of work during the first two weeks working the loin line, after she reported to her trainer that she was experiencing soreness on the loin line.

Mr. Lanier agreed that Petitioner did have to lift the loins off of the conveyor to put them in the box. He said there was no lifting of 60 pounds, though, that the box was 60 pounds once it was filled, but it would not be picked up, it was on a rolling platform. He agreed that the conveyor where the boxes sat did at times get stuck or stop, but that the employee would not move the box then, as his general operator was there for that. He said new hires have to stretch and flex to try to avoid injury.

While loins were sometimes half cuts and sometimes full cuts, and ranged from two to seven pounds, the average was actually about six and-a-half pounds, on the higher end of that range. He said an average of 15,000 loins would come down the line during the shift, there are five employees on the loin line, and each would be responsible for approximately 20 percent of the loins on the line. He said the job was repetitive and fast paced.

Mr. Lanier agreed that Deposition Exhibit 3 to Respondent Exhibit 1, the job description given to Dr. Biafora, did not list weights of loins on it or note the number of employees on the loin line or the speed or pace of the line.

On redirect examination Mr. Lanier said a new hire such as Petitioner would not be counted in the five employees working the line.

Jules Maswa

Mr. Maswa was called as a witness by Respondent. He testified he was a trainer and had worked for Respondent for nine years. He said he had not always been a trainer, he had started working on the line. He said that in May of 2019 he was Petitioner's trainer from May 13 through May 28, 2019. He said loins weighed between two and seven pounds, and there were six full loins to a box, and 12 half loins to a box.

Mr. Maswa said that new hires like Petitioner do not put in as many loins as regular employees, that they work fifteen minutes on and fifteen minutes off. He said he filled out Respondent Exhibit 4, the weekly touchpoint meeting documents. He said one was filled out each week. He said the one for week two noted that Petitioner was having soreness in her right forearm, and he remembered her saying that and that he had taken her down to nursing. He agreed that the third meeting report showed that she was having issues with attendance.

On cross-examination Mr. Maswa said he felt Petitioner did a good job boxing the loins. He said the 40 percent noted on the document meant that Petitioner was doing 40 percent of the job she was supposed to do, with a full hire doing 100 percent. He said he did not know how many loins came down the line in a shift, that was the supervisor's job, so he did not know how many loins Petitioner was handling. Mr. Maswa agreed that in the second week Petitioner was doing 55% of a full hire's work, and he felt she was doing a great job, with a good attitude. He said it was at that point that she reported the forearm soreness to him. He said that as her trainer he was the first person she should have reported that soreness to, and she did give notice to him. He said it was after that she started missing days.

Mr. Maswa said that as of the date of arbitration he was still a trainer for Respondent, he trained on the loin line and on the shipping line.

On redirect examination Mr. Maswa said that 40 percent was not 40 percent of the loins a regular employee did, it meant 40 percent performance.

Petitioner

Petitioner was recalled to testify. She testified that in the first week on the loin line she did not rotate in and out as a full time employee, she spent no time just watching and observing and she was not instructed to spend time stretching. She said they did stretch before they started work the first week, but that was the last time she was required to stretch. She said she had no training on the loin line, that one of the girls had left the loin line to work a different shift and they needed someone wo work at that time, so she was put there. She said at no time that she worked the loin line were there more than five employees working the line.

Petitioner said that at no time did she work 15 minutes on and 15 minutes off. She said that there were occasions when the box conveyor stopped, and when that happened they continued putting loins in boxes and

then would pick them up and put them behind them on a pallet. That was the lifting of boxes she had mentioned earlier, and the only time when she would lift boxes.

On cross-examination Petitioner said she disagreed with the testimony of Mr. Lanier and Mr. Maswa, saying she was not trained to be on the line.

James Lanier

Mr. Lanier was recalled to testify. He said Petitioner was trained as a new hire, and he disagreed if Petitioner testified she was not trained. He said he knew she was trained because he had set the line up, he had put qualified people on the line and he would see to it with a new hire.

Mr. Lanier said the percentage on the touchpoint document was the percentage Petitioner was pulling, that when fully qualified it would have been at 100 percent. It was her progression as a worker, not the percentage of loins being pulled.

On cross-examination Mr. Lanier said that the training process would not be expedited or shortened if the loin line was short staffed, that they would just be instructed to continue to pull their count and to let everything else go.

On redirect examination Mr. Lanier said new hires would not be pushed into a regular employee position during the first 45 days as they were not physically ready to do the pulling part and it would make a mess of his floor.

MEDICAL EVIDENCE

Springfield Clinic medical records for several years prior to May 17, 2019. They indicate that on May 25, 2011 Petitioner saw Dr. Wolters with one year complaints of right and left hand numbness which was getting worse. EMG testing by Dr. Warach on June 17, 2011 confirmed bilateral carpal tunnel syndrome as well as a mild right cubital tunnel syndrome. Right hand carpal and cubital syndrome surgery was performed on June 23, 2011. She advised Dr. Wolters on September 28, 2011 that her right hand symptoms had resolved following that earlier surgery. On that date she gave Dr. Wolters a history of that left hand numbness with an EMG indicating carpal tunnel syndrome. Left carpal tunnel surgery was performed on October 20, 2011. Petitioner reported that she was significantly improved after that surgery and she was released to return to full duty work on October 26, 2011 with maximum medical improvement anticipated in a year. (RX 7 p.108-116)

Medical records of Memorial Medical Center for treatment prior to May 17, 2019 were also introduced. They include records of a fall down some stairs on August 23, 2012 injuring her right arm (and other areas of her body), and x-rays revealed a closed mildly distracted, mildly displaced fracture of the proximal end of the right radius. An x-ray of that same right forearm three years later, on August 20, 2015, after some steel equipment struck her epigastric area as well as her right arm, showed no acute fracture, but noted a slight

deformity of the radial head which was felt to possibly be secondary to the prior August 23, 2012 fracture. (RX 8)

Respondent introduced an Employee Incident Report dated March 28, 2019 for an accident Petitioner reported to her left shoulder while falling hard on the ground. All complaints were to the left shoulder, no complaints were made of the right arm or wrist. (RX 9)

Petitioner was seen at Memorial Express Care on May 28, 2019 with complaints of pain to her right wrist which had significantly increased in the past few days. She advised that facility that she had a history of right carpal tunnel in 2011and she believed her problem was from repetitive motion, saying she was constantly performing the same motion with her wrist at the slaughter house where she worked. She noted that she had an increase in her pain that morning which made it difficult to hold her coffee cup. Physical examination of the right wrist revealed Petitioner was tender to palpation over the radial aspect of the right wrist and was otherwise strong with normal range of motion. X-rays showed degenerative osteoarthritic changes of the first carpometacarpal joint space and an old ulnar styloid avulsion. The impression on that date was right wrist pain and arthritis of the right wrist. (PX 5 p.11-14)

Petitioner was seen by Nurse Practitioner (NP) Jared Whetstone on June 3, 2019, with complaints of right wrist pain and a history of starting a new job on the loin line three weeks earlier, a job which required her to lift and box meat, not do any cutting or butchering. She said the symptoms were not similar to the carpal tunnel which had been treated by Dr. Wolters in 2011. Pain was 7/10 and it was exacerbated by grabbing and holding. Physical examination revealed a number of objective test results as well as a number of normal test results, and voiced tenderness and pain. X-rays of the wrist showed mild first CMC arthritis. The differential diagnosis that day included overuse injury, and first CMC osteoarthritis. A brace was provided and treatment options were discussed. Petitioner wanted to avoid cortisone injections if possible. She was allowed to return to work with activities as pain allowed, while wearing her brace. (PX 2 p.85-87; RX 7 p.48-52)

Petitioner saw NP Whetstone again on June 7, 2019. Petitioner advised she had gotten worse, was 8/10, and she had been up all night crying and screaming. NP Whetstone found some swelling on the dorsal aspect of the wrist and tenderness and swelling within the first CMC joint space. The first dorsal compartment spanning the distal third of the radial side of the forearm and wrist were palpably tender. He said he would call her with the results of her MRI. Naprosyn and a Medrol dosepak were prescribed. (PX 2 p.82,83; RX 7 p.45-47)

An MRI arthrogram of the right wrist on June 21, 2019 showed mild degenerative arthritis at the first CMC joint in the mid carpal region and the distal radial ulnar joint, mild tendinopathy of the extensor carpi ulnaris and a small tear of the triangular fibrocartilage near the radial attachment. (PX 2 p.5,6; RX 7 p.11,12)

Petitioner was seen by NP Whetstone on July 9, 2019. Petitioner advised him that her pain was worse, with pain over the mid carpal regions which she had never felt before. Petitioner had painful and somewhat limited range of motion and reduced grip strength. Petitioner's MRI had shown a small tear of the TFCC and mild degenerative arthritis of the first CMC joint and distal radioulnar joint. His differential diagnosis was TFCC tear versus DRUJ osteoarthropathy. Lifting restrictions of 5–10 pounds were given. (PX 2 p.76-78; RX 7 p.39-43)

On July 18, 2019 Petitioner was seen by Dr. Greatting. On this and numerous subsequent visits the office notes reflect Petitioner advising Dr. Greatting that her work involved loading 10 to 20 loins weighing 10 to 15 pounds each into a box and pushing or sliding the boxes, as well as occasionally having to lift boxes. She estimated she had to fill approximately 200 boxes per shift. Dr. Greatting stated, "It would appear based on her history that her symptoms are related to her work activities." He found swelling on the ulnar side of the right wrist in the area of the extensor carpi ulnaris tendon. He also found she had minimal tenderness over the thumb CMC joint. A corticosteroid injection was performed. Possible therapy was discussed, but Petitioner could not attend due to transportation problems. Restrictions were given of no forceful repetitive pushing, pulling, or gripping in excess of five pounds was given, and if no light duty work was available she was to remain off work. (PX 2 p. 71-73)

Petitioner was seen by Dr. Greatting on August 21, 2019. The injection from the last visit only gave her brief relief according to Petitioner, she was still having pain on the ulnar side of the wrist. Physical examination revealed significant increased mobility of the extensor carpi ulnaris tendon, though there was no frank or gross subluxation of the tendon at that time. He did believe Petitioner pain was caused by that tendon in the sixth dorsal compartment of the right wrist. Surgery to reconstruct the sixth dorsal compartment of the right wrist was discussed and planned. Petitioner's work restrictions were continued. Two days later Petitioner was given a restriction of no repetitive pushing, pulling or gripping of more than five pounds. (PX 2 p.66-68)

Dr. Greatting performed a pre-operative physical on Petitioner on September 3, 2019. His examination revealed some swelling on the ulnar side of the right wrist in the area of the extensor carpi ulnaris tendon. She had mild limitation of motion of the right wrist and was minimally tender over the thumb CMC joint and significantly tender over the extensor carpi ulnaris tendon. Dr. Greatting felt Petitioner's symptoms were primarily from tendinopathy of the extensor carpi ulnaris tendon. A corticosteroid injection was given, and while it was recommended that Petitioner have physical therapy, her transportation difficulties prevented this. She was given light duty restrictions but was to be considered unable to work if light duty was unavailable. (PX 2 p.61,62)

On September 20, 2019 Dr. Greatting performed a reconstruction of the 6th dorsal compartment of Petitioner's right wrist. (PX 2 p.59,60)

Petitioner saw NP Mirjam Naughton October 4, 2019, the surgical site looked good and an order for a custom orthotic was given. She was told she could not return to work at that time. Occupational therapy constructed the brace that same day. (PX 2 p.50,53)

Petitioner was seen by Dr. Greatting on October 16, 2019 and was reporting some pain on the radial side of her right wrist. Her lifting was restricted and she was to wear a brace for two more weeks and then start physical therapy. She was to remain off work. (PX 2 p.46,47)

Petitioner saw Dr. Greatting on November 14, 2019. It was noted she had been unable to take physical therapy due to transportation difficulties. She felt her pain was somewhat improved. Dr. Greatting impressed on Petitioner the importance of her attending physical therapy, which was ordered. Petitioner was seen in occupational therapy that same date and was instructed on a home exercise program. She was to return the next week for a full evaluation. PX 2 p.41-43)

Petitioner was seen in follow-up on December 12, 2019. She had pain on both the radial and ulnar sides of her right wrist and the radial side of the wrist/thumb. She had some burning sensation with range of motion and had a slight amount of popping. She still had some pain on the radial side of thewrist. Most of the physical examination that day was normal, but Petitioner had pain and crepitation with grind test over the thumb CMC joint. Petitioner was advised to stay off work. (PX 2 p.38)

On January 22, 2020was again seen by Dr. Greatting, and was complaining of a burning sensation over the dorsum of the ulnar side of her hand. She had a mildly positive Tinel's sign over the dorsal ulnar sensory neve distal to her incision and crepitation with grind test. He felt she would continue to improve with time. Petitioner was given a work restriction of no lifting of more than five pounds by the right arm, and no repetitive gripping, pushing or pulling with that arm. (PX 2 p.34,35)

Petitioner was seen by Dr. Greatting on March 4, 2020. She was still having pain on the ulnar side of her right wrist. Physical examination on this date revealed Petitioner to have good motion of her forearm, wrist and hand, but some obvious visible subluxation of her extensor carpi ulnaris tendon on wrist flexion and extension and forearm pronation and supination, and those movements were painful. A reconstruction of the left wrist 6th dorsal compartment to stabilize the extensor carpi ulnaris tendon with a palmaris longus tendon graft was recommended. She was to wear her brace until the surgery took place. Petitioner was told to remain off work until further notice. (PX 2 p.29,30)

Dr. Greatting saw Petitioner on January 22, 2020. Petitioner was given restrictions of lifting no more than 5 pounds

Petitioner saw Dr. Greatting on May 8, 2020. After his physical examination of that date Dr. Greatting was of the belief that Petitioner's symptoms were primarily related to the tendinopathy of her extensor carpi ulnaris tendon. A corticosteroid injection of the extensor carpi ulnaris tendon sheath was performed. She was to wear a brace as tolerated. Physical therapy was discussed, but Petitioner noted she had transportation problems. She was given a light duty work restriction and informed that if light duty work was not available she was to remain off work. (PX 2 p.25,26)

Dr. Greatting performed a stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft on May 28, 2020. (PX 2 p.22,23)

On May 30, 2020 after conferring with a telenurse, Petitioner went to Memorial Medical Center's emergency room as she was in severe post-operative pain which was not controlled by medication. In the emergency room she described the pain as being over the surgical site. There was no indication of compartment syndrome or acute carpal tunnel. She was given additional pain medication and a muscle relaxant. (PX 2 p.13-16; PX 6 p.15,16)

On June 10, 2020 Petitioner was seen in postoperative follow-up by Dr. Greatting and was placed in a wrist splint. She was told not to lift more than a couple of pounds. (PX 2 p.8)

Petitioner was seen by Dr. Greatting on August 20, 2020 complaining that her wrist looked deformed. Dr. Greatting noted that there was some thickening of tissue over the dorsoulnar side of her wrist as well as some swelling. He advised Petitioner that the area she thought of as deformed was related to the surgical reconstruction of her 6th dorsal compartment and the tendon graft and scar tissue. Petitioner had good range of

motion and her tendon in the 6th dorsal compartment appeared stable. He advised her to increase her activities as tolerated. Because she could not attend occupational therapy because of transportation she was to do a home exercise program. PX 2 p.139

On October 7, 2020 Petitioner was again seen by Dr. Greatting and advised him that she was doing well and felt she could return to her former work duties with Respondent, saying she had been doing exercises at home. Physical examination showed her to have excellent range of motion of the wrist and forearm and her extensor carpi ulnaris tendon was very stable on range of motion testing. Petitioner was released to return to work with no restrictions effective October 12, 2020. PX 2 p.134

Petitioner was last seen by Dr. Greatting on December 10, 2020. She told him that she felt she was doing well, her pain was improved, and her strength and range of motion were good. On physical exam her range of motion and tendon stability were normal. He said Petitioner "is not or minimally tender over the area of the 6th dorsal compartment." He said she could use her right wrist and hand as tolerated without any restrictions or limitations. She was discharged on a return as-needed basis. PX 2 p.146

DEPOSITION TESTIMONY OF DR. MARK GREATTING

Dr. Greatting was called as a witness by Petitioner. He testified that he was a board certified orthopedic surgeon with a subspecialty in hand surgery. His practice was spent seeing patients in the office two and-a-half days per week and performing surgery two and-a-half to three days per week, with between a third and 40 percent of his practice involving treatment of the hand and wrist. (PX 4 p.8,9)

Dr. Greatting's testimony in regard to history, complaints and physical findings to the extent it was consistent with the summary, above, will not be repeated here.

Dr. Greatting took a history from Petitioner when he initially saw her on July 18, 2019 that she had worked the loin line for three to four weeks. After examining her on that date his diagnosis was tendinopathy or tendinitis of the extensor carpi ulnaris tendon. He said his opinion at that time was that her symptoms were related to the job duties with Respondent she had described to him based on her denying pain or problems with that area of the wrist previously and the symptoms developing directly after she began performing those activities over a period of three to four weeks. He said his opinion would not change if she had only worked those duties on the loin line for two weeks rather than three to four weeks. After giving her a corticosteroid injection he gave her light duty work restrictions. (PX 4 p.11,12,15-17)

After one or two additional office visits Dr. Greatting said he performed surgery on Petitioner's right wrist, reconstructing the sixth dorsal compartment, which is on the side of the wrist near the small finger, wrapping a tendon sheath around the tendon to tighten the sheath up and stabilize the tendon. His diagnosis remained the same, and he took Petitioner off work completely. (PX 4 p.19)

After several post-operative visits Dr. Greatting saw Petitioner on January 22, 2020. At that time she had good stability of the tendon with range of motion but was complaining of some irritation of a sensory nerve that ran through the area as well as some pain on the base of her thumb, on the opposite side of her hand. Dr.

Greatting testified that he told Petitioner he thought the nerve irritation symptoms would continue to improve and he gave her a light duty restriction. When seen on March 4, 2020 Petitioner continued to complain of pain on the ulnar side of her wrist, and his physical examination revealed she had significant instability or recurrent instability to the tendon which was affecting her wrist and forearm range of motion. He recommended another surgery to stabilize the right sixth dorsal compartment, as the tendon was slipping in and out of a little groove in the ulna, causing the pain, and the previous procedure had failed over time. (PX 4 p.23-25)

Dr. Greatting performed the second surgery on May 28, 2020, taking a portion of the palmaris longus tendon and reconstructing the tendon sheaths to stabilize that tendon. Dr. Greatting again saw Petitioner on a number of occasions post-operatively. Because of continuing transportation problems Petitioner again did not receive physical therapy. While he observed thickening where the surgery had taken place he advised Petitioner that was related to the reconstruction and was not unexpected or abnormal. He said by October 7, 2020 Petitioner was doing very well, her pain, range of motion and strength were all good, and she was released to return to work with no restrictions. (PX 4 p.25-27)

Petitioner's final visit with Dr. Greatting was on December 10,2020, and he said she was doing very well at that time, the tendon was very stable, she was declared at maximum medical improvement, and she was released from his care. (PX 4 p.28)

Dr. Greatting testified that his opinion from the first day he had seen Petitioner, that the conditions of her that he was treating were causally connected to her job duties, had not changed, he still felt the medical care he had provided to Petitioner was causally related as well as necessary. (PX 4 p.28,29)

On cross-examination Dr. Greatting testified he was not on Respondent's panel of physicians. He said Petitioner made an excellent recovery from her surgical procedures with excellent range of motion, a very stable tendon, and no tenderness over the sixth dorsal compartment when last seen by him. He said that other than her scar Petitioner had no objective abnormalities from her surgeries when he last saw her, though she did have some thickened peri tissue from the surgery, and that did not affect the mobility of her tendon sheathe. (PX 4 p.29-31)

Dr. Greatting said he had not reviewed a written job description of Petitioner's job, nor had he reviewed any job videos. He said the only information he had about Petitioner's job was what she told him in her initial visit, and that his causation opinion was based solely on the history Petitioner provided to him. (PX 4 p.31,32)

Dr. Greatting said Petitioner told him the loins weighed between 10 and 15 pounds, but that if they weighed 7.5 to 8.27 pounds each that would not change his causation opinion, nor would it matter if she only worked nine days on that job as opposed to the three to four weeks she had told him, or if she was working 15 minutes on and 15 minutes off, that what was important is whether her pain developed while doing those activities. He was of the opinion that no matter the weight, no matter the force, no matter the frequency, no matter how long she was on that job, if her pain started while doing that activity he would relate it to the activity. (PX 4 p.33,34)

When asked if Petitioner's performing one day of that work with 7 to 8 pound loins, 15 minutes on, 15 minutes off would cause her problem, Dr. Greatting said that it would be unusual for it to occur in one day. When asked if nine days was enough to cause the condition he treated, Dr. Greatting said he did not know if he

could answer that , but Petitioner developed the condition over the period of time she was doing those work activities, he thought a hypothetical question of nine working days of eight hours, 15 minutes on, fifteen minutes off and 7.5 to 8.27 pound loins would be sufficient to cause Petitioner's problem. He said he could not say at what point between it being unusual at one day to being related it would be, but her history was enough. (PX 4 p.34-36)

Dr. Greatting agreed that when Petitioner was initially seen in the orthopedic walk-in clinic her complaints of pain were on the radial side, the thumb side of her wrist, and that Petitioner did not report any ulnar-sided wrist pain until after the MRI was performed, that the medical records did not document any ulnar-sided wrist pain up to MRI testing. (PX 4 p.36,37)

Dr. Greatting said that on September 26, 2019 Petitioner was given a work restriction effective October 21, 2019 stating she could do left-handed work only, but that a second restriction note was given the next day, apparently at Petitioner's request, saying she was released to left-handed work only, "including running a cash register." (PX 4 p.38,39)

Dr. Greatting said that Petitioner's first surgery failed because "(t)he tissue that was repaired mush have stretched over time." He said that could happen due to a traumatic injury, but he had no information indicating Petitioner had a traumatic injury following the initial surgery. (PX 4 p.39,40)

On redirect examination Dr. Greatting said Petitioner did not complain of symptoms on the radial side of her wrist when he initially saw her or prior to her initial surgery, though she did have radial side pain after that initial surgery. He said when initially seen by him her pain was along the ulnar side of her wrist over her extensor carpi ulnaris tendon. He said at that time she had mild tendinopathy of the extensor carpi ulnaris tendon and a small tear of the radial attachment of the triangular fibrocartilage complex. (PX 4 p.41,42) He said the MRI did not show anything other than some arthritis at the bottom of her thumb on the radial side of the wrist.

DEPOSITION TESTIMONY OF DR. SAM BIAFORA

Dr. Biafora was called as a witness by Respondent. He testified that he is an orthopedic surgeon focusing on the upper extremities, from the shoulder to the fingertips. He is board certified with a subspecialty certificate in hind surgery. He said he performs a couple of hundred hand or thumb surgeries per year. He said he examined Petitioner at the request of Respondent counsel on October 31, 2019. He was provided with a job description and video, which he relied upon, along with Petitioner's described job activities. He said he also reviewed medical records and diagnostic films which had been provided to him, which he also relied upon in rendering opinions. (RX 1 p.3-7)

Dr. Biafora said Petitioner gave him a history of her working the loin line for one to two weeks in May of 2019 and of her suffering a gradual onset of pain, without any known event. She said her pain had been located in her entire right wrist, she could not remember any particular area of localized pain, though she recalled occasional popping at the base of her thumb. She said she had not experienced pain in her right wrist prior to May of 2019. She did tell him of prior bilateral carpal tunnel releases. She had undergone surgery about a week before seeing him and was to begin postoperative therapy in a few days. (RX 1 p.7-9)

Petitioner described her job to Dr. Biafora as involving packing of loins weighing between 2 and 20 pounds from a conveyor, and placing them in boxes, and pushing the box down the line. She told him that she would strike her ulnar wrist on the conveyor due to the position of her arms relative to the conveyor. He said that at different times Petitioner told him she had worked on that line for one to two weeks and at another point told him she had worked it for one and a half months, and that a medical record from Dr. Greatting indicated her working on the line for three to four weeks. Petitioner told him she worked 8 to 12 hours per day, five to six days per week. He said Petitioner actually demonstrated to him how she lifted the loins, standing with her hands facing each other, lifting up the loins and then placing them into the box before pushing the box along the line. (RX 1 p.9-11)

Dr. Biafora said he limited his physical examination somewhat because of Petitioner's recent surgery. He said he removed the splint she was wearing, observing the scar from the recent surgery along with some mild diffuse swelling. He said he limited the flexion and extension testing and refrained from stress or provocative examination of the wrist due to the recent surgery. He said Petitioner had pain with thumb CMC grinding with some crepitus, which was on the other side of the wrist from where she had surgery. He said his review of the MR Arthrogram of June 21, 2019 revealed some intrasubstance change at the ECU near the base of the ulnar styloid with no clear instability pattern. He said intrasubstance changes were also seen in the fourth and second extensor compartments. He said the was a possible small tear of the central TFCC. He said x-rays had not shown anything of great significance. (RX 1 p.11-13)

Dr. Biafora said his diagnosis was very hard to assess due to Petitioner's recent surgery, but she did have pain at the base of the thumb, which had not been operated on, so he diagnosed symptomatic thumb CMC joint arthritis on the right. He did not believe that condition was caused by Petitioner's job duties as described or as included in the video job analysis. Based on Dr. Greatting's diagnosis and surgery he also diagnosed right wrist ECU tendinopathy with subluxation. He said he did not believe this condition would have been caused or contributed to by these work activities for less than two months. (RX 1 p.13-17)

Dr. Biafora noted that when first seen Petitioner's complaints were isolated to the thumb, or radial side of the wrist and hand, which was consistent with her thumb CMC joint arthritis, but that after her MRI the focus switched to the other side, which he could not understand or interpret. He said the records indicated that they ulnar-sided complaints were not mentioned in the medical records until after the MR arthrogram was done. (RX 1 p.14,15)

Dr. Biafora did not believe Petitioner's work activities necessitated her having her surgery. He did not believe she was at MMI based upon her recent surgery. He did feel she could work at the point her saw her provided she had no use of the right arm. (RX 1 p.16-18)

On cross-examination Dr. Biafora said that none of the medical records he reviewed, including records pre-dating May of 2019, indicated Petitioner had suffered any right wrist pain prior to May of 2019. He agreed that it was his understanding that her complaints occurred while she was working on the loin line. He said he was not aware of any intervening accident to the right wrist after May of 2019, or of any injury to the wrist outside of work at any time. He was aware that Petitioner believed her bagging loins job caused her problems. (RX 1 p.19-21)

Dr. Biafora was asked about the job description he had been provided by Respondent and had relied upon, and he said he no longer had that report and did not know if it was a description of the box making job or the boxing loins job. He said that as of the date of his deposition he did not know what the job task procedure was, all he knew was what Petitioner said in describing her job. He could not remember the physical demand summary for the box making job or what types of movements were needed for that job. He had been provided by Respondent with a video approximately two minutes long showing the box making job, but he was not provided with a video of the boxing loins job. He said he was not provided with any photos of the conveyor Petitioner had described to him or loins or boxes used. He said he did not know how much the boxes Petitioner made weighed or how many boxes she made in a shift, nor did he know how many loins Petitioner would lift and put in boxes during a shift. (RX 1 p.22-26)

After reviewing his written report Dr. Biafora corrected his earlier testimony, saying he erred on page five when he said it was Dr. Wolters who had stated that he believed Petitioner's symptoms were related to Petitioner's work based upon her history, that it was actually Dr. Greatting. He agreed that Dr. Greatting also felt Petitioner's job duties were a causative factor in Petitioner's right wrist condition. He said he had no criticisms of Dr. Greatting as a physician or surgeon as he was not familiar with him. He agreed that the treatment Dr. Greatting provided was reasonable and necessary. He said he agreed that as of the date he saw Petitioner she needed work restrictions and she was not in a position to be released from care. (RX 1 p.27-29)

Dr. Biafora felt Petitioner's complaint on the date he saw her were reasonable, given she had undergone surgery five weeks earlier. He said nothing in her medical records or his examination would indicate to him that she was malingering or magnifying her symptoms. (RX 1 p.31,32)

Dr. Biafora said he was of the opinion that forceful pinching for sustained period of time could aggravate Petitioner's right CMC thumb arthritis and the right extensor carpi ulnaris tendinopathy conditions. He noted that when Petitioner demonstrated her work to him she did not have loins to hold in her hands, but he believed that even if she was forcefully pinching for a few weeks that would not have aggravated it, it needed to be an extended period of time. He then said that working with 2 to 20 pound loins 8 to 12 hours a day, five to six days a week would be considered forceful pinching, but he did not believe she was pinching at all. He then said that even if she was pinching forcefully, a few weeks would not be enough to forcefully aggravate arthritis. (RX 1 p.32-34)

Dr. Biafora said that the mere fact she did not have these complaints prior to working these duties did not imply causation, that something the did not know about could have happened, that he had patients who just work up with complaints they could not explain. When asked if there was evidence Petitioner had woken up one morning with the complaints Dr. Biafora said, "(w)ell, clearly, it happened somehow. I don't know if she awoke from sleep with a pain. * * * It could be anything. Like I said, it just happens. * * * We can't explain it." Dr. Baifora when asked if he had any reason to dispute that Petitioner's symptoms manifested when she started working said that it was possible they did. (RX 1 p.34-36)

Dr. Biafora said he performed a couple hundred independent medical examination per year, with 85 percent being for Respondents. (RX 1 p.37,38)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner's testimony and histories to medical providers and examiners, was inaccurate at times, such as the weight of the loins, which Mr. Lanier and Mr. Maswa both testified weighed between two and seven pounds, with no loins over seven pounds, compared to Petitioner's estimate that they weighed up to fifteen pounds. Similarly she testified that up to twenty loins would be put in a box, while Mr. Lanier and Mr. Maswa said the maximum number was eight. Her description of how the job was performed and the motions involved appeared to be accurate, and her description of the onset of her complaints, the complaints themselves and the medical treatment she received was generally consistent with other testimony and medical records. While Petitioner's estimates of how many loins she might have handled in an hour appears to be high, even using the 40 percent to 55 percent estimates of productivity cited by Mr. Maswa would still make this a very repetitive job, and be consistent with Petitioner's description of it as such. The Arbitrator does not believe Petitioenr's testimony of working full time on the loin line is accurate, but believes she worked more than new trainees might usually do per her uncontradicted testimony that there were only four other employees on the loin line, that a worker had been taken off the line to work another shift and she was replacing her. The Arbitrator finds Petitioner to be credible in regard to the work she performed, her testimony in regard to onset of complaints, her medical treatment and her condition as of the date of arbitration while further finding that her estimates of weight and number of loins packed per shift, etc. were inaccurate.

Michelle Ellis testified to company general procedures at the nursing station, how new employees in a position often were seen in the nursing department for aches and pains, the fact that all jobs, including those performed by Petitioner, were repetitive and how human resources was in charge of light duty work decisions in non-work related injury cases, she was not consulted on those decisions, and she would not know if Petitioner had contacted human resources with restrictions. Ms. Ellis was a credible witness.

James Lanier testified in regard to how the loin line operated, weights of loins, number of loins in boxes and how new trainees were to be integrated gradually on the line. He noted Petitioner was complaining of pain and soreness in her forearm during her second week on the line. He said he did not work full time in Petitioner's area, he would observe her approximately ten times a day while walking through the area. He said the loin line was to have five employees, not counting Petitioner. While Mr. Lanier was not in a position to know how many loins Petitioner was packing or how much time she was packing, he was a credible witness in regard to the information he had actual knowledge of.

Jules Maswa was Petitioner's trainer and worked the loin line himself. His description of loin sizes and numbers was consistent with Mr. Lanier. His estimation of how much Petitioner was asked to pack seems questionable if, as Petitioner testified, there were only four employees and herself packing during this period of time. The same 15,000 loins per hour would be coming down the conveyor and it is only natural to have the trainee pack as many as they could. The first week she was estimated by him to be working at 40 percent of a full employee and the second week she was estimated by him to be working at 55 percent of a full employee. His description, and that of Mr. Lanier, in regard to what that percentage meant did not actually make sense, and the Arbitrator believes it means she was packing that percentage of a full employee's number of loins. Otherwise Mr. Maswa was felt to be a credible witness.

Both Dr. Greatting and Dr. Biafora appeared to be good witnesses who answered all questions put to them in a straightforward manner with no apparent attempt to evade or refuse to answer questions. While their opinions differed, they both appeared to be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on May 17, 2019, and whether Petitioner's current condition of ill-being, tendinopathy of her extensor carpi ulnaris tendon resulting in a. stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft, is causally related to the accident of May 17, 2019,the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein

In a repetitive trauma case, issues of accident and causation are intertwined. Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture, 99 I.I.C. 0961 (1999). Accidental injury need note be the sole causative factor, nor 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, 672-73 (2003). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. Fierke v. Industrial Commission, 723 N.E.2d 846 (2000).

In Edward Hines Precision Components. Industrial Commission, 825 N.E.2d 773 (2005), the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* At N.E.2d 780. Similarly, the Commission noted in Dorhesca Randall v. St. Alexius Medical Center, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain of time each day on a specific task before a finding of repetitive trauma can be made.

While exact numbers of loins packed or weight of loins are in dispute, there is no dispute that Petitioner's job is repetitive. Petitioner's description of the job, even if somewhat exaggerated, certainly appears to be that of a repetitive job. The descriptions by Mr. Lanier and Mr. Maswa confirm the job was repetitive and fast paced. Ms. Ellis testified that an accident report was not necessarily filled out when someone reported to the nurses' station that they were in pain. Therefore there would apparently not be written records to prove that a report had been made, but the lack of a written accident report does not equate to there not being an accident. As Ms. Ellis testified, there were not easy jobs, and all new hires are going to have soreness, they did not consider that enough to justify the filling out of an accident report, but the nursing staff would work to help the employee get through that. She said they would fill out an accident report when "it went from soreness to pain." Pain and soreness both being subjective, that seems a nebulous standard. Ms. Ellis made it clear, however, that

Respondent's jobs were not easy, they were very repetitive, and she did not think Respondent had any jobs which were not repetitive.

Respondent's Weekly Touch Point Meetings report in regard to Petitioner, Respondent Exhibit 4, notes that Petitioner was having soreness in the right forearm and was taken to the nurse by her trainer during her second week on the job, presumably May 17, 2019, as evidenced by the Notations on that form dated May 20, 2019. That form also noted that during her third week on that job she was again taken to the nurse due to right forearm complaints, ice was put on it, and Petitioner was to take pills for pain. A separate claim, 19 WC 017442, was consolidated with this claim for purposes of arbitration and a separate Decision of Arbitrator is being issued for that claim.

Dr. Greatting from his first visit onward was of the opinion that Petitioner had tendinopathy or tendinitis of the extensor carpi ulnaris tendon and that her symptoms were related to the job duties on the loin line that Petitioner described to him. During his deposition, after he had performed two surgeries on the ulnar region of Petitioner's right wrist, he continued to be of that opinion. Petitioner's description of her job was somewhat exaggerated, saying she packed 10 to 15 pound loins and worked 8 to 12 hour days, when she only packed 2 to 8 pound loins and worked one 9 hour day and nothing greater than that, generally working slightly more than 8 hours a day, six days a week. (RX 3) When asked on cross examinations if his opinions would change if the loins only weighed 7.5 to 8.27 pounds, fewer weeks than he had been told and only 15 minutes on and 15 minutes off, Dr. Greatting made it clear that no matter the weight, force, frequency or time on the job, Petitioner stated the pain started while performing the work and he therefore related it to that activity.

While Mr. Lanier and Mr. Maswa both said the 40 percent and 55 percent figures on the Weekly touch Point Meetings form were "performance," the form actually says "% of pull," followed by the 40% and 55% handwritten figures. Mr. Lanier testified that 15,000 loins came down the line per shift. Each of the five employees on the line would therefore be responsible for loading 3,000 loins per shift. With an average weight of 6.5 pounds that would be 19,500 pounds of pork loins per shift per employee. Using those figures at a minimum Petitioner would have been picking up and loading 7,800 pounds of loins per shift, nearly four tons. During her second and third weeks she would have been picking up and loading 10,725 pounds per shift, nearly five-and-a-half tons. Using the figures taken from Respondent's own exhibit Petitioner was performing a rapid, repetitive task. She complained during her second and third week, was seen by the nurses, was told to take pills for pain and ice the forearm, and then sought medical treatment.

The Arbitrator finds that the Petitioner sustained a compensable repetitive trauma accident on May 17, 2019 which arose out of and in the course of her employment by Respondent. The Arbitrator finds that Petitioner's medical condition, tendinopathy of her extensor carpi ulnaris tendon resulting in a. stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft is causally related to the accident of May 17, 2019. These findings are based upon the testimony of Petitioner, Ms. Ellis, Mr. Lanier, Mr. Maswa, the medical records introduced into evidence for treatment subsequent to May 17, 2019 and the testimony of Dr. Greatting. The Arbitrator has given greater weight to the testimony and opinions of Dr. Greatting than those of Dr. Biafora based upon his repeated examinations and dealings with Petitioner, his conservative treatment over a period of time and his actually performing the two surgeries upon her. Dr. Biafora's assertions that such a condition could not be caused in a

few weeks contradicts the testimony of Ms. Ellis who said it was quite usual for people to have soreness and pain when changing to a new repetitive job.

In support of the Arbitrator's decision relating to whether timely notice of the accident was given to Respondent the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner testified to the onset of pain while performing her job on the loin line. She reported that to her trainer, Mr. Maswa, as evidenced by his testimony and by Respondent Exhibit 4, the Weekly Touch Point Meetings form. Respondent Exhibit 4 also notes Petitioner was taken to the nurses station prior to the Weekly Touch Point Meetings form notations of May 20, 2019 due to that right forearm/wrist pain. On the second visit to the nurses station, the subject of 19 WC 017442, she was told to ice the area and to take pain pills. She then began to miss work because of the pain, seeking medical treatment and advising human resources of her restrictions. Ms. Ellis confirmed these facts but said accident reports were not filled out simply because a person reported pain.

The Arbitrator finds that Petitioner gave timely notice of the accident of May 17, 2019 to Respondent. This finding is based upon the testimony of Petitioner, Mr. Maswa, Ms. Ellis and Respondent Exhibit 4.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of May 17, 2017, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner continued working after May 17, 2019, continuing to perform her duties on the loin line. She subsequently claimed a second accident of May 24, 2019, and all lost time was subsequent to May 24, 2019 and will be awarded in 19 WC 017442.

The Arbitrator finds that Petitioner was not temporarily totally disabled as a result of the accident of May 17, 2019 for the period claimed by Petitioner. This finding is based upon Petitioner's losing no time from work until after her second claimed accident of May 24, 2019. Temporary total disability benefits, if any, will be awarded in 19 WC 017442.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of May 17, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, and temporary total disability, above, are incorporated herein.

The Arbitrator finds that Petitioner did not receive any medical treatment until after the date of her second claimed injury to the same area of her body on May 24, 2019, the subject of 19 WC 017442. Medical benefits, if any, will be awarded in 19 WC 017442.

The Arbitrator further finds that based upon the testimony of Petitioner and the alleged accident involving the same injury of May 24, 2019, 19 WC 017442, Petitioner had not reached maximum medical improvement prior to May 24, 2019 and permanent partial disability, if any, will be awarded in 19 WC 017442.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017442
Case Name	Rebecca M Barker v. JBS USA
Consolidated Cases	19WC017441;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0335
Number of Pages of Decision	30
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Lisa Azoory

DATE FILED: 8/29/2022

/s/ Kathryn Doerries, Commissioner

Signature

22IWCC0335

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REBECCA M. BARKER,

Petitioner,

vs. NO: 19 WC 17442

JBS USA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, permanent partial disability, and other-Panel of Physicians 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, herein, corrects a scrivener's error in the Arbitrator's decision, page 24, under "In support of the Arbitrator's decision related to whether medical services…", to strike "May 17, 2019", to replace with "May 24, 2019".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 2021, is, otherwise, hereby, affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $406.49 per week for a period of 65-6/7 weeks, for the period July 9, 2019 through October 12, 2020, that being the period of temporary total incapacity for work under §8(b) of the Act. ($26,770.27 total TTD)

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $365.84 per week for a period of 30.75 weeks, as provided in §8(e)(9) of the Act, for the reason that the injuries sustained caused the 15% loss of use of Petitioner's right hand. ($11,249.58 total PPD)

IT IS FURTHER ORDERED BY THE COMMISSION that as Petitioner was not treated by a physician on Respondent's Panel of Physicians as approved by the Commission on November 18, 2016, and pursuant to §8(a) of the Act and terms of the Order of November 18, 2016, Respondent is not liable for medical bills in Petitioner's Exhibit 3.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 29, 2022

o- 7/12/22
KAD/jsf

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Maria E. Portela

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017442
Case Name	BARKER, REBECCA M v. JBS USA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	27
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Lisa Azoory

DATE FILED: 9/9/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 8, 2021 0.05%

/s/ Dennis OBrien, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

REBECCA M. BARKER
Employee/Petitioner

v.

JBS USA
Employer/Respondent

Case # **19** WC **017442**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **June 25, 2021**. 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 **Effect of Panel of Physicians**

FINDINGS

On **May 24, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**$6,097.30 (10 weeks)**; the average weekly wage was $**609.73**.

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

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

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

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

ORDER

Petitioner sustained a compensable repetitive trauma accident on May 24, 2019 which arose out of and in the course of her employment by Respondent. The Arbitrator finds that Petitioner's medical condition, tendinopathy of her extensor carpi ulnaris tendon resulting in a. stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft is causally related to the accident of May 24, 2019.

Petitioner gave timely notice of the accident of May 24, 2019 to Respondent.

Petitioner was temporarily totally disabled from work from July 9, 2019 through October 12, 2020, a period of 65 6/7 weeks, at a weekly rate of $406.49.

Petitioner was not treated by a physician included on Respondent's Panel of Physicians as approved by the Commission on November 18, 2016, and, pursuant to Section 8(a) of the Act and the terms of the Order of November 18, 2016, all charges included in Petitioner Exhibit 3 are not the responsibility of Respondent.

Petitioner sustained permanent partial disability to the extent of 15% loss of use of the right hand pursuant to §8(e) of the Act, 30.75 weeks of disability, at $365.84 per week.

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 9, 2021

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified her highest level of education was the 12th grade, that she was divorced and had no children under 18. She said Respondent JBS is a hog slaughterhouse and that she began employment with Respondent in February of 2019. Her initial job was building cardboard boxes to be placed on the line. She worked that job for approximately two months before moving to a different position on the loin line in the middle of May, 2019.

Petitioner said the loin line was similar to an assembly line, with five people, including herself, standing and boxing loins. She said there were two conveyor belts in front of her as she stood to perform her work, one on top and one on bottom. The higher belt was at about her waist level and the lower belt was down in the area of her knees. The top belt moved from the right to the left, and the lower belt moved from the left to the right. She said pork loins came down the line and they would pick them up and place them in boxes. She said she would grab a loin with both of her hands and just place them in the box. She said she was never trained on that job.

Petitioner said that how she put the loins in the boxes depended on the size of the loins, as she was putting between 6 and 20 loins in a box. She said they were slippery as they had already been bagged and labeled. The loins were put in the box in layers. She would grab a loin from the upper conveyor belt to her left with both hands and place it in the box which was on a rolling table in front of her which was below waist level. When the box was full she would shove the box onto the lower conveyor box and start filling a new box. She said this was her sole job task, and between 10,000 and 20,000 loins came down the line per shift, and she would box one fifth of the loins which came down the line, 2,000 or more a day. Petitioner said she worked an eight-hour shift six days per week.

Petitioner said the other four employees working the loin line were doing the same work. She said the conveyor belt moved pretty fast. She said the average weight of a loin coming down the line was between 7 and 10 pounds, but some weighed more, up to 12 to 15 pounds. When full the boxes weighed at least 60 to 70 pounds. She said that when the conveyor belt stopped, which happened about every other day, she would have to lift the boxes. While on the line she said she would be using her hands during her entire shift. She a 15-20 minute break in the mornings and a half hour lunch break.

Petitioner said she worked on the loin line for about three weeks. She said while working the loin line she noticed she had burning and stinging, like needles were going through her hands. She said this started while on the loin line, at the beginning of the third week she was working on the loin line.

Petitioner said she had carpal tunnel in 2011 and had received a full duty release after she had surgery, with no symptoms. She said that at no point after her surgery did she have symptoms in her right wrist similar to the symptoms she said started while working on the loin line in May of 2019. Petitioner said she was not

having any right wrist problems when hired by Respondent and she did not notice any right wrist problems when working the job making boxes. Petitioner said that prior to starting work in February of 2019 Respondent had her undergo a pre-employment physical, and she was cleared to work.

Petitioner said that after noticing her symptoms she reported this to her trainer, Jules, who reported it to their supervisor, Dave. She said she gave the notice to him when it was happening, when she noticed her symptoms, when it was getting worse. She said Jules took her over to the on-site nurse's station where they massaged it, put a cold pack on it, which did not work. After having seen the nurse she tried to continue working on the line but it continued to get worse. Upon return to the loin line she said she was doing the same job she had described, with the same amount of loins per shift and loins of the same weights. At that point Jules contacted the supervisor and he said Petitioner should be sent home. Petitioner said she did not ask to see a doctor. Respondent's Exhibit 3, records of Petitioner's dates of work and hours work, indicates that Petitioner's last day of actual work was May 24, 2019, thus the last day she was exposed to this repetitive work.

Subsequent to the initial visit with the nurse Petitioner said she saw the nurse twice. She said she was not referred to a doctor. She said she went to see her doctor because it was getting worse and she could not take it anymore. Petitioner said she eventually was seen at Springfield Clinic on June 3, 2019, seeing Nurse Practitioner (NP) Jared Whetstone. She said she described her problem to him and she was examined and given a brace for her wrist. She said the brace did not help at all. NP Whetstone gave her light duty restrictions, and she called somebody at Respondent and advised them of the light duty restriction. She said she was not offered a light duty position by Respondent, she was told there was no light duty. When she asked about a job putting labels on loins she was advised that job was already taken.

Petitioner said she returned to see NP Whetstone on June 7, 2019, and an MRI was ordered, and her light duty restrictions continued. The MRI arthrogram was performed on June 21, 2019, and she followed up with NP Whetstone on July 9, 2019. She was told to stay on light duty restrictions and she was referred to Dr. Greatting.

Petitioner saw Dr. Greatting on July 18, 2019. She said she told him of her symptoms, and the symptoms had not changed. He reviewed the MRI with her, gave her an injection and maintained her restrictions. She said the injection did not help.

Petitioner said that when she next saw Dr. Greatting on August 21, 2019 he continued her restrictions and recommended surgery for her. That surgery was performed on September 20, 2019. She said that following the surgery her wrist still did not feel right, she still had problems with the wrist burning, pinching and throbbing.

Petitioner said she was next seen by Dr. Greatting's assistant on October 4, 2019 and then saw Dr. Greatting on October 16, 2019. Physical therapy was ordered and he continued to keep her off work. Petitioner said she went to one physical therapy session but had no transportation to go to more as she no longer had her truck. They had given her paperwork on exercises to do, and she continued to do them.

Petitioner said she then saw Respondent's examining physician, Dr. Biafora, on November 12, 2019. She said her visit with that doctor was not very long and that he did not examine her, just looking at the wrist because she was still in a cast as it was seven weeks after her surgery.

Petitioner said she returned to see Dr. Greatting on November 14, 2019 and December 12, 2019. He continued to keep her off work and she said she continued doing the home exercise program. She said that when she saw Dr. Greatting on January 22, 2020 he gave her light duty restrictions. At that point she said she really had not noticed any improvement in her right wrist in the three months following surgery. She said when she saw Dr. Greatting on March 4, 2020 the doctor recommended a second surgery, and he took her off work again at that point. The second surgery was performed on May 28, 2020. She said that while Memorial Medical Center records may show her going to the emergency room two days following that surgery, she could not remember why she went to the emergency room.

Petitioner testified that she saw Dr. Greatting on June 10, 2020 and he gave her light duty restrictions at that time. She saw him again on August 20, 2020, and at that point she was complaining of the right wrist being deformed. She noted the deformity at the arbitration hearing, and the parties agreed that the area she pointed to was the radial process, the bump on the outside of her wrist, which she noted was sticking out more than it previously had, and that area was numb. She said Dr. Greatting continued to recommend physical therapy, but she still did not have a truck, so she just continued her home exercise program, which she said helped. She said she got a little bit better after the second surgery.

Petitioner said she continued to improve and saw Dr. Greatting on October 7, 2020. She agreed that as of that date Dr. Greatting wanted to return her to full duty work effective October 12, 2020.

Petitioner said she last saw Dr. Greatting on December 10, 2020, when he released her from his care.

Petitioner testified that she no longer worked for Respondent, that she was currently working at Memorial Medical Center as of February of 2021, in the Environmental Services department, doing housekeeping. She said she is earning $15 an hour at Memorial and is working 50 to 60 hours a week, including overtime.

Petitioner testified that as of the date of arbitration her right wrist felt fine, though she still had numbness in the lateral wrist, where the surgery had been. She said she had motion and no pain at all. She said she only noticed a little problem with range of motion and strength. She said she was able to do all of her work duties for Memorial, and the wrist did not affect her at all on a day to day basis as of the date of arbitration.

Petitioner said she did not believe she would be able to perform the duties of the loin line as of the date of arbitration as that was too repetitive with the wrist and because she cannot lift as much with the right arm as she used to because of the two surgeries.

Petitioner said she was right hand dominant.

On cross-examination Petitioner said her initial job for Respondent was constructing empty boxes on the 6 a.m. to 3 p.m. shift, and she had no wrist or hand pain while doing that job. She said the pain started after she began work on the loin line, on the afternoon shift. She said if the attendance records for Respondent showed she only worked nine days on the loin line, she would not be sure if that was right or wrong, though nine days did sound about right. She agreed that she started on the loin line in the middle of May, 2019, and the last day she worked on that line was May 28, 2010, when she took a leave of absence.

Petitioner said she told Dr. Greatting that the loins weighed between 10 to 15 pounds. She said if someone from the company were to testify that the loins weighed up to seven pounds she would disagree with that. She agreed she was considered a new hire on the job of boxing loins.

She agreed she was allowed to see a nurse, and said she did not fill out an accident report, that she was not allowed to do so. She agreed that she had a prior accident with Respondent and had filled out an accident report as well as demonstrate how she fell. She said she did not recall filling out an accident report for her wrist injury.

Petitioner said that after she stopped working on the loin line for Respondent her pain remained about the same as when she was working. She agreed that she told Physician's Assistant Whetstone on June 7, 2019, two weeks after ceasing to work for Respondent, that she was crying and in extreme pain.

Petitioner said that she had not had any problems with her right arm before this accident, and could not remember being in the emergency room in 2012 complaining of right arm pain. She said she also did not recall being in the emergency room on August 20, 2015 in regard to her right arm and right elbow.

When asked if she currently smoked Petitioner said she did, about half a pack a day as of the date of arbitration, but noted that she had previously smoked three packs a day while working for Respondent.

Petitioner said that she had no lingering symptoms in her right hand except for when she was lifting and noted that the numbness in the area where the surgery occurred was still present. She said it only affected her activities of daily living if she lifted a lot.

On redirect examination Petitioner said the weight of the loins on the line varied. She said that as part of her application process she did tell Respondent verbally of her prior work comp cases before she was hired, telling them of the surgery she had while working for DOT Foods. She said she also informed them on the post-offer medical history of her prior carpal tunnel syndrome surgery in 2010.

Michelle Ellis

Ms. Ellis testified that she is Respondent's Occupational Health Manager and had worked for Respondent for about 14 years. She said he manages the nurses' station at Respondent's plant and is familiar with the injury reporting paperwork and incident reporting. She said that after an injured employee fills out an ESI they are taken care of in nursing and they also send them to panel physicians. She identified Respondent Exhibit 3 as an attendance record for Petitioner. She noted that the exhibit showed that Petitioner punched in and out of work nine times between May 13, when she started working the loin line, and May 28, working approximately eight hours per day. She said that Petitioner was a union employee, as all workers there longer than 45 days became part of Local 431.

Ms. Ellis said employees are made aware of the panel agreement during orientation, as part of a power point presentation, and they then sign off on that during orientation. Ms. Ellis said Respondent had a panel of physicians agreement that had been approved by the Illinois Workers' Compensation Commission. She said Dr. Greatting was not part of the panel of physicians, that the upper extremity specialists on the panel were Dr. Maender and Dr. Wolters.

In response to Petitioner's testimony that she had called regarding her wanting to work light duty, Ms. Ellis said that HR would have notified her if Petitioner had made such a call as she helps them in the process finding a person a light duty job. She said they typically accommodate people even after surgery if it is a work related injury, even accommodating one pound lifting restrictions or no use restrictions.

Ms. Ellis said Petitioner never filled out an accident report for her May 2019 work injury. She then identified Respondent's Exhibit 9 as being an accident report Petitioner previously filled out on March 28, 2019 for a different accident.

On cross-examination Ms. Ellis was asked if it was her understanding that if a workers' compensation case for an employee of Respondent was denied or disputed that the employee could at that point go off the panel for treatment, and she said that was not her understanding. She said that if a panel physician no longer wanted to treat an employee the employee could then get a second opinion, again, off the panel.

Ms. Ellis said she did not know if Respondent would accommodate light duty if the injury was not considered to be a work related injury, it was out of her realm, as she only works with work related injuries, and she did not know what HR did, and it was their decision.

Ms. Ellis said that a long time before the arbitration hearing she had reviewed Dr. Biafora's IME report, and she knew he denied the case was work related and that the job duties caused any aggravation in her condition.

Ms. Ellis testified that an accident report was not necessarily filled out when somebody reported they were in pain. She said the jobs they had were not easy jobs, and all new hires are going to have soreness, and that isn't something they would fill out a report for, but they would help them get through it. She was asked if that meant that just because she filled out an incident report in March of 2019 did not mean that she would necessarily have to fill one out when she presented with complaints when starting on the loin line, Ms. Ellis said if Petitioner had objective findings she would have been required to fill out an accident report. She said if she had an injury and/or pain she would have had to fill out an accident report.

Ms. Ellis was shown Respondent Exhibit 4, notes from weekly touchpoint meetings where is said Petitioner did present to somebody with pain and soreness when she started the loin line. Ms. Ellis said they do this with people in new jobs, they check on them, and people always have soreness and pain when they are starting a new job, and they come to nursing who help them get through the soreness and break-in pains from the new job. In those instances an accident report is not always filled out. They fill it out, according to Ms. Ellis, when it goes from soreness to pain. She said that none of their jobs is easy, they are very repetitive jobs. She did not think they had any jobs which were not repetitive.

Ms. Ellis said the attendance reports indicated that while working the loin line job Petitioner worked full eight hour days.

On redirect examination Ms. Ellis said it was typical for new employees to be seen in nursing in the first 45 days, they actually have a policy to see them at 10, 24 and 45 days.

Ms. Ellis said that for a non-work related injury HR was the appropriate entity to be contacted for light duty work and HR would call nursing to discuss that with them to make sure a job description fit with the

restrictions, so if Petitioner had contacted HR, Ms. Ellis would come to know about it, even if it were a non-work injury.

James Lanier

Mr. Lanier was called as a witness for Respondent. He said he was the loin boning supervisor on the second shift. He had been employed by Respondent for approximately three and-a-half years. He was Petitioner's direct supervisor on the loin line in May of 2019. That shift worked from 3:15 to 12:15. He said Petitioner was only working for him for about two weeks, she worked nine or ten days. He said that in a typical day he would see her about ten times as he was at least walking through the area, as he was also a general operator at the back end of the loin boning line.

Mr. Lanier said pork loins weighed between two and seven pounds, there are specifications and weight classifications for the loins. He said none of the loins weighed more than seven pounds. Most boxes contained six loins, though some could contain eight.

Mr. Lanier said that new hires such as Petitioner are in a probationary period and start by working with a person qualified to perform the job, with the trainee working on the line for 10 to 15 minutes at a time, doing a rotation with the qualified trainer. He said new hires do not box as many lines as a regular employee, only putting 40 to 60 loins in boxes in an hour. He disagreed with Petitioner's testimony that she would handle 2,000 loins per shift. He said new hires would box an average of 50 loins per hour, so approximately 400 loins per day. Regular employees would do about 80 boxes per hour, with six to eight loins per box, for eight hours, while a new hire would fill 80 to 100 boxes during an entire shift. His description of how loins were picked off the conveyor and placed in the box was similar to Petitioner's description, though he noted a worker could use one or both hands to put a loin in a box.

Mr. Lanier said there was no lifting involved in the job other than picking up the loins, so he disagreed with her testimony that Petitioner would be required to lift boxes weighing approximately 60 pounds. He said pinching is not required to pick up and box the loins.

Mr. Lanier said new hires would actually get on the line and work in 15 to 20 minute intervals, and when they were not working on the line they would be watching and stretching as the qualified person did the job. He said there were scheduled breaks at 6:00 and 8:30. He said the purpose of stretching and watching for new hires was for them to get used to it, like working out, they have to stretch and train their body for the process. He said in the nine days Petitioner worked the job she was mostly watching and stretching.

Mr. Lanier said he did not fill out Respondent Exhibit 4, the weekly touchpoint meeting document that had his name on the top as Petitioner's supervisor. He said it was filled out by the qualified trainer, but he would review it after it was filled out by the other worker. These were filled out weekly for new hires, and the company keeps them. He agreed that Petitioner's first week was May 13. He also agreed that Petitioner was having pain or soreness in her forearm by the second week on the job. The report for the third week noted that Petitioner missed work four days that week, which was consistent with his memory.

Mr. Lanier reviewed Deposition Exhibit 3 of Respondent Exhibit 1 and said it was a job task performance description for the boxing loins job, and that it was a fair and accurate representation of the job. He says they go over those descriptions with all employees starting a new job.

On cross-examination Mr. Lanier said he was not on the floor monitoring Petitioner at all times. When asked if there was any record of the count of loins Petitioner took off the line while working Mr. Lanier said all there was for that was Petitioner having been instructed on the count. No document is given to new hires such as Petitioner advising them what their count is to be, the trainers were to go over that with them. When asked if Petitioner was trained on the job, Mr. Lanier said the document showed the trainer followed up with Petitioner on her job. He said the training consisted of the trainer taking the worker to the area, advising them on what PPE they needed, give them the count, and show them the job. The training was to continue until they were in the job for 45 days. He said Jules was Petitioner's trainer, and he was present at the hearing.

Mr. Lanier was asked about the contents of Respondent Exhibit 4 and said that percentage of pull, 40 percent, would be the count the trainer gave Petitioner, what she was to do each hour, and in week two it was 55. Mr. Lanier said Petitioner missed one day of work during the first two weeks working the loin line, after she reported to her trainer that she was experiencing soreness on the loin line.

Mr. Lanier agreed that Petitioner did have to lift the loins off of the conveyor to put them in the box. He said there was no lifting of 60 pounds, though, that the box was 60 pounds once it was filled, but it would not be picked up, it was on a rolling platform. He agreed that the conveyor where the boxes sat did at times get stuck or stop, but that the employee would not move the box then, as his general operator was there for that. He said new hires have to stretch and flex to try to avoid injury.

While loins were sometimes half cuts and sometimes full cuts, and ranged from two to seven pounds, the average was actually about six and-a-half pounds, on the higher end of that range. He said an average of 15,000 loins would come down the line during the shift, there are five employees on the loin line, and each would be responsible for approximately 20 percent of the loins on the line. He said the job was repetitive and fast paced.

Mr. Lanier agreed that Deposition Exhibit 3 to Respondent Exhibit 1, the job description given to Dr. Biafora, did not list weights of loins on it or note the number of employees on the loin line or the speed or pace of the line.

On redirect examination Mr. Lanier said a new hire such as Petitioner would not be counted in the five employees working the line.

Jules Maswa

Mr. Maswa was called as a witness by Respondent. He testified he was a trainer and had worked for Respondent for nine years. He said he had not always been a trainer, he had started working on the line. He said that in May of 2019 he was Petitioner's trainer from May 13 through May 28, 2019. He said loins weighed between two and seven pounds, and there were six full loins to a box, and 12 half loins to a box.

Mr. Maswa said that new hires like Petitioner do not put in as many loins as regular employees, that they work fifteen minutes on and fifteen minutes off. He said he filled out Respondent Exhibit 4, the weekly touchpoint meeting documents. He said one was filled out each week. He said the one for week two noted that Petitioner was having soreness in her right forearm, and he remembered her saying that and that he had taken her down to nursing. He agreed that the third meeting report showed that she was having issues with attendance.

On cross-examination Mr. Maswa said he felt Petitioner did a good job boxing the loins. He said the 40 percent noted on the document meant that Petitioner was doing 40 percent of the job she was supposed to do, with a full hire doing 100 percent. He said he did not know how many loins came down the line in a shift, that was the supervisor's job, so he did not know how many loins Petitioner was handling. Mr. Maswa agreed that in the second week Petitioner was doing 55 percent of a full hire's work, and he felt she was doing a great job, with a good attitude. He said it was at that point that she reported the forearm soreness to him. He said that as her trainer he was the first person she should have reported that soreness to, and she did give notice to him. He said it was after that she started missing days.

Mr. Maswa said that as of the date of arbitration he was still a trainer for Respondent, he trained on the loin line and on the shipping line.

On redirect examination Mr. Maswa said that 40 percent was not 40 percent of the loins a regular employee did, it meant 40 percent performance.

Petitioner

Petitioner was recalled to testify. She testified that in the first week on the loin line she did not rotate in and out as a full time employee, she spent no time just watching and observing and she was not instructed to spend time stretching. She said they did stretch before they started work the first week, but that was the last time she was required to stretch. She said she had no training on the loin line, that one of the girls had left the loin line to work a different shift and they needed someone to work at that time, so she was put there. She said at no time that she worked the loin line were there more than five employees working the line.

Petitioner said that at no time did she work 15 minutes on and 15 minutes off. She said that there were occasions when the box conveyor stopped, and when that happened they continued putting loins in boxes and then would pick them up and put them behind them on a pallet. That was the lifting of boxes she had mentioned earlier, and the only time when she would lift boxes.

On cross-examination Petitioner said she disagreed with the testimony of Mr. Lanier and Mr. Maswa, saying she was not trained to be on the line.

James Lanier

Mr. Lanier was recalled to testify. He said Petitioner was trained as a new hire, and he disagreed if Petitioner testified she was not trained. He said he knew she was trained because he had set the line up, he had put qualified people on the line and he would see to it with a new hire.

Mr. Lanier said the percentage on the touchpoint document was the percentage Petitioner was pulling, that when fully qualified it would have been at 100 percent. It was her progression as a worker, not the percentage of loins being pulled.

On cross-examination Mr. Lanier said that the training process would not be expedited or shortened if the loin line was short staffed, that they would just be instructed to continue to pull their count and to let everything else go.

On redirect examination Mr. Lanier said new hires would not be pushed into a regular employee position during the first 45 days as they were not physically ready to do the pulling part and it would make a mess of his floor.

MEDICAL EVIDENCE

Springfield Clinic medical records for several years prior to May 17, 2019. They indicate that on May 25, 2011 Petitioner saw Dr. Wolters with one year complaints of right and left hand numbness which was getting worse. EMG testing by Dr. Warach on June 17, 2011 confirmed bilateral carpal tunnel syndrome as well as a mild right cubital tunnel syndrome. Right hand carpal and cubital syndrome surgery was performed on June 23, 2011. She advised Dr. Wolters on September 28, 2011 that her right hand symptoms had resolved following that earlier surgery. On that date she gave Dr. Wolters a history of that left hand numbness with an EMG indicating carpal tunnel syndrome. Left carpal tunnel surgery was performed on October 20, 2011. Petitioner reported that she was significantly improved after that surgery and she was released to return to full duty work on October 26, 2011 with maximum medical improvement anticipated in a year. (RX 7 p.108-116)

Medical records of Memorial Medical Center for treatment prior to May 17, 2019 were also introduced. They include records of a fall down some stairs on August 23, 2012 injuring her right arm (and other areas of her body), and x-rays revealed a closed mildly distracted, mildly displaced fracture of the proximal end of the right radius. An x-ray of that same right forearm three years later, on August 20, 2015, after some steel equipment struck her epigastric area as well as her right arm, showed no acute fracture, but noted a slight deformity of the radial head which was felt to possibly be secondary to the prior August 23, 2012 fracture. (RX 8)

Respondent introduced an Employee Incident Report dated March 28, 2019 for an accident Petitioner reported to her left shoulder while falling hard on the ground. All complaints were to the left shoulder, no complaints were made of the right arm or wrist. (RX 9)

Petitioner was seen at Memorial Express Care on May 28, 2019 with complaints of pain to her right wrist which had significantly increased in the past few days. She advised that facility that she had a history of right carpal tunnel in 2011and she believed her problem was from repetitive motion, saying she was constantly performing the same motion with her wrist at the slaughterhouse where she worked. She noted that she had an increase in her pain that morning which made it difficult to hold her coffee cup. Physical examination of the right wrist revealed Petitioner was tender to palpation over the radial aspect of the right wrist and was otherwise strong with normal range of motion. X-rays showed degenerative osteoarthritic changes of the first

carpometacarpal joint space and an old ulnar styloid avulsion. The impression on that date was right wrist pain and arthritis of the right wrist. (PX 5 p.11-14)

Petitioner was seen by NP Jared Whetstone on June 3, 2019, with complaints of right wrist pain and a history of starting a new job on the loin line three weeks earlier, a job which required her to lift and box meat, not do any cutting or butchering. She said the symptoms were not similar to the carpal tunnel which had been treated by Dr. Wolters in 2011. Pain was 7/10 and it was exacerbated by grabbing and holding. Physical examination revealed a number of objective test results as well as a number of normal test results, and Petitioner's voicing tenderness and pain. X-rays of the wrist showed mild first CMC arthritis. The differential diagnosis that day included overuse injury, and first CMC osteoarthritis. A brace was provided and treatment options were discussed. Petitioner wanted to avoid cortisone injections if possible. She was allowed to return to work with activities as pain allowed, while wearing her brace. (PX 2 p.85-87; RX 7 p.48-52)

Petitioner saw NP Whetstone again on June 7, 2019. Petitioner advised she had gotten worse, was 8/10, and she had been up all night crying and screaming. NP Whetstone found some swelling on the dorsal aspect of the wrist and tenderness and swelling within the first CMC joint space. The first dorsal compartment spanning the distal third of the radial side of the forearm and wrist were palpably tender. He said he would call her with the results of her MRI. Naprosyn and a Medrol dosepak were prescribed. (PX 2 p.82,83; RX 7 p.45-47)

An MRI arthrogram of the right wrist on June 21, 2019 showed mild degenerative arthritis at the first CMC joint in the mid carpal region and the distal radial ulnar joint, mild tendinopathy of the extensor carpi ulnaris and a small tear of the triangular fibrocartilage near the radial attachment. (PX 2 p.5,6; RX 7 p.11,12)

Petitioner was seen by NP Whetstone on July 9, 2019. Petitioner advised him that her pain was worse, with pain over the mid carpal regions which she had never felt before. Petitioner had painful and somewhat limited range of motion and reduced grip strength. Petitioner's MRI had shown a small tear of the TFCC and mild degenerative arthritis of the first CMC joint and distal radioulnar joint. His differential diagnosis was TFCC tear versus DRUJ osteoarthropathy. Lifting restrictions of 5–10 pounds were given. (PX 2 p.76-78; RX 7 p.39-43)

On July 18, 2019 Petitioner was seen by Dr. Greatting. On this and subsequent visits the office notes reflect Petitioner advising Dr. Greatting that her work involved loading 10 to 20 loins weighing 10 to 15 pounds each into a box and pushing or sliding the boxes, as well as occasionally having to lift boxes. She estimated she had to fill approximately 200 boxes per shift. Dr. Greatting stated, "It would appear based on her history that her symptoms are related to her work activities." He found swelling on the ulnar side of the right wrist in the area of the extensor carpi ulnaris tendon. He also found she had minimal tenderness over the thumb CMC joint. A corticosteroid injection was performed. Possible therapy was discussed, but Petitioner could not attend due to transportation problems. Restrictions were given of no forceful repetitive pushing, pulling, or gripping in excess of five pounds was given, and if no light duty work was available she was to remain off work. (PX 2 p. 71-73)

Petitioner was seen by Dr. Greatting on August 21, 2019. The injection from the last visit only gave her brief relief according to Petitioner, she was still having pain on the ulnar side of the wrist. Physical examination revealed significant increased mobility of the extensor carpi ulnaris tendon, though there was no frank or gross subluxation of the tendon at that time. He did believe Petitioner pain was caused by that tendon in the sixth

dorsal compartment of the right wrist. Surgery to reconstruct the sixth dorsal compartment of the right wrist was discussed and planned. Petitioner's work restrictions were continued. Two days later Petitioner was given a restriction of no repetitive pushing, pulling or gripping of more than five pounds. (PX 2 p.66-68)

Dr. Greatting performed a pre-operative physical on Petitioner on September 3, 2019. His examination revealed some swelling on the ulnar side of the right wrist in the area of the extensor carpi ulnaris tendon. She had mild limitation of motion of the right wrist and was minimally tender over the thumb CMC joint and significantly tender over the extensor carpi ulnaris tendon. Dr. Greatting felt Petitioner's symptoms were primarily from tendinopathy of the extensor carpi ulnaris tendon. A corticosteroid injection was given, and while it was recommended that Petitioner have physical therapy, her transportation difficulties prevented this. She was given light duty restrictions but was to be considered unable to work if light duty was unavailable. (PX 2 p.61,62)

On September 20, 2019 Dr. Greatting performed a reconstruction of the 6th dorsal compartment of Petitioner's right wrist. (PX 2 p.59,60)

Petitioner saw NP Mirjam Naughton October 4, 2019, the surgical site looked good and an order for a custom orthotic was given. She was told she could not return to work at that time. Occupational therapy constructed the brace that same day. (PX 2 p.50,53)

Petitioner was seen by Dr. Greatting on October 16, 2019 and was reporting some pain on the radial side of her right wrist. Her lifting was restricted and she was to wear a brace for two more weeks and then start physical therapy. She was to remain off work. (PX 2 p.46,47)

Petitioner saw Dr. Greatting on November 14, 2019. It was noted she had been unable to take physical therapy due to transportation difficulties. She felt her pain was somewhat improved. Dr. Greatting impressed on Petitioner the importance of her attending physical therapy, which was ordered. Petitioner was seen in occupational therapy that same date and was instructed on a home exercise program. She was to return the next week for a full evaluation. PX 2 p.41-43)

Petitioner was seen in follow-up on December 12, 2019. She had pain on both the radial and ulnar sides of her right wrist and the radial side of the wrist/thumb. She had some burning sensation with range of motion and had a slight amount of popping. She still had some pain on the radial side of the wrist. Most of the physical examination that day was normal, but Petitioner had pain and crepitation with grind test over the thumb CMC joint. Petitioner was advised to stay off work. (PX 2 p.38)

On January 22, 2020 Petitioner was again seen by Dr. Greatting, complaining of a burning sensation over the dorsum of the ulnar side of her hand. She had a mildly positive Tinel's sign over the dorsal ulnar sensory neve distal to her incision and crepitation with grind test. He felt she would continue to improve with time. Petitioner was given a work restriction of no lifting of more than five pounds by the right arm, and no repetitive gripping, pushing or pulling with that arm. (PX 2 p.34,35)

Petitioner was seen by Dr. Greatting on March 4, 2020. She was still having pain on the ulnar side of her right wrist. Physical examination on this date revealed Petitioner to have good motion of her forearm, wrist and hand, but some obvious visible subluxation of her extensor carpi ulnaris tendon on wrist flexion and extension and forearm pronation and supination, and those movements were painful. A reconstruction of the left wrist 6th

dorsal compartment to stabilize the extensor carpi ulnaris tendon with a palmaris longus tendon graft was recommended. She was to wear her brace until the surgery took place. Petitioner was told to remain off work until further notice. (PX 2 p.29,30)

Dr. Greatting saw Petitioner on January 22, 2020. Petitioner was given restrictions of lifting no more than 5 pounds.

Petitioner saw Dr. Greatting on May 8, 2020. After his physical examination of that date Dr. Greatting was of the belief that Petitioner's symptoms were primarily related to the tendinopathy of her extensor carpi ulnaris tendon. A corticosteroid injection of the extensor carpi ulnaris tendon sheath was performed. She was to wear a brace as tolerated. Physical therapy was discussed, but Petitioner noted she had transportation problems. She was given a light duty work restriction and informed that if light duty work was not available she was to remain off work. (PX 2 p.25,26)

Dr. Greatting performed a stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft on May 28, 2020. (PX 2 p.22,23)

On May 30, 2020 after conferring with a telenurse, Petitioner went to Memorial Medical Center's emergency room as she was in severe post-operative pain which was not controlled by medication. In the emergency room she described the pain as being over the surgical site. There was no indication of compartment syndrome or acute carpal tunnel. She was given additional pain medication and a muscle relaxant. (PX 2 p.13-16; PX 6 p.15,16)

On June 10, 2020 Petitioner was seen in postoperative follow-up by Dr. Greatting and was placed in a wrist splint. She was told not to lift more than a couple of pounds. (PX 2 p.8)

Petitioner was seen by Dr. Greatting on August 20, 2020 complaining that her wrist looked deformed. Dr. Greatting noted that there was some thickening of tissue over the dorsoulnar side of her wrist as well as some swelling. He advised Petitioner that the area she thought of as deformed was related to the surgical reconstruction of her 6th dorsal compartment and the tendon graft and scar tissue. Petitioner had good range of motion and her tendon in the 6th dorsal compartment appeared stable. He advised her to increase her activities as tolerated. Because she could not attend occupational therapy because of transportation she was to do a home exercise program. (PX 2 p.139)

On October 7, 2020 Petitioner was again seen by Dr. Greatting and advised him that she was doing well and felt she could return to her former work duties with Respondent, saying she had been doing exercises at home. Physical examination showed her to have excellent range of motion of the wrist and forearm and her extensor carpi ulnaris tendon was very stable on range of motion testing. Petitioner was released to return to work with no restrictions effective October 12, 2020. (PX 2 p.134)

Petitioner was last seen by Dr. Greatting on December 10, 2020. She told him that she felt she was doing well, her pain was improved, and her strength and range of motion were good. On physical exam her range of motion and tendon stability were normal. He said Petitioner "is not or minimally tender over the area of the 6th dorsal compartment." He said she could use her right wrist and hand as tolerated without any restrictions or limitations. She was discharged on a return as-needed basis. (PX 2 p.146)

DEPOSITION TESTIMONY OF DR. MARK GREATTING

Dr. Greatting was called as a witness by Petitioner. He testified that he was a board certified orthopedic surgeon with a subspecialty in hand surgery. His practice was spent seeing patients in the office two and-a-half days per week and performing surgery two and-a-half to three days per week, with between a third and 40 percent of his practice involving treatment of the hand and wrist. (PX 4 p.8,9)

Dr. Greatting's testimony in regard to history, complaints and physical findings to the extent it was consistent with the summary, above, will not be repeated here.

Dr. Greatting took a history from Petitioner when he initially saw her on July 18, 2019 that she had worked the loin line for three to four weeks. After examining her on that date his diagnosis was tendinopathy or tendinitis of the extensor carpi ulnaris tendon. He said his opinion at that time was that her symptoms were related to the job duties with Respondent she had described to him based on her denying pain or problems with that area of the wrist previously and the symptoms developing directly after she began performing those activities over a period of three to four weeks. He said his opinion would not change if she had only worked those duties on the loin line for two weeks rather than three to four weeks. After giving her a corticosteroid injection he gave her light duty work restrictions. (PX 4 p.11,12,15-17)

After one or two additional office visits Dr. Greatting said he performed surgery on Petitioner's right wrist, reconstructing the sixth dorsal compartment, which is on the side of the wrist near the small finger, wrapping a tendon sheath around the tendon to tighten the sheath up and stabilize the tendon. His diagnosis remained the same, and he took Petitioner off work completely. (PX 4 p.19)

After several post-operative visits Dr. Greatting saw Petitioner on January 22, 2020. At that time she had good stability of the tendon with range of motion but was complaining of some irritation of a sensory nerve that ran through the area as well as some pain on the base of her thumb, on the opposite side of her hand. Dr. Greatting testified that he told Petitioner he thought the nerve irritation symptoms would continue to improve and he gave her a light duty restriction. When seen on March 4, 2020 Petitioner continued to complain of pain on the ulnar side of her wrist, and his physical examination revealed she had significant instability or recurrent instability to the tendon which was affecting her wrist and forearm range of motion. He recommended another surgery to stabilize the right sixth dorsal compartment, as the tendon was slipping in and out of a little groove in the ulna, causing the pain, and the previous procedure had failed over time. (PX 4 p.23-25)

Dr. Greatting performed the second surgery on May 28, 2020, taking a portion of the palmaris longus tendon and reconstructing the tendon sheaths to stabilize that tendon. Dr. Greatting again saw Petitioner on a number of occasions post-operatively. Because of continuing transportation problems Petitioner again did not receive physical therapy. While he observed thickening where the surgery had taken place he advised Petitioner that was related to the reconstruction and was not unexpected or abnormal. He said by October 7, 2020 Petitioner was doing very well, her pain, range of motion and strength were all good, and she was released to return to work with no restrictions. (PX 4 p.25-27)

Petitioner's final visit with Dr. Greatting was on December 10,2020, and he said she was doing very well at that time, the tendon was very stable, she was declared at maximum medical improvement, and was released from his care. (PX 4 p.28)

Dr. Greatting testified that his opinion from the first day he had seen Petitioner, that the conditions of her that he was treating were causally connected to her job duties, had not changed, he still felt the medical care he had provided to Petitioner was causally related as well as necessary. (PX 4 p.28,29)

On cross-examination Dr. Greatting testified he was not on Respondent's panel of physicians. He said Petitioner made an excellent recovery from her surgical procedures with excellent range of motion, a very stable tendon, and no tenderness over the sixth dorsal compartment when last seen by him. He said that other than her scar Petitioner had no objective abnormalities from her surgeries when he last saw her, though she did have some thickened peri tissue from the surgery, and that did not affect the mobility of her tendon sheathe. (PX 4 p.29-31)

Dr. Greatting said he had not reviewed a written job description of Petitioner's job, nor had he reviewed any job videos. He said the only information he had about Petitioner's job was what she told him in her initial visit, and that his causation opinion was based solely on the history Petitioner provided to him. (PX 4 p.31,32)

Dr. Greatting said Petitioner told him the loins weighed between 10 and 15 pounds, but that if they weighed 7.5 to 8.27 pounds each that would not change his causation opinion, nor would it matter if she only worked nine days on that job as opposed to the three to four weeks she had told him, or if she was working 15 minutes on and 15 minutes off, that what was important is whether her pain developed while doing those activities. He was of the opinion that no matter the weight, no matter the force, no matter the frequency, no matter how long she was on that job, if her pain started while doing that activity he would relate it to the activity. (PX 4 p.33,34)

When asked if Petitioner's performing one day of that work with 7 to 8 pound loins, 15 minutes on, 15 minutes off would cause her problem, Dr. Greatting said that it would be unusual for it to occur in one day. When asked if nine days was enough to cause the condition he treated, Dr. Greatting said he did not know if he could answer that, but Petitioner developed the condition over the period of time she was doing those work activities, he thought a hypothetical question of nine working days of eight hours, 15 minutes on, fifteen minutes off and 7.5 to 8.27 pound loins would be sufficient to cause Petitioner's problem. He said he could not say at what point between it being unusual at one day to being related it would be, but her history was enough. (PX 4 p.34-36)

Dr. Greatting agreed that when Petitioner was initially seen in the orthopedic walk-in clinic her complaints of pain were on the radial side, the thumb side of her wrist, and that Petitioner did not report any ulnar-sided wrist pain until after the MRI was performed, that the medical records did not document any ulnar-sided wrist pain up to MRI testing. (PX 4 p.36,37)

Dr. Greatting said that on September 26, 2019 Petitioner was given a work restriction effective October 21, 2019 stating she could do left-handed work only, but that a second restriction note was given the next day, apparently at Petitioner's request, saying she was released to left-handed work only, "including running a cash register." (PX 4 p.38,39)

Dr. Greatting said that Petitioner's first surgery failed because "(t)he tissue that was repaired must have stretched over time." He said that could happen due to a traumatic injury, but he had no information indicating Petitioner had a traumatic injury following the initial surgery. (PX 4 p.39,40)

On redirect examination Dr. Greatting said Petitioner did not complain of symptoms on the radial side of her wrist when he initially saw her or prior to her initial surgery, though she did have radial side pain after that initial surgery. He said when initially seen by him her pain was along the ulnar side of her wrist over her extensor carpi ulnaris tendon. He said at that time she had mild tendinopathy of the extensor carpi ulnaris tendon and a small tear of the radial attachment of the triangular fibrocartilage complex. (PX 4 p.41,42) He said the MRI did not show anything other than some arthritis at the bottom of her thumb on the radial side of the wrist.

DEPOSITION TESTIMONY OF DR. SAM BIAFORA

Dr. Biafora was called as a witness by Respondent. He testified that he is an orthopedic surgeon focusing on the upper extremities, from the shoulder to the fingertips. He is board certified with a subspecialty certificate in hind surgery. He said he performs a couple of hundred hand or thumb surgeries per year. He said he examined Petitioner at the request of Respondent counsel on October 31, 2019. He was provided with a job description and video, which he relied upon, along with Petitioner's described job activities. He said he also reviewed medical records and diagnostic films which had been provided to him, which he also relied upon in rendering opinions. (RX 1 p.3-7)

Dr. Biafora said Petitioner gave him a history of her working the loin line for one to two weeks in May of 2019 and of her suffering a gradual onset of pain, without any known event. She said her pain had been located in her entire right wrist, she could not remember any particular area of localized pain, though she recalled occasional popping at the base of her thumb. She said she had not experienced pain in her right wrist prior to May of 2019. She did tell him of prior bilateral carpal tunnel releases. She had undergone surgery about a week before seeing him and was to begin postoperative therapy in a few days. (RX 1 p.7-9)

Petitioner described her job to Dr. Biafora as involving packing of loins weighing between 2 and 20 pounds from a conveyor, and placing them in boxes, and pushing the box down the line. She told him that she would strike her ulnar wrist on the conveyor due to the position of her arms relative to the conveyor. He said that at different times Petitioner told him she had worked on that line for one to two weeks and at another point told him she had worked it for one and a half months, and that a medical record from Dr. Greatting indicated her working on the line for three to four weeks. Petitioner told him she worked 8 to 12 hours per day, five to six days per week. He said Petitioner actually demonstrated to him how she lifted the loins, standing with her hands facing each other, lifting up the loins and then placing them into the box before pushing the box along the line. (RX 1 p.9-11)

Dr. Biafora said he limited his physical examination somewhat because of Petitioner's recent surgery. He said he removed the splint she was wearing, observing the scar from the recent surgery along with some mild diffuse swelling. He said he limited the flexion and extension testing and refrained from stress or provocative examination of the wrist due to the recent surgery. He said Petitioner had pain with thumb CMC grinding with some crepitus, which was on the other side of the wrist from where she had surgery. He said his review of the MR Arthrogram of June 21, 2019 revealed some intrasubstance change at the ECU near the base

of the ulnar styloid with no clear instability pattern. He said intrasubstance changes were also seen in the fourth and second extensor compartments. He said the was a possible small tear of the central TFCC. He said x-rays had not shown anything of great significance. (RX 1 p.11-13)

Dr. Biafora said his diagnosis was very hard to assess due to Petitioner's recent surgery, but she did have pain at the base of the thumb, which had not been operated on, so he diagnosed symptomatic thumb CMC joint arthritis on the right. He did not believe that condition was caused by Petitioner's job duties as described or as included in the video job analysis. Based on Dr. Greatting's diagnosis and surgery he also diagnosed right wrist ECU tendinopathy with subluxation. He said he did not believe this condition would have been caused or contributed to by these work activities for less than two months. (RX 1 p.13-17)

Dr. Biafora noted that when first seen Petitioner's complaints were isolated to the thumb, or radial side of the wrist and hand, which was consistent with her thumb CMC joint arthritis, but that after her MRI the focus switched to the other side, which he could not understand or interpret. He said the records indicated that they ulnar-sided complaints were not mentioned in the medical records until after the MR arthrogram was done. (RX 1 p.14,15)

Dr. Biafora did not believe Petitioner's work activities necessitated her having her surgery. He did not believe she was at MMI based upon her recent surgery. He did feel she could work at the point her saw her provided she had no use of the right arm. (RX 1 p.16-18)

On cross-examination Dr. Biafora said that none of the medical records he reviewed, including records pre-dating May of 2019, indicated Petitioner had suffered any right wrist pain prior to May of 2019. He agreed that it was his understanding that her complaints occurred while she was working on the loin line. He said he was not aware of any intervening accident to the right wrist after May of 2019, or of any injury to the wrist outside of work at any time. He was aware that Petitioner believed her bagging loins job caused her problems. (RX 1 p.19-21)

Dr. Biafora was asked about the job description he had been provided by Respondent and had relied upon, and he said he no longer had that report and did not know if it was a description of the box making job or the boxing loins job. He said that as of the date of his deposition he did not know what the job task procedure was, all he knew was what Petitioner said in describing her job. He could not remember the physical demand summary for the box making job or what types of movements were needed for that job. He had been provided by Respondent with a video approximately two minutes long showing the box making job, but he was not provided with a video of the boxing loins job. He said he was not provided with any photos of the conveyor Petitioner had described to him or loins or boxes used. He said he did not know how much the boxes Petitioner made weighed or how many boxes she made in a shift, nor did he know how many loins Petitioner would lift and put in boxes during a shift. (RX 1 p.22-26)

After reviewing his written report Dr. Biafora corrected his earlier testimony, saying he erred on page five when he said it was Dr. Wolters who had stated that he believed Petitioner's symptoms were related to Petitioner's work based upon her history, that it was actually Dr. Greatting. He agreed that Dr. Greatting also felt Petitioner's job duties were a causative factor in Petitioner's right wrist condition. He said he had no criticisms of Dr. Greatting as a physician or surgeon as he was not familiar with him. He agreed that the

treatment Dr. Greatting provided was reasonable and necessary. He said he agreed that as of the date he saw Petitioner she needed work restrictions and she was not in a position to be released from care. (RX 1 p.27-29)

Dr. Biafora felt Petitioner's complaint on the date he saw her were reasonable, given she had undergone surgery five weeks earlier. He said nothing in her medical records or his examination would indicate to him that she was malingering or magnifying her symptoms. (RX 1 p.31,32)

Dr. Biafora said he was of the opinion that forceful pinching for sustained period of time could aggravate Petitioner's right CMC thumb arthritis and the right extensor carpi ulnaris tendinopathy conditions. He noted that when Petitioner demonstrated her work to him she did not have loins to hold in her hands, but he believed that even if she was forcefully pinching for a few weeks that would not have aggravated it, it needed to be an extended period of time. He then said that working with 2 to 20 pound loins 8 to 12 hours a day, five to six days a week would be considered forceful pinching, but he did not believe she was pinching at all. He then said that even if she was pinching forcefully, a few weeks would not be enough to forcefully aggravate arthritis. (RX 1 p.32-34)

Dr. Biafora said that the mere fact she did not have these complaints prior to working these duties did not imply causation, that something they did not know about could have happened, that he had patients who just woke up with complaints they could not explain. When asked if there was evidence Petitioner had woken up one morning with the complaints Dr. Biafora said, "(w)ell, clearly, it happened somehow. I don't know if she awoke from sleep with a pain. * * * It could be anything. Like I said, it just happens. * * * We can't explain it." Dr. Baifora when asked if he had any reason to dispute that Petitioner's symptoms manifested when she started working said that it was possible they did. (RX 1 p.34-36)

Dr. Biafora said he performed a couple hundred independent medical examination per year, with 85 percent being for Respondents. (RX 1 p.37,38)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner's testimony and histories to medical providers and examiners, was inaccurate at times, such as the weight of the loins, and how many loins would be put in a box. Her description of how the job was performed and the motions involved appeared to be accurate, and her description of the onset of her complaints, the complaints themselves and the medical treatment she received was generally consistent with other testimony and medical records. While Petitioner's estimates of how many loins she might have handled in an hour appears to be high, even using the estimates of productivity cited by Mr. Maswa would still make this a very repetitive job, and be consistent with Petitioner's description of it as such. The Arbitrator finds Petitioner to be credible in regard to the work she performed, her testimony in regard to onset of complaints, her medical treatment and her condition as of the date of arbitration while further finding that her estimates of weight and number of loins packed per shift, etc. were inaccurate.

Michelle Ellis testified to company general procedures at the nursing station, how new employees in a position often were seen in the nursing department for aches and pains, the fact that all jobs, including those performed by Petitioner, were repetitive and how human resources was in charge of light duty work decisions in

non-work related injury cases, she was not consulted on those decisions, and she would not know if Petitioner had contacted human resources with restrictions. Ms. Ellis was a credible witness.

James Lanier noted Petitioner was complaining of pain and soreness in her forearm during her second week on the line. He said he did not work full time in Petitioner's area, he would observe her approximately ten times a day while walking through the area. He said the loin line was to have five employees, not counting Petitioner. While Mr. Lanier was not in a position to know how many loins Petitioner was packing or how much time she was packing, he was a credible witness in regard to the information he had actual knowledge of.

Jules Maswa was Petitioner's trainer and worked the loin line himself. His estimation of how much Petitioner was asked to pack seems questionable if, as Petitioner testified, there were only four employees and herself packing during this period of time. The same 15,000 loins per hour would be coming down the conveyor and it is only natural to have the trainee pack as many as they could. The first week she was estimated by him to be working at 40 percent of a full employee and the second week she was estimated by him to be working at 55 percent of a full employee. His description, and that of Mr. Lanier, in regard to what that percentage meant did not actually make sense, and the Arbitrator believes it means she was packing that percentage of a full employee's number of loins. Otherwise Mr. Maswa was felt to be a credible witness.

Both Dr. Greatting and Dr. Biafora appeared to be good witnesses who answered all questions put to them in a straightforward manner with no apparent bias, and no apparent attempt to evade or refuse to answer questions. While their opinions differed, they both appeared to be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on May 24, 2019, and whether Petitioner's current condition of ill-being, tendinopathy of her extensor carpi ulnaris tendon resulting in a stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft, is causally related to the accident of May 24, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein

In a repetitive trauma case, issues of accident and causation are intertwined. Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture, 99 I.I.C. 0961 (1999). Accidental injury need note be the sole causative factor, nor 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, 672-73 (2003). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. Fierke v. Industrial Commission, 723 N.E.2d 846 (2000).

In Edward Hines Precision Components. Industrial Commission, 825 N.E.2d 773 (2005), the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* At N.E.2d 780. Similarly, the Commission noted in Dorhesca Randall v. St. Alexius Medical Center, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain of time each day on a specific task before a finding of repetitive trauma can be made.

Respondent Exhibit 3 establishes that the last day Petitioner worked the loin line was May 24, 2019, the alleged date of accident.

While exact numbers of loins packed or weight of loins are in dispute, there is no dispute that Petitioner's job is repetitive. Petitioner's description of the job, even if somewhat exaggerated, certainly appears to be that of a repetitive job. The descriptions by Mr. Lanier and Mr. Maswa confirm the job was repetitive and fast paced. Ms. Ellis testified that an accident report was not necessarily filled out when someone reported to the nurses station that they were in pain. Therefore there would apparently not be written records to prove that a report had been made, but the lack of a written accident report does not equate to there not being an accident. As Ms. Ellis testified, there were no easy jobs, and all new hires are going to have soreness, they did not consider that enough to justify the filling out of an accident report, but the nursing staff would work to help the employee get through that. She said they would fill out an accident report when "it went from soreness to pain." Pain and soreness both being subjective, that seems a nebulous standard. Ms. Ellis made it clear, however, that Respondent's jobs were not easy, they were very repetitive, and she did not think Respondent had any jobs which were not repetitive.

Respondent's Weekly Touch Point Meetings report in regard to Petitioner, Respondent Exhibit 4, notes that Petitioner was having soreness in the right forearm and was taken to the nurse by her trainer during her second week on the job, presumably May 17, 2019, as evidenced by the Notations on that form dated May 20, 2019. That form also noted that during her third week on that job she was again taken to the nurse due to right forearm complaints, ice was put on it, and Petitioner was to take pills for pain. A separate claim, 19 WC 017442, was consolidated with this claim for purposes of arbitration and a separate Decision of Arbitrator is being issued for that claim.

Dr. Greatting from his first visit onward was of the opinion that Petitioner had tendinopathy or tendinitis of the extensor carpi ulnaris tendon and that her symptoms were related to the job duties on the loin line that Petitioner described to him. During his deposition, after he had performed two surgeries on the ulnar region of Petitioner's right wrist, he continued to be of that opinion. Petitioner's description of her job was somewhat exaggerated, saying she packed 10 to 15 pound loins and worked 8 to 12 hour days, when she only packed 2 to 8 pound loins and worked one 9 hour day and nothing greater than that, generally working slightly more than 8 hours a day, six days a week. (RX 3) When asked on cross examinations if his opinions would change if the loins only weighed 7.5 to 8.27 pounds, fewer weeks than he had been told and only 15 minutes on and 15 minutes off, Dr. Greatting made it clear that no matter the weight, force, frequency or time on the job, Petitioner stated the pain started while performing the work and he therefore related it to that activity.

While Mr. Lanier and Mr. Maswa both said the 40 percent and 55 percent figures on the Weekly touch Point Meetings form were "performance," the form actually says "% of pull," followed by the 40% and 55% handwritten figures. Mr. Lanier testified that 15,000 loins came down the line per shift. Each of the five employees on the line would therefore be responsible for loading 3,000 loins per shift. With an average weight of 6.5 pounds that would be 19,500 pounds of pork loins per shift per employee. Using those figures at a minimum Petitioner would have been picking up and loading 7,800 pounds of loins per shift, nearly four tons. During her second and third weeks she would have been picking up and loading 10,725 pounds per shift, nearly five-and-a-half tons. Using the figures taken from Respondent's own exhibit Petitioner was performing a rapid, repetitive task. She complained during her second and third week, was seen by the nurses, was told to take pills for pain and ice the forearm, and then sought medical treatment.

The Arbitrator finds that the alleged date of accident, May 24, 2019, is a proper manifestation date for this repetitive trauma accident as it was the last date she worked the loin line job and was exposed to the repetitive motions associated with that job.

The Arbitrator further finds that the Petitioner sustained a compensable repetitive trauma accident on May 24, 2019 which arose out of and in the course of her employment by Respondent. The Arbitrator finds that Petitioner's medical condition, tendinopathy of her extensor carpi ulnaris tendon resulting in a stabilization extensor carpi ulnaris tendon reconstruction of the 6th dorsal compartment with palmaris longus tendon graft, is causally related to the accident of May 24, 2019. These findings are based upon the testimony of Petitioner, Ms. Ellis, Mr. Lanier, Mr. Maswa, the medical records introduced into evidence for treatment subsequent to May 17, 2019 and the testimony of Dr. Greatting. The Arbitrator has given greater weight to the testimony and opinions of Dr. Greatting than those of Dr. Biafora based upon his repeated examinations and dealings with Petitioner, his conservative treatment over a period of time and his actually performing the two surgeries upon her. Dr. Biafora's assertions that such a condition could not be caused in a few weeks contradicts the testimony of Ms. Ellis who said it was quite usual for people to have soreness and pain when changing to a new repetitive job.

The Arbitrator further finds that the chain-of-events also support a finding of causal connection. This finding is based upon Petitioner's unrebutted testimony to a pre-accident state of asymptomatic good health in the right wrist, her having an accident on May 24, 2019 as a result of repetitive trauma and her immediately after said accident having pain, reporting the pain, seeking medical treatment and new diagnoses based on diagnostic testing and physical examinations. Certi-Serve, Inc. vs. Industrial Commission, 101 Ill.2d 236,244 (1984)

In support of the Arbitrator's decision relating to whether timely notice of the accident was given to Respondent the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner testified to the onset of pain while performing her job on the loin line. She reported that to her trainer, Mr. Maswa, as evidenced by his testimony and by Respondent Exhibit 4, the Weekly Touch Point Meetings form. Respondent Exhibit 4 also notes Petitioner was taken to the nurses station prior to the Weekly Touch Point Meetings form notations of May 20, 2019 due to that right forearm/wrist pain. On the second visit to the nurses station, the subject of 19 WC 017442, she was told to ice the area and to take pain pills. She then began to miss work because of the pain, seeking medical treatment and advising human resources of her restrictions. Ms. Ellis confirmed these facts but said accident reports were not filled out simply because a person reported pain.

The Arbitrator finds that Petitioner gave timely notice of the accident of May 24, 2019 to Respondent. This finding is based upon the testimony of Petitioner, Mr. Maswa, Ms. Ellis and Respondent Exhibit 4.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of May 24, 2017, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner continued working after May 17, 2019, continuing to perform her duties on the loin line. She then ceased working effective May 25, 2019. Petitioner was seen at Memorial Express Care on May 28, 2019 but no work restrictions were placed on her at that time. (PX 5 p.5,29) Petitioner was next seen by NP Whetstone on June 3, 2019, and was given a release to return to work, "with activities as pain allows in her brace." (PX 2 p.85,87) The June 7, 2019 visit with NP Whetstone does not specifically address work limitations. (PX 2 p.82,83) The first specific restriction from work was on July 9, 2019 when NP Whetstone gave lifting restrictions of five to ten pounds. (PX 2 p.76,78) Petitioner was next seen by Dr. Greatting on July 18, 2018, and he gave her a five pound restriction, noting that if no light duty work was available Petitioner was to remain off work. (PX 2 p.71-73) Petitioner testified that Respondent did not offer her work with any restrictions. Dr. Greatting continued to restrict Petitioner from work, either wholly or partially, until released with no restrictions effective October 12, 2020. (PX 2 p.134)

The Arbitrator finds that Petitioner was temporarily totally disabled from work from July 9, 2019 through October 12, 2020, a period of 65 6/7 weeks. This finding is based upon the testimony of Petitioner and Dr. Greatting as well as the medical records of NP Whetstone and Dr. Greatting.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of May 17, 2019, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, and temporary total disability, above, are incorporated herein.

As noted by Ms. Ellis in her testimony, Respondent had in effect at the time of this accident a Commission approved Panel of Physicians. Ms. Ellis testified that Petitioner would have been advised of the existence of the panel agreement during orientation as part of a power point presentation and Petitioner would have signed off on that during orientation. This testimony was unrebutted by Petitioner. A copy of the Commission Order of November 18, 2016 finding that the agreement (and its attachments) was the result of good faith collective bargaining and reflected the provisions of Section 8(a) of that Act was introduced into evidence as Respondent Exhibit 6. This panel agreement attached to the Order of November 18, 2016 notes it was negotiated between Respondent and Petitioner's union. One of the attachments to the Commission Order is a "Notice To Employees" which states that employees must choose a physician from the panel for treatment of work-related injuries and diseases, "otherwise, the charges for treatment will not be paid by the employer." (RX 6 p.3)

A list of Panel of Physicians was included in Respondent Exhibit 6 and identified Dr. Maender and Dr. Wolters as the upper extremity specialists on the panel. Dr. Greatting testified that he was not on Respondent's panel of physicians. (PX 4 p.29)

The medical bills introduced by Petitioner are not for medical care provided by physicians included on Respondent's Panel of Physicians as set out in the Commission's Order. (RX 6; PX 3)

The Arbitrator finds that Petitioner was not treated by a physician included on Respondent's Panel of Physicians as approved by the Commission on November 18, 2016, and, pursuant to Section 8(a) of the Act and the terms of the Order of November 18, 2016, all charges included in Petitioner Exhibit 3 are not the responsibility of Respondent. This finding is based on the testimony of Petitioner, Ms. Ellis, Dr. Greatting, the Commission Order of November 18, 2016 and a review of the medical bills contained in Petitioner Exhibit 3.

In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident, causal connection, and temporary total disability, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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 line worker in a meat packing plant 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. The Arbitrator notes Petitioner has found other work doing housekeeping work for a hospital which pays approximately the same wage. Because of the ability to return to the prior work and the current work at a similar wage, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 50 years old at the time of the accident. Because of Petitioner's expected 15 to 20 year continued work life, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner is currently earning a similar wage with her current employer and is able to work overtime in that position as well. Because of her continued employability and her not having restrictions placed upon her by her surgeon, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner is right hand dominant, and testified that as of the date of arbitration her right wrist felt fine, though she still had numbness in the lateral wrist, where the surgery had been. She said she had motion and no pain at all. She said she only noticed a little problem with range of motion and strength. She said she was able to do all of her work duties for her present employer, and the wrist did not affect her at all on a day to day basis as of the date of arbitration. She said she did not feel she could perform her prior work for Respondent because of the repetitive nature of that job. She testified and demonstrated that the bump on the ulnar side of her right wrist, where her surgery took place, was considerably enlarged, and that was the area where she had numbness. Dr. Greatting testified that he observed thickening where the surgery had taken place and he advised Petitioner that was related to the reconstruction and was not unexpected or abnormal. He said by October 7, 2020 Petitioner was doing very well, her pain, range of motion and strength were all good, and she was released to return to work with no restrictions. Because of Petitioner's continued complaints of a little problem with range of motion and strength and permanent structural change to the wrist, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of the right hand pursuant to §8(e) of the Act, 30.75 weeks of disability, at $365.84 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015554
Case Name	William Best v. Johnson Controls, Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0336
Number of Pages of Decision	19
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Robert Maciorowski

DATE FILED: 8/29/2022

/s/Stephen Mathis, Commissioner

Signature

DISSENT: /s/Deborah Baker, Commissioner

Signature

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

William Best,

Petitioner,

vs. NO. 20WC 15554

Johnson Controls Inc.,

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 accident, medical expenses, prospective medical care, causal connection, fee schedule payment under group, penalties and fees, 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 November 16, 2021, 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 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 $33,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 29, 2022

/s/*Stephen J. Mathis*
Stephen J. Mathis

SJM/sj
o-6/29/2022
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

DISSENT (IN PART)

While I agree with the Arbitrator's decision with respect to finding that Petitioner proved by a preponderance of the evidence that he sustained work-related repetitive trauma injuries that manifested on June 13, 2019 and the awards of medical and temporary total disability (TTD) benefits; I disagree with the decision to deny Petitioner's request for penalties and attorney fees.

The Arbitrator, in finding Petitioner proved a compensable claim, found that Respondent's failure to pay the medical bills was "troubling" but did not rise to the level of unreasonable or vexatious as required by the Act. The Arbitrator further took note of "the delay in payment" of temporary total disability (TTD) benefits for the undisputed period of June 17, 2021, through August 15, 2021, but found that while "troubling," it did not rise to the level of vexatious and unreasonable. I find that not only was there a "delay," in payment of medical bills and TTD, but there was an unreasonable delay.

Petitioner filed a Petition For Review with respect to the issues of penalties pursuant to §§19(l) and 19(k), and attorney fees with respect to §16 of the Act. On review, Petitioner argues that Respondent's purported reliance on the opinions of Dr. Grant Garrigues to dispute causal connection is unreasonable, vexatious, and evidence of bad faith. Petitioner argues that Respondent sent Petitioner to Dr. Garrigues for an examination pursuant to section 12 of the Act, only after Dr. Primus, the physician that he was referred to buy Respondent's occupational health facility, had already opined that Petitioner's condition was causally related to his work activities.

Additionally, Petitioner argues that Dr. Garrigues was not provided with a description of Petitioner's work activities, thus his opinions are not credible or persuasive. Respondent filed no response to Petitioner's Statement of Exceptions and brief. I find Petitioner's arguments to be persuasive and supported by both the facts and the law.

On June 25, 2019, Petitioner treated at Physicians Prompt Care Centers, one of Respondent's affiliated occupational health facilities, for complaints of right hand pain and numbness, and was referred to Dr. Primus. On July 2, 2019, Petitioner sought treatment with Dr. Primus who diagnosed Petitioner with a right upper extremity lesion of the ulnar nerve and ulnar nerve compression at the elbow. Dr. Primus opined: "Based on the patient's given history, our review of any pertinent records that were provided, physical examination and review of images, we believe the injuries evaluated today are causally and directly related to the work injury." On May 1, 2020, almost one year later, Respondent sent Petitioner for an examination by Dr. Garrigues pursuant to section 12 of the Act. Dr. Garrigues opined that Petitioner's right arm condition was not causally related to his work activities.

Section 19(l) provides as follows:

> In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits *** have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l)* (West 2012) (Emphasis added).

See *Theis v. Illinois Workers' Compensation Commission*, 2017 IL App (1st) 161237WC, ¶ 20 (finding that "…section 19(l) penalties apply to the delayed payment of medical expenses (section 8(a)) and TTD benefits (section 8(b)).").

With respect to section 19(k), the Act provides, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k)* (West 2012). Section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory, and "is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998). Likewise, section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. *820 ILCS 305/16* (West 2012).

Based on the above, I find that penalties are warranted in this case. At the very least, penalties pursuant to §19(l) should be awarded. The physicians at Respondent's affiliated occupational health facility referred Petitioner to Dr. Primus who opined that Petitioner's right upper extremity condition was causally related to his work activities. Despite this opinion,

Respondent found another physician, Dr. Garrigues, to examine Petitioner, who ultimately opined that Petitioner's condition was not causally related. Respondent waited almost one year to obtain a causal connection opinion from Dr. Garrigues even though Dr. Primus had already provided one. I find it significant that Petitioner did not choose Dr. Primus as a treating physician, but simply followed the occupational health physician's recommendation to see Dr. Primus.

For the reasons set forth above, I respectfully dissent.

/s/Deborah J. Baker
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015554
Case Name	BEST, WILLIAM v. JOHNSON CONTROLS, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Robert Maciorowski

DATE FILED: 11/16/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 16, 2021 0.06%

/s/ Raychel Wesley, Arbitrator

Signature

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

WILLIAM BEST Case # **20** WC **15554**
Employee/Petitioner
v.
JOHNSON CONTROLS, INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Raychel A. Wesley, Arbitrator of the Commission, in the City of Chicago, on October 1, 2021. 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 **X** ***TTD***
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon Respondent?
N. Is Respondent due any credit?

FINDINGS

On the date of accident, **June 13, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**105,664.00**; the average weekly wage was $**2,032.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of **$1354.67/week** for **8 4/7** weeks, commencing **6/17/2021** through **8/15/2021**, as provided in Section 8(b) of the Act.
- The respondent shall pay further sum of **$21,496.00** for reasonable and necessary medical services pursuant to the medical fee schedule directly to Petitioner as provided by the Section 8(a) and 8.2 of the Act.
- The respondent shall pay $ 0 in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ 0 in fees, as provided in Section 16 of the Act.
- The respondent shall pay $ 0 in penalties, 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 temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter the final cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

/s/ *Raychel A. Wesley* **NOVEMBER 16, 2021**
Signature of Arbitrator

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION
CHICAGO, ILLINOIS

WILLIAM BEST,	)	
Petitioner,	)	
	)	**NO. 20 WC 015554**
v.	)	
	)	
JOHNSON CONTROLS, INC.,	)	
Respondent,	)	

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact:

The Petitioner testified that he has worked as a sprinkler fitter for 26 years, since the age of 22. (Tr. P. 13-14). His entire career as a sprinkler fitter has been with Respondent, Johnson Controls. (Tr. P. 14). Sprinkler Fitters install overhead fire protections systems, using wrenches and drills to install pipes, valves, sprinkler heads, and fire pumps. (Tr. P. 14-16, 24-25). Photographs received into evidence depict the size and type of materials used by Mr. Best as a sprinkler fitter. (Tr. P. 17-28, PX11). The material and equipment weigh from several pounds to more than one hundred pounds. (Tr. P. 17, 19, PX10).

Petitioner explained the process of installing sprinkler systems. (Tr. P. 16, 26-31). A typical day begins at 7 a.m. and ends at 3:30 p.m. (Tr. P. 26, 31, 60). After unloading material from the truck, the pipe is laid out according to the drawings and the pipe is installed overhead. (Tr. P. 20, 21, 27, 30-31, 76-77). In excess of 70% of the day is spent working overhead. (Tr. P. 31). Vibrating tools such as treading machines, cutting machines and Hilti drills are used 70% of the day. (Tr. P. 23-26, 31, 68-69, 74). A job description confirmed Petitioner's testimony concerning his work duties. (Tr. P. 31, PX10). When installing pipe, sprinkler fitters will bend over and pick up a piece of pipe, average length of twelve feet, and hold it overhead while

attaching it to a fitting. (PX10). A hanger is attached to the ceiling using a Hilti drill and a pipe wrench is used to tighten the pipe. (Tr. P. 24-25, PX12). This process is repeated 80-125 times in an average workday. (PX10).

Petitioner has been employed as a sprinkler fitter foreman with Respondent for the last 21 years of his 26 year career. (Tr. P. 27). Petitioner has additional supervisory duties as a foreman in addition to his installation duties. (Tr. P. 27, 60-61, 64).

Petitioner testified that prior to June of 2019, he did not have any issues or problems with his right arm or hand, he had not received any medical treatment to his right arm or hand, nor had he ever experienced any numbness or tingling to his right arm or hand. (Tr. P. 57-58).

Petitioner testified that in the spring and summer of 2019, while at work, he began to experience numbness and tingling in the fingers of his right hand. (Tr. P. 32-33). Petitioner is right-handed. (Tr. P. 34). Among the work activities that would cause the numbness and tingling were working with wrenches and using the drills. (Tr. P. 33).

Petitioner testified that he informed his supervisor, Jim Thompson, and was instructed to report his condition to Sedgwick Claims. (Tr. P. 33). Sedgwick directed him to an urgent care, Physician's Prompt Care. (Tr. P. 33-34,36).

On June 19, 2019, Petitioner presented to Physician's Prompt Care. (Tr. P. 33-34, PX4). Notes from that visit indicate the chief complaint was "Patient comes in today for a workman's comp injury and arm pain." (PX1). "Patient states he was working overhead with tools, and ever since has pain in shoulder down to fingers on right side…his 4th and 5th digit on right hand are numb." (PX1). Petitioner was diagnosed with right elbow epicondylitis and was prescribed anti-inflammatories and a Medrol dose pack steroid by Dr. Nagib All. (Tr. P. 34, PX1). Petitioner returned to the urgent care on June 25, 2019. (Tr. P. 35, PX1). At that time, Petitioner

still had complaints of numbness in his right hand and was directed to see Dr. Gregory Primus, an orthopedic physician. (Tr. P. 35, PX1). The June 25 note from Dr. All specifically states this was a workman's compensation injury, and noted Petitioner denied a specific date of injury. (PX1).

Petitioner saw Dr. Primus on July 2, 2019. (Tr. P. 37, PX2). Dr. Primus's records include a two page medical history completed and signed by Petitioner. (Tr. P. 38-39, PX2). Petitioner checked that this was a workman's compensation injury due to "repetitive motions at work." (Tr. P. 39-40, 65, PX2). Elbow x-rays showed no evidence of fracture, dislocation or degenerative changes at the humeral-ulnar or humeral-radial joint. (PX2). Dr. Primus's examination was positive for tenderness of the ulnar nerve and decreased sensation of the ulnar nerve. (PX2). Dr. Primus diagnosed ulnar nerve compression, cubital tunnel syndrome and recommended an EMG. (PX2). In addition, Dr. Primus indicated that based on the patient's history, his review of records, his physical examination, and his review of images, Petitioner's injury was causally and directly related to work. (PX2).

Petitioner sought care with Dr. Emily Mayekar of Midwest Orthopedic Consultants on July 30, 2019. (Tr. P. 40, PX3). Dr. Mayekar noted right hand numbness and tingling for the last two months, and that Petitioner cannot recall a specific injury, but he does a lot of repetitive work as a pipe fitter. (PX3). The diagnosis was cubital tunnel vs. cervical radiculopathy, and Petitioner was instructed to use a brace at night, nerve gliding therapy, limit repetitive motions at work and return in two months. (PX3).

Petitioner returned to Dr. Mayekar as instructed on September 24, 2019. (Tr. P. 41-42, PX3). An EMG and cervical MRI were prescribed. (Tr. P. 42, PX3). An October 1, 2019

EMG/NCV revealed an ulnar mononeuropathy at the elbow without evidence of cervical radiculopathy. (PX3). An October 3, 2019 MRI of the neck did not show any spinal cord compression. (PX3). Petitioner discussed the results of these studies with Dr. Mayekar on October 22, 2019. (Tr. P. 43, PX3). At that time, Dr. Mayekar diagnosed cubital tunnel syndrome and recommended surgery and work restrictions. (Tr. P. 43, PX3).

Petitioner testified he continued to work for Respondent but was unable to avoid the use of vibrating tools or repetitive motions at work due to the fact that those things were necessary to do his job. (Tr. P. 44-45).

Petitioner returned to Dr. Mayekar on February 11, 2020 complaining of additional numbness and tingling in his right hand, and a new onset of right hand weakness, despite following her recommendations concerning bracing and exercises. (Tr. P. 66, PX3). Petitioner explained while at work he noticed a decreased grip strength and difficulty holding tools. (Tr. P. 44). Surgery was again recommended. (PX3). Petitioner testified that the surgery was not authorized by Respondent. (Tr. P. 43, PX3). Instead, Petitioner was sent for a §12 exam with Dr. Grant Garrigues of Midwest Orthopedics at Rush, despite Respondent previously having selected Dr. Primus to examine Petitioner and provide an opinion on causation. (Tr. P. 45). Dr. Garrigues agreed with the diagnosis of cubital tunnel syndrome and the need for surgery. (Tr. P. 45-46). Respondent still did not approve surgery. (Tr. P. 46).

Ultimately, Petitioner underwent a cubital tunnel release and ulnar decompression at the Center for Minimally Invasive Surgery on June 21, 2021 by Dr. Mayekar. (Tr. P. 47, PX3). Petitioner was taken off work and continued off work until August 15, 2021. (Tr. P. 47-49, PX3). Petitioner's last visit with Dr. Mayekar was August 10, 2021. (Tr. P. 49, PX3). Dr.

Mayekar noted some increased sensation was returning to Petitioner's right hand. (PX3). She instructed Petitioner to return in 6-8 months. (PX3). Petitioner testified that since the surgery, the numbness in his fingers is improving. (Tr. P. 52). In addition, his grip strength is improving. (Tr. P. 53). However, he still has residual problems with both areas. (Tr. P. 52-53, 58).

Petitioner testified that in June of 2019 he was paid $50.80/hr., 40 hours a week. (Tr. P. 50). In the 52 week period prior to his injury, Petitioner worked a full 40 hour work week, unless Respondent did not have work available due to weather, lack of materials or job delays. (Tr. P. 50-53).

Petitioner presented the testimony of Dr. Mayekar, a Board Certified Orthopedic Surgeon. (PX9). Dr. Mayekar confirmed that during her initial history, Petitioner did not report a specific injury, rather he stated he did a lot of repetitive activities at work. (PX9, P. 9). Dr. Mayekar discussed the EMG and MRI results that she had ordered. (PX9, P. 10-13). Essentially, the nerve conduction study confirmed the diagnosis of cubital tunnel syndrome of the elbow and the MRI ruled out any involvement of the neck or shoulder. (PX9, P. 10-13).

Dr. Mayekar reviewed the "Sprinkler Fitter Job Elements" submitted as PX10 and stated that the document accurately reflected the work activities as discussed with Petitioner. (PX9, P. 21). Dr. Mayekar confirmed Petitioner's work activities as a sprinkler fitter caused or contributed to cause the cubital tunnel syndrome she diagnosed, especially repetitive motions and use of vibrating tools. (PX9, P. 21-24, 41-43). Dr. Mayekar testified that it is more likely true than not true that Petitioner's work activities contributed to his cubital tunnel syndrome and the need for surgery. (PX9, P. 41-42, 46). Dr. Mayekar explained that it is well demonstrated

that compressive neuropathies, such as cubital tunnel syndrome can be related to repetitive motions at work, along with repetitive heavy lifting and use of vibratory tools. (PX9, P. 9-10).

Dr. Mayekar also confirmed that Petitioner was unable to return to work in a full duty capacity during the period he was under her care. (PX9, P. 9, 11, 13). Specifically, Dr. Mayekar stated Petitioner should avoid repetitive motions and vibrating tools. (PX9, P. 9, 11, 13). Dr. Mayekar stated Petitioner's subjective complaints of pain were consistent with the objective diagnostic studies and at no time did Petitioner exhibit signs of malingering or secondary gain. (PX9, P. 12, 26).

Conclusions of Law

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

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 work activities aggravated or accelerated the process which led to the employee's current condition of ill-being. Id.

> Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a preexisting injury in Hopkins, the Commission noted that petitioner was in good health prior to the fall, he had no restrictions prior to his

fall, and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Petitioner's cubital tunnel syndrome is causally connected to his work activities as a sprinkler fitter with Respondent, Johnson Controls, his employer for his entire 26-year career. The Arbitrator also specifically finds that Petitioner's work activities contributed to cause the need for the surgery performed by Dr. Mayekar on June 17, 2021.

Petitioner testified that he began to experience numbness in his hand and fingers in June of 2019 while working for Johnson Controls. This was confirmed by the medical records submitted into evidence. Drs. Primus and Mayekar both stated that Petitioner's work activities as a sprinkler fitter contributed to cause his cubital tunnel syndrome. Prior to the onset of symptoms at work in June of 2019, Petitioner had not had any complaints or treatment to his right hand or arm. The Arbitrator further finds Petitioner's testimony to be credible.

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

With regard to repetitive overhead work and the use of vibrating tools causing cubital tunnel syndrome, the Arbitrator notes that this Commission has found causal connection between various repetitive work activities and cubital tunnel syndrome.

In City of Springfield v. I.W.C.C., 388 Ill. App.3d 297 (4th Dist. 2009), an electrician that used vibrating tools and performed repetitive motions at work developed bilateral cubital tunnel syndrome. The Arbitrator's and Commission's finding that petitioner's cubital tunnel syndrome was causally connected to his repetitive work activities and use of vibrating tools was affirmed by the Workers' Compensation Division of the Illinois Appellate Court. Id.

In Sexton v. State of Illinois, 20 IWCC 0435, petitioner was a chief building engineer with the Secretary of State that used vibrating tools, pipe wrenches, pipe benders and cutters, and hammer drills to operate and maintain heaters, refrigeration systems and water pumps. In addition, 15% of his workday was spent in a supervisory role. The Arbitrator found, and the Commission affirmed, petitioner's cubital tunnel syndrome was causally related to the use of vibrating tools and repetitive hand and arm work activities. Id.

Other types of repetitive work activities that have been found by the Commission to have been causally connected to the development of cubital tunnel syndrome include:

- 47 year old mechanic using vibratory and hand tools, 15 I.W.C.C. 0302;
- fast food grill cook using spatula to flip burgers and heavy force to clean grill, 2016 IL App (3d) 150302WC-U;
- refrigerator coil assembler that did repetitive handling of parts, 07 I.W.C.C. 1057
- 37 year old ironworker using vibrating tools and lifting 50-60 lbs. on a regular basis, 06 I.W.C.C.1005; and
- coal mine repairman that did repetitive motions with hand and vibrating tools, 2014 IL App (4th) 130720WC-U;

In this case, the "Sprinkler Fitter Job Elements" confirmed the repetitive, heavy duty, overhead nature of the work activities and use of vibrating tools described by Petitioner. Respondent declined to present any testimony from Petitioner's coworkers or supervisors to refute Petitioner's testimony of his job activities or physical condition prior to June of 2019. It is well settled that the failure of a party to produce testimony or evidence within its control creates a presumption that the evidence, if produced, would be adverse or unfavorable. Reo Movers v.

Industrial Commission, 226 Ill.App.3d 216, 589 N.E.2d 704, 168 Ill.Dec. 304, (1st Dist.), Stypula v. City of Chicago, 03 IIC 833. Petitioner testified 70% of his workday involved the use of vibrating tools and repetitive motions. In light of this testimony, the work activities performed by Petitioner for Respondent were certainly sufficient to cause Petitioner's cubital tunnel syndrome.

What were Petitioner's earnings?

Petitioner testified that he worked a forty-hour work week earning $50.80 per hour, and that he was available to work at all times prior to his injury. The only time Petitioner failed to work a full forty-hour week was the result of Respondent's inability to provide work. Respondent failed to present any admissible evidence to refute Petitioner's testimony. The Arbitrator finds that Petitioner earned $50.80 per hour, resulting in an average weekly wage of $2,032.00, pursuant to §10 of the Act. Sylvester v. Industrial Commission, 197 Ill.2d 225 (2001).

1. ***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 submitted the following medical expenses without objection concerning reasonableness and necessity:

Exhibit 4 – Midwest Orthopedic Consultants: $10,588.00
Exhibit 5 – Center for Minimally Invasive Surgery: $8,487.00
Exhibit 6 – Fusion Healthcare Solutions: $1,101.00
Exhibit 7 – Anesthesia Management/MD2X, SC: $875.00
Exhibit 8 – Riverside Medical Center: $445.00

The Arbitrator awards the above medical bills in the amount of $21.496.00 to be paid directly to Petitioner.

K. What temporary benefits are in dispute?

The Arbitrator finds that Respondent is responsible for temporary total disability benefits from the date of Dr. Mayekar's surgery on June 17, 2021, to the date of his release back to work, August 15, 2021, as both parties agree to the period of disability. Respondent to pay temporary total disability in the amount of $1398.53 per week for 8 4/7 weeks.

M. Should penalties or fees be imposed upon Respondent?

Medical Expenses

The Arbitrator takes note that the nonpayment is troubling but does not find that it rises to the level of unreasonable or vexatious as required by the Act for the imposition of penalties.

Temporary Total Disability/Maintenance

Respondent did not dispute the period of temporary total disability, only liability. The Arbitrator relies on the findings of Dr. Primus of causal connection and imposes the liability for payment on Respondent. Although the Arbitrator takes note that the delay in payment is troubling, does not find that it rises to the level of vexatious and unreasonable and therefore the Arbitrator does not order penalties pursuant to §19(k) of the Act or fees pursuant to §16 of the Act.

N. Is Respondent due any credit?

Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). §8(j) 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." §8(j) 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. However, an employer has the burden to establish its entitlement to a 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 narrowly construed. Id. Respondent failed to present any evidence that 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 finds that Respondent has not met its burden of proof establishing entitlement to a credit for benefits extended by Petitioner's health plan.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC034365
Case Name	Cathy Lay v. Tri-C Elementary School District #5
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0337
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	James Parrot
Respondent Attorney	Rich Lenkov

DATE FILED: 8/30/2022

/s/Maria Portela, Commissioner

Signature

22IWCC0337

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

CATHY LAY,

Petitioner,

vs. NO: 14 WC 34365

TRI-C ELEMENTARY, SCHOOL DIST. #5,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the decision of the Arbitrator, with the following clarifications and corrections:

Under the "Findings" section, in the second to last sentence, the Commission replaces the "$0 for other benefits, for a total credit of $0" with "$81,054.86 for other benefits, for a total credit of $81,054.86."

In the last sentence under the "Findings" section, the Commission replaces the "$81,054.86" with "TBD and any paid" and adds the phrase "as stipulated by the parties" to the end of the sentence.

In the sixth paragraph of the "Testimony" section, the Commission strikes the portion of the last sentence that reads: "and she was worried she may not be retained at the end of the school year if she did not play."

Finally, in the fourteenth paragraph under the "Testimony" section, the Commission corrects a scrivener's error in the fifth sentence and replaces the word "ready" with the word "reading."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $494.67 per week, from December 17, 2008 through January 6, 2009, October 9, 2009 through November 2, 2009, and September 12, 2011 through October 18, 2011 for a period of 11 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 $445.20 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 40% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services outlined in Petitioner's Exhibits 8, 9 and 13 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $735.35 in reimbursement for out-of-pocket medical expenses.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for medical bills paid through its group medical plan pursuant to Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such Section 8(j) credit.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $13,950.00. 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.

August 30, 2022

/s/ *Maria E. Portela*

MEP/dmm
O: 071222
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

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
CORRECTED ARBITRATION DECISION

Cathy Lay
Employee/Petitioner

v.

Tri-C Elementary, School Dist. #5
Employer/Respondent

Case # **14** WC **034365**

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 24, 2021**. 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: **Reimbursement of insurance co-payments.**

FINDINGS

On **December 17, 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 $**38,584.26**; the average weekly wage was $**742.00**.

On the date of accident, Petitioner was **44** 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 $**81,054.86** for medical expenses that have been paid, as provided in Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Exhibits 8, 9, and 13, as provided in §8(a) and §8.2 of the Act, as the Arbitrator finds said bills to be reasonable, necessary, and causally related to the work accident. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive a credit for medical bills paid through its group medical plan pursuant to Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit.

Respondent shall reimburse Petitioner for out-of-pocket insurance co-payments in the amount of $736.36.

Respondent shall pay Petitioner temporary total disability benefits of $**494.67**/week for the period **12/17/08 through 1/6/09, 10/9/09 through 11/2/09, and 9/12/11 through 10/18/11,** representing **11-6/7** weeks, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $**445.20/**week for a period of **200 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a loss of **40% body as a whole** as a result of her right shoulder 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.

August 17, 2021

Arbitrator Linda J. Cantrell

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on March 24, 2021 on all issues. The issues in dispute are accident, causal connection, medical bills, temporary total disability benefits, nature and extent of Petitioner's injuries, and reimbursement of out-of-pocket insurance co-payments. All other issues have been stipulated.

TESTIMONY

Petitioner was 44 years old, married, with no dependent children at the time of accident. She became a certified kindergarten through 12th grade music teacher in 2007. She received a bachelor's degree in business administration from the University of Evansville and a master's degree in education from Greenville College. Petitioner began working for Respondent in August 2008 as a first-grade teacher. She signed a one-year contract and was an untenured, at-will employee. She became tenured in 2013.

Petitioner testified she had no injuries to her right shoulder prior to December 17, 2008. Petitioner had 20 first grade students in her class in 2008. Petitioner described her teaching responsibilities as teaching general first grade education according to state standards and making sure the kids were safe, disciplined, and entertained. She built rapport with her students which included physical activities. Other than the lunch period, Petitioner was responsible for supervising her students the entire time they were present.

Petitioner testified that in December 2008, she arrived at work around 7:30 a.m. and class started at 8:00 a.m. Students were excused at 2:35 p.m. and the teachers' day ended at 3:15 p.m. On December 17, 2008, a student volleyball tournament was scheduled for all grades. The physical education teacher, Sarah Hoss, sent a schedule to the teachers to have their class in the gym at a particular time for the tournament. She testified that Mrs. Hoss was absent the day of the tournament and it was conducted instead by Bruce Breeden. Because the tournament was not during the regular PE period but during class time, Petitioner was required to be present to supervise her class while other classes participated. During a normal PE period, Petitioner was not required to be present with her students.

Petitioner testified she first learned there would be a teacher volleyball game when she was entering the gym on 12/17/08 with her students. Another teacher told her that when the students finished their tournament, the teachers were asked to play a game of volleyball. Petitioner was not prepared to play volleyball as she was wearing boots, not tennis shoes, and regular school attire, not sports clothes. After the student tournament finished and the students were seated in the bleachers, Mr. Breeden said over a microphone, "Hey, kids, would you like to see your teachers play?". Petitioner stated the students responded with "a deafening cheer" and they were excited to see their teachers play.

Petitioner testified she did not want to play in the teachers' volleyball game because it made her nervous and she did not want to fall or embarrass herself. Petitioner did not think her participation in the volleyball game was voluntary. She stated that all of the teachers took the court and her students looked at her and she decided to play because she felt an enormous

amount of pressure. She felt she could not refuse to play. She did not think participation was voluntary because a sign-up sheet was always passed around for volunteers to sign up for voluntary activities. Petitioner was on the clock and paid during the teacher game. She continued to be responsible for her students during the teachers' game.

Petitioner testified that at the time of the game she had been a full-time teacher for only a few months and had not yet received her first review. She was concerned she would not be viewed as a team player if she did not participate in the game and she was worried she may not be retained at the end of the school year if she did not play.

The teachers volleyed the ball back and forth a few times. One teacher fell without injury. The ball went over Petitioner's head and she turned and ran to get it. Petitioner lost her footing and fell into the brick or concrete wall of the gym, striking her right shoulder. Petitioner testified the teachers' volleyball game benefitted the students in that they saw role models participating in physical activity thereby encouraging them to be physical. She testified that the teachers' game was part of her regular duties as a teacher and was not for her personal recreation.

Petitioner was never told by any of her superiors not to participate in the volleyball game. She was not told she could skip the game and do her preparation time as she would during a regular PE hour. Neither the gym teacher, the principal, nor other administrators told Petitioner she was required to play the game.

Petitioner testified that Respondent's workers' compensation carrier paid for her medical treatment through 2013 and her health insurance through the school district paid thereafter. Petitioner was not reprimanded for participating in the teachers' game and it was not mentioned in her year-end review. She was retained as a teacher the following years.

Petitioner testified she could not move her right arm after the fall. She used her left hand to lift her right arm and felt her right shoulder pop back into place. She stated she broke her humeral head in three places and underwent surgery. Post-operative physical therapy was too painful and she underwent another surgery to remove the hardware one year later. Petitioner was diagnosed with avascular necrosis and underwent core decompression surgery. Petitioner continued to have pain and underwent injections in her shoulder. Petitioner testified she was told she also had a partial rotator cuff tear that may be the source of her ongoing pain, but her doctor was not certain if surgery would improve her pain. She testified she was told she would require a shoulder replacement in the future due to the avascular necrosis condition.

Petitioner is right-hand dominant. She testified she can no longer perform household chores, including vacuuming. She cannot perform any activity above chest level, such as lifting boxes at school or hanging clothes. It is difficult for her to write on the whiteboard and she has to hold her arm steady with her left hand. She cannot use power or hand tools or perform any activity that requires turning or striking with her right arm. She can no longer ride horses, play golf, or ride four wheelers. Petitioner testified she can perform all her work activities as a teacher, but not as well as she did prior to the accident. She has to ask for assistance to lift boxes and prepare her classroom at the beginning and end of the school year.

The injury has affected Petitioner's mental health as she is worried about when the avascular necrosis will cause bone collapse. She is concerned her students could accidentally hurt her shoulder and she avoids physical contact with people. She was very independent before the accident and now requests assistance to perform many tasks. She has to rely on her husband to perform many tasks which causes anxiety.

Petitioner testified her shoulder is always painful. She takes prescription pain medication when the pain is real bad and occasionally takes Ibuprofen and Tylenol. Petitioner last treated with Dr. Brown in February 2019. She seeks treatment when her pain continues longer than a few days.

On cross-examination, Petitioner testified she normally had 20 minutes of prep time when her students were in PE class. She stated she was not told she could take prep time during the student volleyball tournament on 12/17/08. She testified she was a first-year teacher and did not have any knowledge of the teachers' game. She did participate in other activities to build rapport with her students, such as family reading night. Petitioner testified that family ready night was not part of her job duties, was voluntary, and held in the evening. A sign-up sheet was circulated to get volunteers for voluntary events.

Petitioner testified she did not have to supervise her students during lunch recess, but only during good behavior recess if her class earned it. She testified it was not her duty to play with the students during recess. She stated she did not think about negative implications or job stability at the time she participated in the teachers' volleyball game on 12/17/08. She was not told by any administrative personnel to participate in the game. She felt she could not refuse to participate.

Respondent's principal at the time, Sara Barnstable, testified at arbitration. Mrs. Barnstable testified she is currently the Assistant Superintendent and has worked for the district for 21 years. She testified that teachers had prep time during PE and music class, where they would perform assessments, learning preparation, grading, parent contact, etc. Teachers were given discretion to arrange among themselves who would supervise the students during the volleyball tournament and which teachers would receive prep time or free time. Mrs. Barnstable testified the tournament is a tradition at the school held four times per year. She does not recall giving any specific instructions to the teachers prior to the event as it was a routine game. She did not tell the teachers anything about participating in the game and they were not required to play. If a teacher chose not to participate it would not have a negative impact on his or her job performance evaluation.

Mrs. Barnstable testified that teachers could build rapport with students by playing with them during activities, including the tournament, during classroom activities, dances, etc. Mrs. Barnstable was shown a copy of the teachers' employment contract and admitted the contract states teachers have the responsibility and duty to accept extracurricular duties and assignments. However, she testified she understood assignments to mean committees and not the volleyball tournament. Mrs. Barnstable admitted the teachers' game was during the workday and she never told Petitioner she did not have to participate in the game. She never instructed the teachers not

to play a volleyball game at the end of the student's tournament. She was not present in the gym during the teachers' game on 12/17/08. The accident report prepared by Mrs. Barnstable does not state Petitioner was injured during a "voluntary" recreational activity.

The physical education teacher in charge of running the tournament, Bruce Breeden, testified at arbitration. Mr. Breeden is an art teacher in the district at Carterville Junior High and High School. In 2008, Mr. Breeden was an aide to the PE teacher. He testified he conducted the tournament on 12/17/08 because the PE teacher was absent. He did not recall being told anything about teacher participation after the tournament. It was never discussed with him whether teacher involvement was voluntary or mandatory. Mr. Breeden does not recall what he said to the students about their teachers playing a game or how the students responded. He only remembers the teachers must have played a game because Petitioner was injured. The PE teacher normally conducted the tournament so he was not aware of any standard procedures with regard to teachers' participation. It was his understanding he was to encourage the teachers to play the game to get the students excited. He remembers the game was stopped and someone got hurt, but he did not see the accident and does not recall any details.

MEDICAL HISTORY

Petitioner immediately reported to the emergency room at Memorial Hospital of Carbondale. X-rays of Petitioner's right shoulder revealed a comminuted oblique fracture through the humeral neck with avulsion of the greater tuberosity. The diagnosis included a dislocated right shoulder.

Petitioner followed up with Southern Illinois Orthopedic Center and reported she was injured during a school activity in the gym. Dr. Treg Brown noted right shoulder and knee injury at work when falling into a wall. His impression was a three-part proximal humerus fracture. On 12/22/08, Dr. Brown performed an open reduction and internal fixation with plate and screws of the three-part fracture. Intraoperatively, Dr. Brown appreciated the biceps tendon was entrapped and torn. On 1/6/09, Petitioner's right arm was placed in a sling and she was placed on light duty restrictions of no lifting greater than 5 pounds.

Petitioner completed 61 sessions of physical therapy from 12/29/08 through 6/20/09. On 3/17/09, Dr. Brown documented continued pain in the right shoulder and difficulty with any activities at chest height. Dr. Brown's impression was residual tendonitis of the biceps and supraspinatus and a possible rotator cuff tear. On 6/30/09, Dr. Brown noted a recurrence of pain in the shoulder possibly secondary to the plate and screws, or a rotator cuff injury aggravated by physical therapy. He administered an injection in Petitioner's shoulder.

On 7/21/09, Petitioner returned to Dr. Brown with pain and a burning sensation with overhead activity and lifting. On 10/9/09, Dr. Brown decompressed the adhesive capsulitis and scar tissue around the rotator cuff and acromium and removed the hardware. Petitioner was kept off work until 11/2/09.

Petitioner continued to experience post-operative pain and reported to the emergency room on 10/14/09. Petitioner was prescribed Dilaudid and Toradol. Petitioner engaged in 29

sessions of physical therapy from 10/12/09 through April 2010. On 12/2/09, Petitioner reported pain and dysfunction in her shoulder and difficulty sleeping. On 1/27/10, Dr. Brown noted loss of motion and a significant increase of pain. He suspected avascular necrosis and ordered an MRI. The MRI was performed on 2/18/10 and revealed swelling in the shoulder, a suggestion of AVN, tendinosis, and a small full thickness insertional tear of the distal right subscapularis tendon. On 2/24/10 and 3/31/10, Dr. Brown administered injections in Petitioner's right shoulder which provided temporary relief.

On 4/27/10, Petitioner was examined by Dr. Leesa Galatz at Washington University School of Medicine. Dr. Galatz recommended waiting to perform a core decompression surgery even though Petitioner's pain persisted. On 7/13/10, Dr. Brown opined he agreed with a core decompression but concluded that if it did not provide relief a shoulder replacement would be indicated.

On 10/13/10, Petitioner was examined by Dr. Michael Nogalski pursuant to Section 12 of the Act. Dr. Nogalski noted Petitioner continued to have tightness and pain in her shoulder and she had difficulty holding anything away from her body or above chest level. Dr. Nogalski interpreted the MRI to show AVN and tendinopathic changes around the supra and infraspinatus. Dr. Nogalski opined Petitioner will continue to have some symptoms in her shoulder for some time that may result in a subchondral procedure. He recommended x-rays in three months with a potential MMI date in six months. Dr. Nogalski opined Petitioner's condition is causally related to the injury.

On 1/19/11, Dr. Brown diagnosed AVN and referred Petitioner back to Dr. Galatz. His impression was Petitioner may require a hemiarthroplasty in the future. On 7/27/11, Petitioner returned to Dr. Nogalski for a second examination pursuant to Section 12 of the Act. Dr. Nogalski agreed with Dr. Galatz's recommendation of a core decompression of the shoulder.

On 9/12/11, Dr. Galatz performed a core decompression of the posttraumatic avascular necrosis. Surgery initially provided significant pain improvement. Petitioner was released to return to full duty work on 10/18/11. On 1/25/12, Dr. Galatz opined Petitioner might require a right shoulder reconstruction. Petitioner was last examined by Dr. Galatz on 11/28/12 which showed some reduction in range of motion. X-rays at that time revealed avascular necrosis of the right humeral head without articular collapse.

Petitioner returned to Dr. Brown on 4/3/13 with continued shoulder pain. Dr. Brown's impression was biceps tendinitis for which he recommended an injection and physical therapy. The injection was performed on 6/6/13 and Petitioner underwent 10 sessions of physical therapy from 7/2/13 through October 2013. On 8/26/14, Dr. Brown noted persistent and constant right shoulder pain. His impression was rotator cuff impingement and he injected Petitioner's shoulder.

On 2/10/15, Petitioner reported to Dr. Brown her pain was "getting to her" and she was unable to cope with it. An MRI was performed that showed slight flattening of the humeral head, probably representing AVN, partial tear of the supraspinatus tendon, subscapularis tendinosis, osteoarthritis at the glenohumeral joint, fluid, and swelling. On 3/3/15, Dr. Brown stated

Petitioner was likely to continue to suffer pain and recommended hyaluronic acid or platelet rich plasma injections as opposed to surgery.

On 8/2/16, Petitioner reported to Dr. Brown increased pain preparing her classroom for the year. Exam showed limited internal rotation and positive impingement and biceps tendinitis tests. Dr. Brown recommended a steroid injection and stated the rotator cuff tear was likely increasing. He recommended a repeat MRI.

On 8/28/18, Petitioner saw Dr. Brown for continued pain with school activities. Physical examination showed impingement signs and an x-ray revealed slight calcific densities in the supraspinatus. Dr. Brown's impression was impingement, possible incomplete rotator cuff tear, and stabilized AVN. He administered a subacromial cortisone injection and recommended an MRI arthrogram.

On 9/21/18, Petitioner was examined by Dr. Lyndon Gross pursuant to Section 12 of the Act. Dr. Gross noted Petitioner had 4/10 pain with activities. Physical exam showed limited range of motion, positive impingement tests, and tenderness. Dr. Gross diagnosed AVN of the humeral head causally related to her work accident and the objective findings were consistent with her complaints. Dr. Gross opined Petitioner was not at MMI and agreed an MRI arthrogram was appropriate.

On 10/30/18, Dr. Brown's examination revealed pain with impingement testing and full forward elevation. Petitioner completed 20 physical therapy sessions from 11/29/18 through February 2019. On 12/11/18, Dr. Brown noted continued right shoulder pain with slight improvement with physical therapy. Examination showed forward elevation of 120 degrees, external rotation at 45 degrees, slight weakness in the supraspinatus, and a positive Speed's test. Petitioner's last visit with Dr. Brown was on 1/8/19.

On 6/7/19, Petitioner returned to Dr. Gross for a second examination pursuant to Section 12 of the Act. Dr. Gross stated his physical examination was essentially unchanged from the year before. He opined Petitioner had plateaued with regard to any further improvement and had reached MMI. Dr. Gross opined Petitioner would need future medical treatment on an as-needed basis for her right shoulder injury including periodic re-evaluation, injections, and possibly a total shoulder arthroplasty. Dr. Gross provided an AMA rating of 6% of the arm or 4% of the person.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, an injury must "arise out of" and "in the course of" employment. 820 ILCS 305/1(d). An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to

the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id*. "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Indus. Comm'n*, 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Indus. Comm'n*, 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 671 (2003).

The issue in dispute is whether Petitioner's accident arose out of her employment with Respondent. The Arbitrator finds that Petitioner met her burden that she sustained an accident arising out of her employment with Respondent on 12/17/08. The Arbitrator finds that Petitioner testified credibly and it is undisputed that she slipped while participating in a teacher demonstration volleyball game for the students. The volleyball game occurred during regular school hours while Petitioner was on the clock and receiving compensation. Petitioner was performing her supervisory job duties as a teacher during the teachers' game. There is ample evidence to support the teachers' volleyball game was not a voluntary, recreational event such that the Section 11 defense would defeat her claim.

Section 11 of the Act states, in relevant part: "Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties, and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

For Section 11 to apply, the activity must be both voluntary and recreational. *Elmhurst Park Dist. v. Illinois Workers' Comp. Comm'n*, 395 Ill.App.3d 404, 408 (1st Dist. 1980). Recreational means for one's "own 'diversion' or to 'refresh' or 'strengthen' his spirits after toil." *Id.* at 409.

In *Board of Education of City of Chicago v. Industrial Comm'n*, 81 Ill. 2d 17 (1980), the Supreme Court affirmed the Commission's decision that the elementary teacher's injury while engaging in volleyball practice after work hours on school property for a teacher-student game arose out of and in the course of the employment and was not merely recreational. The court focused on facts quite similar to this case: the gym teacher requested claimant and other teachers to participate in the game; the game was to be during school hours; the after-hours pre-game practice was in the school gym and used school equipment; and the principal knew about the practice but did nothing to discourage it and agreed the activity could enhance the teacher-student relationship. *Id*. at 19-21.

In *Calumet School Dist. No. 132 v. Illinois Workers' Comp. Comm'n*, 2016 IL App (1st) 153034WC, the court affirmed the Commission's decision to award benefits to a middle-school science teacher injured in an after-school basketball game and rejected the Section 11 defense. The court cited evidence that: teachers were expected to participate in after-school activities; students enjoyed playing games with teachers; such games build rapport with students; when the principal requested the teacher to play he had not yet received his review or new contract; during the game the teacher was responsible for overseeing students; and the teacher did not want to

play. *Id*. at ¶¶6-11, 35. The court reached this conclusion even though another teacher testified participation was strictly voluntary and a different teacher monitored the students. *Id*. at ¶¶18-22.

In *Elmhurst Park*, the court found Section 11 inapplicable to a fitness facility worker injured during an admittedly voluntary wallyball game where: the employee's duties including promoting classes and competition; the game participants were paying customers; the employee was not ordered to play but a co-worker requested the employee play; and although the evidence conflicted whether work policies prohibited employees from playing there was no evidence the employee was disciplined for playing. 395 Ill.App.3d at 410.

There is insufficient evidence in the present case to support the application of Section 11. The teacher demonstration volleyball game was not after work for Petitioner's diversion or refreshment, but for the benefit of the students. Both the principal and gym teacher acknowledged as much. Petitioner was required to be present in the school gym to supervise her students during their games. Petitioner did not want to play in the teacher game and it was not for her recreation. She did not believe her participation was voluntary but was part of "team" building to benefit the students. Petitioner was on-duty during regular school hours during the game and remained responsible for her students. The PE teacher announced the teachers' game to get the approximate 120 students cheering. Petitioner felt pressured to participate and she was unaware of the annual teachers' volleyball game tradition as she was a first-year teacher who worked for Respondent for only a few months prior to the incident.

Respondent's principal testified the game was part of the teacher's regular duties, and that first-grade students observing their teachers in physical activity could send a beneficial message to students and enhance the student–teacher relationship. She admitted the teachers' volleyball game was an annual tradition and she did not provide any instruction to the teachers about participating in or conducting the event. She never informed Petitioner she did not have to participate in the game. The principal agreed that during the game teachers were required to supervise students.

Petitioner testified that all voluntary events, including family reading night and dances, were arranged by circulating a sign-up sheet for teachers to volunteer. A volunteer sign-up sheet was not circulated for the teachers' volleyball game and Petitioner first learned of the event while entering the gym with her class. Further, the teachers' employment contract states teachers have the responsibility and duty to accept extracurricular duties and assignments. Although the principal disagreed that the volleyball game fell within the definition of "extracurricular duties and assignments", Petitioner was a newly hired teacher having recently signed the employee contract on May 15, 2008.

Based on the foregoing evidence, the Arbitrator finds Petitioner's accident arose out of and in the course of her employment with Respondent.

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

The Arbitrator finds that Petitioner's current condition of ill-being in her right shoulder is causally connected to her work injury of December 17, 2008. The Arbitrator concludes that

Petitioner testified in a credible manner as her testimony was consistent with all other evidence admitted at the time of hearing.

Petitioner suffered an immediate onset of pain and right shoulder dislocation when she fell and collided with the gym wall. There is no evidence Petitioner had any prior injuries or pre-existing conditions in her right shoulder. On 10/13/10, Respondent's Section 12 examiner, Dr. Michael Nogalski, opined Petitioner's condition in her right shoulder is causally related to her injury and all treatment through that date was reasonable and necessary. On 7/27/11, Dr. Nogalski agreed Petitioner should undergo a core decompression of the posttraumatic avascular necrosis which was performed on 9/12/11. On 1/25/12, Dr. Galatz opined Petitioner might require a right shoulder reconstruction.

On 9/21/18, Respondent's Section 12 examiner, Dr. Lyndon Gross, diagnosed AVN of the humeral head and opined the condition was causally related to Petitioner's work accident. Dr. Gross agreed an MRI arthrogram was reasonable and necessary as recommended by Dr. Brown. Dr. Gross opined Petitioner would not reach MMI until it was determined if there had been more significant collapse of the humeral head or degeneration of the glenohumeral joint related to the collapse, which would require additional treatment.

On 6/7/19, Petitioner returned to Dr. Gross who opined Petitioner had plateaued with regard to any further improvement and reached MMI. Dr. Gross opined Petitioner would need future medical treatment on an as-needed basis for her right shoulder injury, including periodic re-evaluation, injections, and possibly a total shoulder arthroplasty.

Based on the above evidence, the Arbitrator finds Petitioner's current condition of ill-being is causally connected to the injury that occurred on December 17, 2008.

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 (O): Other: Is Petitioner entitled to reimbursement of insurance co-payments?

Based on the above findings regarding accident and causal connection, the Arbitrator finds Petitioner is entitled to medical benefits related to her right shoulder. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care. As a result, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, contained in Petitioner's Exhibits 8, 9, and 13, as provided in Section 8(a) and Section 8.2 of the Act. The parties stipulate that Respondent shall receive a credit for medical bills paid through its group medical plan pursuant to Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit. The parties stipulate that Respondent has paid and shall receive a credit for medical expenses in the amount of $81,054.86.

Respondent shall further reimburse Petitioner for out-of-pocket insurance co-payments in the amount of $736.36.

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

"A claimant is temporarily and totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of [the] injury will permit." *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1. "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 142, 923 N.E.2d 266, 271 (2010).

The Arbitrator finds Petitioner is entitled to temporary total disability benefits from 12/17/08 through 1/6/09, 10/9/09 through 11/2/09, and 9/12/11 through 10/18/11. Respondent shall pay Petitioner temporary total disability benefits of $494.67/week for 11-6/7ths weeks, as provided in Section 8(b) of the Act.

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

Petitioner's accident occurred prior to the 2011 amendment of §8.1b of the Act. Petitioner was 44 years old at the time of accident. She sustained multiple fractures to the humeral head and dislocation of the right shoulder. She underwent an open reduction and internal fixation with plate and screws of the three-part fracture, with a torn and entrapped biceps tendon. Despite surgery, extensive physical therapy, and an injection, Petitioner continued to have a symptomatic shoulder. She underwent a second surgery to remove the hardware, including decompression of adhesive capsulitis and scar tissue around the rotator cuff and acromium. Despite the second surgery and additional physical therapy and injections, Petitioner's condition failed to improve. A post-surgical MRI revealed swelling, suggestive of avascular necrosis, and a small full thickness insertional tear of the distal right subscapularis tendon. Petitioner underwent a third surgery consisting of a core decompression of the posttraumatic avascular necrosis. Both of Petitioner's orthopedic surgeons opined she will likely require a right shoulder reconstruction due to articular collapse. Following the third surgery, Petitioner underwent additional injections and physical therapy and was diagnosed with rotator cuff impingement. Another MRI revealed slight flattening of the humeral head, probably representing AVN, partial tear of the supraspinatus tendon, subscapularis tendinosis, osteoarthritis at the glenohumeral joint, fluid, and swelling. It was recommended that Petitioner undergo hyaluronic acid or platelet rich plasma injections as opposed to a fourth surgery.

From 2016 through 2019, Petitioner continued to exhibit pain, limited internal rotation, impingement signs, and biceps tendinitis. Repeat diagnostics revealed calcific densities in the supraspinatus, impingement, possible incomplete rotator cuff tear, and AVN. Petitioner continued treatment, including a subacromial cortisone injection and physical therapy. In 2019, section 12 examiner, Dr. Gross, opined his examination was unchanged from the year before and Petitioner would need future medical treatment on an as-needed basis, including periodic re-evaluation, injections, and possibly a total shoulder arthroplasty.

Petitioner testified her shoulder is "always" painful. She is right-hand dominant. She testified she can no longer perform household chores, including vacuuming, or perform any activity above chest level. It is difficult for her to write on the whiteboard and she has to hold her arm steady with her left hand. She cannot use tools or perform activities that require turning or

striking with her right arm. She can no longer ride horses, play golf, or ride four wheelers. Petitioner testified she can perform all her work activities as a teacher, but not as well as she did prior to the accident. She has to ask for assistance to lift boxes and prepare her classroom at the beginning and end of the school year.

The injury has affected Petitioner's mental health as she is worried about when the avascular necrosis will cause bone collapse. She is concerned her students could accidentally hurt her shoulder and she avoids physical contact with people. She was very independent before the accident and now requests assistance to perform many tasks. She has to rely on her husband to perform many tasks which causes anxiety. Petitioner takes prescription pain medication when her pain is really bad and occasionally takes Ibuprofen and Tylenol. She seeks medical treatment when her pain does not subside after a few days.

Based upon the foregoing evidence, the Arbitrator orders Respondent to pay Petitioner the sum of $**445.20**/week for a period of **200 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **40% body as a whole** as a result of her right shoulder injury**.**

Arbitrator Linda J. Cantrell DATED: _____

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037289
Case Name	Shawn Daniels v. Continental Tire North America
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0338
Number of Pages of Decision	22
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Keefe, Jr.

DATE FILED: 8/30/2022

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHAWN DANIELS,

Petitioner,

vs. NO: 18 WC 37289

CONTINENTAL TIRE,

Respondent.

DECISION AND OPINION ON REVIEW

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

Although we affirm the Arbitrator's finding that the permanent restrictions recommended by Dr. Gornet are persuasive, we find that Petitioner was not entitled to vocational rehabilitation services prior to May 6, 2021.

The Arbitrator found that Petitioner was entitled to vocational rehabilitation services as of July 20, 2020, that being the date on which Dr. Gornet found him to be at maximum medical improvement ("MMI") and on which he was given permanent cervical restrictions consisting of 20 pounds lifting and no overhead work. At that time, Dr. Gornet did not believe the occipital release that had been recommended by Dr. Blake would benefit Petitioner but opined that Petitioner might require facet ablations in the future. Two days later, on July 22, 2020, Respondent's attorney sent Petitioner's attorney a letter acknowledging receipt of Dr. Gornet's "MMI slip" and stating:

> Unless Dr. Marino has placed your client at maximum medical improvement, I do not believe the case is ready for vocational rehabilitation and maintenance benefits.
>
> Provided that my client is not going to accommodate the current restrictions, TTD [temporary total disability] benefits will continue. *Rx7*.

On August 4, 2020, Respondent's attorney sent another letter to Petitioner's attorney stating:

> There appears to be a conflict between the opinion of Dr. Blake and Dr. Gornet. Does your client intend on seeing Dr. Hagan?
>
> I believe my client is resetting the exams to address work status.
>
> In the interim, my client is continuing weekly benefits. *Rx11*.

Petitioner's initial vocational rehabilitation interview with Tim Kaver did not occur until August 20, 2020. Therefore, Petitioner's attorney was on notice that Respondent disputed that Petitioner was at MMI because he had not been released by Dr. Marino, who had been treating Petitioner for dizziness and vertigo, and that there was uncertainty whether Petitioner would be seeing Dr. Hagan for the occipital release. In any event, Respondent continued paying TTD benefits because it believed Petitioner was not yet at MMI.

On January 6, 2021, Respondent's attorney sent another letter to Petitioner's attorney stating:

> When we last spoke, you were going to reach out to Dr. Hagan to find out if he could give some level of certainty as to whether the surgery he is proposing will significantly help your client's reported level of symptoms.
>
> My client is not accepting liability for the multiple bills from England & Company. Your client by his own admission is not at maximum medical improvement. Therefore, the vocational rehabilitation is premature.
>
> Further, according to your client's application for employment at Continental Tire, he previously worked as a phlebotomist and medical assistant shortly before being hired by Continental Tire. This is in the light physical demand level.
>
> My client is continuing weekly benefits at this time.

Rx7.

We initially find that Petitioner admitted he was not at MMI until May 5, 2021. Petitioner claimed, on the Request for Hearing Form, that he was entitled to TTD benefits for 142-3/7 weeks from "8/6/18-6/9/19 and 6/17/19-5/5/21." Respondent agreed with this claimed period of TTD. Petitioner also claimed that he was entitled to maintenance for 7-1/7 weeks from "5/6/21-6/23/21." Respondent disputed Petitioner's entitlement to maintenance benefits.

Therefore, Petitioner's claim for vocational rehabilitation services while he was temporarily totally disabled is logically inconsistent. In other words, it was pointless to look for a job when he was claiming to be medically unable to work. Petitioner attempts to overcome this logical inconsistency by citing *Nascote Indus. v. IC* for the proposition that:

> Rehabilitative efforts may be undertaken even though the extent of an employee's permanent disability cannot yet be determined. *Hartlein v. Illinois Power Co*., 151 Ill.2d 142, 165, 176 Ill.Dec. 22, 601 N.E.2d 720 (1992); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill.App.3d 170, 179–80, 251 Ill.Dec. 966, 741 N.E.2d 1144 (2000). It follows then that a claimant might be entitled to maintenance benefits incidental to a rehabilitation program before he or she has reached maximum medical improvement.

Nascote Indus. v. IC, 353 Ill. App. 3d 1067, 1075, 820 N.E.2d 570, 577 (2004). Petitioner further argues:

> Based on this precedent, Respondent's argument is without merit. While Petitioner was unable to work during this time, it was obvious that Petitioner would not be able to return to his former employment. Petitioner thus made the wisest use of his time and the benefits paid by Respondent. While Respondent argues that "it is not reasonable that [it] pay thousands of dollars in vocational rehabilitation services during a time Petitioner admitted he was incapable of working while under active medical treatment. . .", Respondent ignores the fact that it would have to pay even more "thousands of dollars" if Petitioner did not begin rehabilitative efforts immediately, as it would have to pay for vocational rehabilitation and an even longer maintenance period. It is extraordinary that Respondent would argue against Petitioner's diligence, when it is Petitioner's diligence that would reduce its liability for temporary total disability and maintenance benefits."

P-brief at 12. Petitioner also claims, "Ironically, it was Respondent's initial denial of any treatment with Dr. Hagan, which left Petitioner with no choice but to begin looking for work." *P-brief at 13*.

The Arbitrator found:

> With respect to whether Petitioner began his vocational rehabilitation efforts prematurely, based upon the above findings as to causal connection and that the permanent restrictions of Dr. Gornet were reasonable and necessary, the Arbitrator finds that Petitioner did not undertake his job search efforts too soon. Petitioner's permanent restrictions by Dr. Gornet were placed on 7/20/20, which precluded him from returning to his pre-accident job for Respondent. There was no testimony or evidence that Petitioner could return to employment for Respondent with his current light physical demand restrictions. Further, Petitioner's permanent restrictions remained unchanged despite undergoing further treatment by Dr. Blake and Dr. Hagan that significantly improved his headaches and dizziness."

Dec. 15.

We disagree with Petitioner's arguments and the Arbitrator's decision on this issue. It is not true that Petitioner had "no choice but to begin looking for work" because Respondent was, in fact, continuing to pay TTD benefits. The Arbitrator did not address the fact that, although Petitioner had been placed at MMI by Dr. Gornet for the cervical condition, he had not been placed at MMI by Dr. Marino (for dizziness and vertigo) or Dr. Blake (occipital and migraine symptoms) or, subsequently, Dr. Hagan. The evidence shows that Respondent's attorney sent multiple letters to Petitioner's attorney asking whether Petitioner intended to pursue the occipital surgery with Dr. Hagan, which Respondent ultimately approved on January 21, 2021. *Rx11*. Again, Respondent continued to pay TTD benefits that entire time and did not stop paying benefits until May 7, 2021, when Respondent's attorney wrote Petitioner's attorney that benefits were being terminated based on Dr. deGrange's opinion that Petitioner could return to work in a full duty capacity. *Rx7*.

After Petitioner's occipital surgery on February 2, 2021, Dr. Hagan released Petitioner on March 22, 2021. At that time, Petitioner had no headaches, no "pressure" in his head, no midline pain on the top of his head and his dizzy spells had decreased. Dr. Hagan noted that Petitioner still had residual neck pathology that "remains unchanged" and he returned Petitioner to his "baseline previous restrictions as per Dr. Gornet." Although other MMI dates may be reasonable, we will not disturb the parties' stipulation that Petitioner was entitled to TTD through May 5, 2021.

We also find Petitioner's reliance on *Nascote Industries* to be misplaced because it was decided prior to the changes in the Act that allowed for temporary partial disability (TPD). The *Nascote* court found the claimant was entitled to maintenance under §8(a) for the period she was allowed to work 4-hour days by her physician as part of a rehabilitation plan. Therefore, there is no similarity between the situation in *Nascote* and the case at bar. Here, Petitioner was admittedly TTD and not working part-time. Instead, he was completely off work and receiving TTD benefits. Petitioner attempts to describe his vocational rehabilitation efforts as a way to make the "wisest use of his time" and that his "diligence" would ultimately save Respondent money in TTD and maintenance benefits. Regardless of Petitioner's allegedly altruistic motivation, the fact remains that he had not been released at MMI by Dr. Marino and Dr. Blake at the time he began his vocational rehabilitation with Tim Kaver in August 2020. As long as Respondent was continuing to pay TTD, while the questions surrounding possible surgery with Dr. Hagan were being resolved, we find Petitioner's vocational rehabilitation services were premature.

Therefore, we modify the Arbitrator's award pertaining to charges for vocational rehabilitation services and find Respondent is not liable for charges incurred prior to May 6, 2021. However, we agree that once Respondent terminated TTD benefits as of May 5, 2021, Petitioner was then entitled to receive maintenance benefits and vocational rehabilitation became reasonable and necessary at that time. We affirm the Arbitrator's award of vocational services and maintenance from May 6, 2021 through the date of hearing on June 23, 2021, along with prospective vocational services "to aid him with computer literacy and his job search efforts, including short-term training and computer literacy tutoring, but specifically excluding a formal educational program as recommended by Mr. Kaver." *Dec. 15.*

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $547.24/week for 7 weeks, commencing May 6, 2021 through

June 23, 2021, as provided in Section 8(a) of the Act. Pursuant to the parties' stipulation, the permanent partial disability advance in the amount of $5,000.00 shall be a credit toward maintenance benefits awarded herein. 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 reasonable and necessary medical expenses in Petitioner's Exhibit 1 under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for vocational rehabilitation services listed in Petitioner's Exhibit 22 beginning May 6, 2021, under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for the vocational rehabilitation benefits to Petitioner to aid him with computer literacy and his job search efforts, including short-term training and computer literacy tutoring, but specifically excluding a formal educational program as recommended by Mr. Kaver.

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.

August 30, 2022

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

SE/
O: 7/12/22
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037289
Case Name	DANIELS, SHAWN v. CONTINENTAL TIRE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Keefe, Jr.

DATE FILED: 8/19/2021

/s/ Linda Cantrell, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 17, 2021 0.05%

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)

SHAWN DANIELS
Employee/Petitioner

v.

CONTINENTAL TIRE
Employer/Respondent

Case # **18** WC **037289**

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville,** on **June 23, 2021**. 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? **(Vocational Rehabilitation and permanent restrictions)**
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? **(Vocational Rehabilitation)**
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **August 3, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,921.38**; the average weekly wage was $**820.86.**

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**78,020.79** for TTD, $**0** for TPD, $**0** for maintenance, and $**5,000.00 (PPD advance)** for other benefits, for a total credit of $**83,020.79**.

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

ORDER

Respondent stipulated that the only medical bills in dispute relate to vocational rehabilitation services and not medical treatment provided to Petitioner. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's group exhibit 1 pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. Respondent shall further pay the reasonable and necessary vocational rehabilitation expenses outlined in Petitioner's group exhibit 1.

Respondent shall authorize and pay for the vocational rehabilitation benefits to Petitioner to aid him with computer literacy and his job search efforts, including short-term training and computer literacy tutoring, but specifically excluding a formal educational program as recommended by Mr. Kaver.

Respondent shall pay Petitioner maintenance benefits of $**547.24**/week for **7** weeks, commencing **May 6, 2021 through June 23, 2021**, as provided in Section 8(a) of the Act. Pursuant to the parties stipulation, the permanent partial disability advance in the amount of $5,000 shall be a credit toward maintenance benefits awarded herein.

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

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

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

August 19, 2021

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SHAWN DANIELS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-037289
	)	
CONTINENTAL TIRE NORTH AMERICA,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 23, 2021 pursuant to Section 19(b) of the Act. The parties stipulated that on August 3, 2018 Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection with regard to vocational rehabilitation and permanent restrictions, medical bills related to vocational rehabilitation, maintenance benefits, and prospective vocational rehabilitation benefits. All other issues have been stipulated.

TESTIMONY

Petitioner was 47 years old, married, with two dependent children at the time of accident. Petitioner testified that on August 3, 2018 he smashed his head on a conveyor belt while trying to replace rubber on a refining mill. Petitioner stated he was knocked to the ground and suffered a head laceration and injured his neck. Following emergency care, Petitioner followed up with his primary care physician and the Brain and Spine Institute before coming under the care of Dr. Gornet. Petitioner underwent conservative care and Dr. Gornet performed a C3-4 fusion which resolved the headaches in the front of his head. Dr. Gornet referred Petitioner to Dr. Blake who administered an injection that provided relief. Dr. Gornet referred Petitioner to Dr. Hagan for ongoing headaches, pressure, and dizziness. Petitioner testified that Dr. Hagan cut four nerves and cleaned up two other nerves that completely resolved his dizziness and headaches.

Petitioner testified he still has memory issues. He is currently on restrictions pursuant to Dr. Gornet's orders on 7/20/20 of no lifting greater than 20 pounds and no overhead work. Petitioner testified he began looking for work within his restrictions and used the services of England and Company. He stated that when he reached MMI on 7/20/20 he still had headaches, dizziness, and pressure. He did treat with Dr. Hagan until after he was released at MMI by Dr. Gornet for his neck injury. Despite his symptoms after reaching MMI for his neck until undergoing surgery with Dr. Hagan, he continued to perform a job search and worked with

England and Company. He took time off his job search to recover following his surgery with Dr. Hagan. Despite being released by Dr. Hagan, he is still under permanent restrictions imposed by Dr. Gornet. He is currently looking for work.

On cross-examination, Petitioner testified his memory issues require him to read and re-read sometimes to memorize things. He has to make a list when he goes shopping. He forgets events that his children are involved in. He came under Dr. Hagan's care in December 2020 and Respondent continued to pay him TTD benefits from his MMI date of 7/20/20 through December 2020. During that five-month period, Petitioner received at least one injection by Dr. Blake. He met with Tim Kaver of England and Company on 8/20/20. He testified he told Mr. Kaver he still experienced symptoms of dizziness, forgetfulness, difficulty concentrating, and lack of focus. He told Mr. Kaver he used a cane at times to balance when he walked and he could not drive because of dizziness. When he met with Mr. Kaver on 8/20/20 Petitioner was still experiencing neck pain and insomnia. He told Mr. Kaver he had difficulty standing for more than one hour and he could not read for more than twenty minutes at a time. He told Mr. Kaver he felt he could return to work if his symptoms of lack of focus, lack of concentration, and dizziness improved. Petitioner testified he did not feel he could return to work as of 8/20/20 as his symptoms had not resolved until his surgery with Dr. Hagan. Petitioner was examined by Dr. deGrange a second time on 9/24/20 and reported the same problems he reported to Mr. Kaver on 8/20/20. Petitioner testified he performed a job search from the date he reached MMI through his surgery with Dr. Hagan because he needed to work and support his family.

Petitioner testified he only met with Mr. Kaver one time. He has spoken with Mr. Kaver on the phone and performed virtual meetings. He testified he speaks to Mr. Kaver's assistant two to three times per month. Mr. Kaver has not secured Petitioner a job and he has not had any job interviews. He testified he was offered a stocking position job but once the potential employer learned of his work restrictions he was not hired. He is documenting his current job searches.

Petitioner testified he met with Mr. Kaver in 2015 after a work-related accident in the coal mines that resulted in permanent restrictions of no lifting greater than 50 pounds below waist, 25 pounds to shoulder level, and 20 pounds overhead. His restrictions were imposed by Dr. Nathan Mall whom he last saw in June 2015. His permanent restrictions by Dr. Mall remained in place until his accident with Respondent on 8/3/18. In 2015, Mr. Kaver recommended that Petitioner take free computer and typing classes that were offered at the library. Petitioner stated he went to the classes a few times but he is still a one-finger typer. He did not continue to take the classes because it "wasn't working" and nobody helped him.

Petitioner testified that the numbness and tingling in his left hand has resolved. After his injury in the coal mine and prior to working for Respondent, Petitioner was employed by Dr. Elbert Fasnacht as an apprentice performing blook work, x-rays, and paperwork. He testified that that job is no longer within his physical restrictions as he would have to help elderly get in and out of their wheelchairs and lay them down. He worked for Dr. Fasnacht for one and a half years and was terminated because they were overstaffed. He stated he was a patient of Dr. Fasnacht and he was hired as a favor. He has not applied for any office positions since his 8/3/18 accident. Mr. Kaver has recommended a schooling program because Petitioner is interested in small business management. Petitioner has a high school diploma.

MEDICAL HISTORY

Petitioner was transported by ambulance to SSM Good Samaritan Hospital. A 3cm laceration on the top of his scalp was closed with five suturing stapes and Petitioner was advised to follow-up with Dr. Fasnacht. Before he could be seen by Dr. Fasnacht, Petitioner returned to the hospital on 8/5/18 with complaints of head pain, exhaustion, weakness, dizziness, and altered speech pattern. Petitioner reported feeling in a daze and expressed inability to sleep well since the accident. He was admitted to the neurology department and Dr. Syed Shah diagnosed post-concussion syndrome. A brain CT scan was negative for acute hemorrhage and Petitioner was taken off work and restricted from driving.

Petitioner followed up with Dr. Shah and complained of neck pain, post-traumatic migraine headaches, and anxiety attacks. Petitioner was prescribed Zonasimide and a low dose of Topamax and advised to apply ice or heat to his neck. Topamax caused side effects and he was switched to Depakote.

Petitioner followed up with Dr. Fasnacht and reported cognitive impairment, dizziness, irritability, loss of balance, and pain associated with post-concussion syndrome. Dr. Fasnacht removed the sutures and later referred Petitioner to SIH Brain & Spine Institute for suspected seizures.

In October 2018, Dr. Shah referred Petitioner to Amair Sheikh who noted Petitioner continued to have symptoms of headaches, confusion, inability to concentrate on a sustained mental task, and irritation with his mental fog. Dr. Sheikh agreed with Dr. Shah's assessment of post-concussive syndrome and ordered an EEG to rule out suspicions of seizure. The EEG was normal and Dr. Fasnacht referred Petitioner to Dr. Matthew Gornet to evaluate his cervical spine.

Dr. Gornet evaluated Petitioner in January 2019 and noted Petitioner's complaints of neck pain into both trapezii with daily headaches and occasional left arm numbness. Physical examination was positive for pain with reproduction of dizziness with flexion/extension and lateral rotation with decrease in biceps on the left and decreased sensation in the C6 dermatome. Dr. Gornet ordered an MRI that demonstrated annular tears at C3-4, C4-5, and C5-6 with a small protrusion at C6-7. Petitioner was referred for physical therapy and injections with Dr. Blake at C4-5 and C5-6 that resulted in minimal improvement. Dr. Gornet tentatively recommended surgical disc replacement from C3-4 through C5-6.

Petitioner was examined by Dr. Todd Silverman and Dr. Donald deGrange pursuant to Section 12 of the Act. Drs Silverman and deGrange agreed that Petitioner's post-concussive syndrome was related to the accident but disagreed on causal connection as to Petitioner's cervical spine. Dr. Silverman opined Petitioner's post-concussive syndrome required aggressive treatment; however, he did not believe the tinnitus and cognitive dysfunction were causally connected to the work accident. Dr. Silverman recommended medication. Dr. deGrange diagnosed C3-4 disc herniation that he opined was causally connected to the work accident and he recommended a C3-4 discectomy and fusion.

Dr. Gornet opined Petitioner had obvious structural pathology at C3-4 most significantly, but also annular tears and disc pathology at C4-5 and C5-6 which he recommended be treated to avoid persistent headaches and neck pain. Dr. Gornet ordered a cervical CT scan that revealed facet arthropathy on the right at C2-3 and C3-4 with facet changes at C4-5. Dr. Gornet stated a fusion could cause adjacent level stress that would be mitigated by disc replacement, but disc replacement would not address facet pathology. He agreed with Dr. deGrange to proceed with a single level fusion at C3-4, though he cautioned Petitioner that he may require treatment with disc replacement at his other levels in the future. He advised that if Petitioner's headaches and dizziness persisted following treatment of his cervical spine, he would require further evaluation by a neurologist.

Respondent obtained a supplemental report from Dr. Silverman on 6/4/19, in which he reviewed the report prepared by Dr. deGrange and follow-up notes from Dr. Gornet. He noted that concussion syndrome can cause chronic post-traumatic headaches independent of neck pathology, and he believed Petitioner's headaches were so diffuse, unresponsive to anesthetic blockade, and rife with migrainous features that they were most consistent with post-concussive migraine than cervicogenic headache. He stated that if Petitioner decided not to pursue his recommendations of care under a neurologist rather than a cervical spine specialist, he would presume that Petitioner's headaches were no longer a substantial issue and he would place him at MMI with an impairment rating of 0%. He stated it would be reasonable for Petitioner to return to work with light duty work restrictions.

On 7/19/19, Dr. Gornet performed an anterior discectomy and fusion at C3-4 that confirmed a central midline annular tear with a central herniation and bilateral foraminal herniations with inflammatory tissue. Petitioner reported improved neck pain but persistent dizziness and headaches. On 10/28/19, Dr. Gornet placed Petitioner under restrictions of no lifting greater than 10 pounds and no overhead work. On 11/6/19, Petitioner was examined by Dr. Ahmed Jafri who recommended pain management for greater occipital nerve block and a referral with an ENT for persistent complaints of dizziness and tinnitus.

On 12/17/19, Petitioner presented to Dr. Marino of the Midwest Dizziness and Balance Institute at the referral of Dr. Fasnacht with a chief complaint of dizziness. Dr. Marino recommended additional testing and cerumen debridement. Petitioner followed up with Dr. Marino on 1/16/20 and denied headaches. An MRI of the brain was normal. Testing and examination led to a diagnosis of left peripheral vestibulopathy, multifactorial cervicogenic disequilibrium, otolith dysfunction, and post-concussive migraine. Petitioner began a course of advanced vestibular treatment and reported improvement in his symptoms, but he continued to have episodes of dizziness throughout the day with fatigue following significant activity. Petitioner also reported tightness and tension returning down the right side of his neck with headache.

On 1/20/20, Petitioner reported to Dr. Gornet that his headaches continued to improve but he still had neck pain. Dr. Gornet recommended restrictions of no lifting greater than 20 pounds and no overhead work as Dr. Gornet believed Petitioner would not improve further due to facet arthropathy.

Petitioner's family physician referred him to Dr. Helen Blake on 2/13/20 for consultation for a greater occipital nerve block for his headaches. On 3/12/20, Petitioner reported complete relief. Petitioner demonstrated no tenderness to palpation over the greater occipital ridge but continued to have diminished range of motion in his cervical spine. Dr. Blake advised that Petitioner will require nerve blocks in the future. His symptoms returned over the following months and Dr. Blake administered an injection in the greater occipital nerve on 7/16/20. Dr. Blake recommended surgical consultation to release the greater occipital nerve entrapment. She administered a third occipital nerve injection on 10/29/20.

Petitioner returned to Dr. Gornet on 7/20/20 and reported some improvement in neck pain, but he still had residual symptoms. CT scan revealed solid fusion at C3-4, with some facet changes at C2-3 and C4-5. Dr. Gornet felt the facet arthritis was the source of his ongoing symptoms. He recommended permanent restrictions of no lifting greater than 20 pounds and no overhead work. Dr. Gornet released Petitioner at MMI and opined Dr. Blake's recommendation for occipital release by Dr. Hagan would not provide benefit.

On 8/20/20, Petitioner met with Tim Kaver from England & Company for a vocational assessment. Petitioner reported he would be able to return to work only if the symptoms of dizziness, loss of concentration, and nausea lessened. Mr. Kaver recommended keyboarding/computer classes. On 12/7/20, Mr. Kaver opined Petitioner was a candidate for a Small Business Management Associates Degree from John A. Logan College. He estimated the cost to be $9,270.00. Mr. Kaver provided monthly reports through May 2021.

Respondent's counsel sent Petitioner's counsel letters between 8/4/20 and 12/14/20 requesting whether Petitioner was pursuing treatment with Dr. Hagen in light of the conflicting recommendations between Dr. Gornet and Dr. Blake. Respondent's counsel sent Petitioner's counsel letters explaining vocational rehabilitation services were disputed because Petitioner had not reached MMI for his head injury.

Petitioner was examined a second time by Dr. deGrange on 9/24/20 who noted Petitioner experienced immediate relief following neck surgery, but he still had symptoms in the area of C2-3, with persistent dizziness, tinnitus, blurred vision, and nystagmus. He had noise and light sensitivity, insomnia, and loss of short-term memory as well as concentration with aphasia. Physical examination revealed generalized tenderness from the subocciput through the interscapular region, weakness of the left shoulder, and light touch in the dermatomes of C2 through T2 in the bilateral upper extremities with decreased sensation throughout the left upper extremity. He did not believe the nerve release recommended by Dr. Hagan was reasonable or necessary. He opined that Petitioner's post-concussive symptoms would prevent his return to his usual and customary job duties in the near future. He recommended permanent restrictions of no lifting greater than 25 pounds overhead, no forceful pushing or pulling greater than 50 pounds with the left upper extremity and no repetitive use of the neck.

Petitioner was examined a second time by Dr. Silverman on 11/19/20. Dr. Silverman reviewed updated records of Dr. Blake, Dr. Marino, and Dr. Gornet. He noted Petitioner continued to report frequent episodes of dizziness and poor balance despite improvement from vestibular rehabilitation. Petitioner also reported poor sleep due to neck pan and hypersensitivity

to bright light. Physical examination again demonstrated notable decreased cervical range of motion in all directions, particularly the left side, and tenderness to light touch over the right posterior head region. Dr. Silverman believed Petitioner's ongoing dizziness was post-concussive with an element of anxiety and possible symptom magnification, while his right posterior head pain was likely due to right C2-3 facet arthropathy with possible radiculopathy or occipital neuropathy. He opined Petitioner required no permanent restrictions from a neurologic perspective. Dr. Silverman did not believe that any occipital entrapment was related to the accident or that surgical treatment through nerve release was necessary.

On 12/7/20, Petitioner presented to Dr. Robert Hagan who noted occipital pain radiating into Petitioner's neck and bilateral shoulders. Physical examination was positive for decreased range of motion in all directions of his cervical spine, midline tenderness at the protuberance provoking dizziness with palpation, and tenderness to palpation of the occipital nerves. Given Petitioner's positive response to the occipital injections, Dr. Hagan recommended surgery. On 2/2/21, Dr. Hagan performed an occipital nerve resection of the greater occipital nerve, third occipital nerve, and lesser occipital nerve, decompression, and neurolysis. On 3/22/21, Petitioner reported significant improvement in his headaches, dizziness, and pressure, and he attempted driving. Petitioner continued to report neck pain. Petitioner was released at MMI by Dr. Hagan on 5/10/21 with Dr. Gornet's restrictions still in place.

On 4/27/21, Petitioner was examined a third time by Dr. deGrange who noted Petitioner's pressure headaches and dizziness improved following the occipital procedure performed by Dr. Hagan. Petitioner reported some lingering complaints of noise and light sensitivity and neck pain with radiation into the base of his neck at the cervicothoracic junction and occasionally into the trapezius muscles. Physical examination revealed persistent diffuse tenderness from the suboccipt through the interscapular region with decrease in sensation and light touch in the C2 through T2 dermatomes in the bilateral upper extremities. Dr. deGrange reviewed Dr. Hagan's operative note, Dr. Gornet's records, and Petitioner's imaging studies, and found no objective basis for Petitioner's continued subjective complaints. He opined that Petitioner could return to work at his usual and customary employment and found he suffered 2% impairment to his person.

On 6/10/21, June Blaine performed a records review at Respondent's request. She opined that Petitioner had not reached MMI as of 8/20/20, and other than a few phone calls, the vocational services provided after that date were not warranted. She explained it was unclear at that time whether Petitioner's head injury symptoms would resolve. She opined that the charges for vocational services in work comp cases in Southern Illinois range between $115.00 and $125.00 per hour. She opined that an Associates degree in Small Business Management is not a requirement for employment as an entry level manager, wholesale, office, or agriculture management position because many employers have training programs.

Timothy Kaver testified by way of deposition on 6/3/21. Mr. Kaver is a certified vocational rehabilitation counselor who creates vocational rehabilitation plans to assist injured workers returning to employment. Mr. Kaver also provides expert testimony in litigated matters regarding wage-earning potential. Mr. Kaver is certified by the U.S. Department of Labor to assist federally injured workers. Mr. Kaver testified that he previously assisted Petitioner with

rehabilitation efforts following a work injury in 2015. At that time, he referred Petitioner to the public library for free keyboarding and computer skills training. That litigation was resolved and Mr. Kaver closed his file. Mr. Kaver began assisting Petitioner with his current claim on 8/20/20 at which time Petitioner presented with continued residual symptoms following a closed head injury and light duty work restrictions were in place. Petitioner possessed a high school diploma and had the requisite reading and comprehension ability to be successful in a community college classroom if necessary. Since Petitioner's light duty restrictions were permanent, and his prior employment as a mill operator fell within the medium physical demand category, Mr. Kaver began assisting Petitioner with exploring other careers. Mr. Kaver purchased an occupational outlook handbook published by the US Department of Labor which Petitioner used to explore suitable career options. Petitioner completed the career assessment inventory, which is a computerized form that assists clients in learning more about themselves and fields they may like. Following this assessment, Mr. Kaver determined Petitioner would benefit from a specific career goal geared towards the field of small business management. Mr. Kaver developed a specific vocational rehabilitation plan dated 12/7/20, which outlined specifically what was necessary for Petitioner to procure a job in this field.

Mr. Kaver's plan starts with a two-year small business management program at John A. Logan Community College in Carterville, IL. His plan outlines all classes Petitioner would take and the associated expenses. Petitioner's expected earnings upon completing the program and obtaining an Associates degree range from annual earnings of $24,863 to $46,439. Mr. Kaver anticipated Petitioner would find a position earning between $32,000 to $33,000 per year. Without the degree, Petitioner would be limited to entry-level employment that required additional training on the job in positions such as a customer service representative, security guard, order clerk, reservationist, dispatcher, and/or retail clerk/cashier. These positions pay between $22,880 to $27,040 per year. Mr. Kaver testified that Petitioner would require basic computer skills prior to pursing any additional education. He estimated the cost of the two-year program to be $9,270.

On cross-examination, Mr. Kaver testified he reviews his client's medical records, notes the current level of function, and takes into consideration the medication usage and side-affects therefrom. He admitted Petitioner told him on 8/20/20 that only if the dizziness, lack of focus, and memory problems improved did he feel capable of returning to work. Mr. Kaver was aware Petitioner was receiving treatment for these symptoms and was hopeful they would dissipate enough for him to be able to become re-employed in a physically appropriate career. Petitioner continued to experience these symptoms through the end of 2020. Mr. Kaver testified that Petitioner did not complete the recommended free computer training in 2015 and believed he did not do so because he was released to return to work and was employable at a medium demand level without computer skills. He agreed Petitioner did not participate in the recommended Illinois Department of Rehab Services training. Mr. Kaver agreed that if Petitioner did not require the 20-pound restriction recommended by Dr. Gornet he would not require additional schooling or vocational rehabilitation and would be able to continue working in his medium demand level position with Respondent.

Mr. Kaver testified he was aware Petitioner had recently undergone surgery by Dr. Hagan. Petitioner reported to Mr. Kaver that his dizzy spells were improved following same.

Petitioner also reported that his chronic headaches were improving but he remained under the restrictions recommended by Dr. Gornet. Mr. Kaver testified that although many of the free local services provided by libraries for computer training assistance are not available because of COVID-19, he did recommend referring Petitioner to a tutor to assist him with gaining computer skills and looking for work. Petitioner did not receive any job offers or interviews since starting work with Mr. Kaver.

June Blaine testified by way of deposition on 6/22/21. Ms. Blaine is a certified vocational rehabilitation counselor. Eighty percent of her practice involves helping clients find employment and twenty percent involves providing opinions in litigated cases. Ms. Blaine testified she prefers to wait until patients are at MMI prior to preceding with vocational rehabilitation because their condition is subject to change prior thereto. She testified that Mr. Kaver's rehabilitation services prior to Petitioner's release by Dr. Hagan were premature because the post-concussion symptoms would not allow him to participate fully in the proposed rehab plan. She also testified that an Associates degree is unnecessary to find employment because companies have assistant manager programs or employees work their way up from an entry level position. She opined a starting wage for that type of position in Southern Illinois is $15.00 per hour with a path to make up to $20.00 per hour.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury? (vocational rehabilitation and permanent restrictions).

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 442 N.E.2d 908 (1982). A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011). The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003).

Respondent stipulated that Petitioner's C3-4 fusion and post-concussion conditions are causally connected to Petitioner's work accident on 8/3/18. The issue is what, if any, permanent restrictions Petitioner requires for the cervical spine; and if a restriction is required whether the restriction(s) prevent Petitioner from returning to work in his usual and customary employment with Respondent.

On 7/20/20, Dr. Gornet placed permanent restrictions on Petitioner of no lifting greater than 20 pounds and no overhead work. On 9/24/20, Dr. deGrange recommended permanent restrictions of no lifting greater than 25 pounds overhead, no forceful pushing or pulling greater than 50 pounds with the left upper extremity, and no repetitive use of the neck. On 11/19/20, Dr.

Silverman opined Petitioner required no permanent restrictions from a neurologic perspective. Drs. Gornet and Silverman both opined that the occipital nerve surgery recommended by Dr. Hagan was unreasonable and unnecessary. Both doctors were wrong. On 2/2/21, Dr. Hagan performed an occipital nerve resection of the greater occipital nerve, third occipital nerve, and lesser occipital nerve, decompression, and neurolysis. This surgery significantly improved Petitioner's headaches and dizziness and he was released with no restrictions other than those imposed by Dr. Gornet in July 2020 for his cervical spine.

On 4/27/21, Dr. deGrange noted Petitioner still had some lingering complaints of noise and light sensitivity and neck pain with radiation into the base of his neck at the cervicothoracic junction and occasionally into the trapezius muscles. Physical examination revealed persistent diffuse tenderness from the subocciput through the interscapular region with decreased sensation and light touch in the C2 through T2 dermatomes in the bilateral upper extremities. Dr. deGrange reviewed Dr. Hagan's operative note, Dr. Gornet's updated records, and Petitioner's imaging studies, and found no objective basis for Petitioner's continued subjective complaints. He opined that Petitioner no longer required restrictions for his cervical spine and that Petitioner could return to work at his pre-accident position for Respondent. Dr. Silverman opined Petitioner did not require restrictions for post-concussion syndrome both before and after Dr. Hagan performed surgery.

The Arbitrator finds the opinions of Drs. deGrange and Silverman unsupported by the evidence. Dr. deGrange's opinion is contrary to his own physical examination findings as noted above. Dr. Silverman's examination also showed positive findings which were confirmed intraoperatively. Both examiners characterized Petitioner's symptoms as subjective; however, Petitioner's objective imaging studies and the objective intraoperative findings rebut any notion that Petitioner had reached MMI or that no rational explanation exists for his complaints.

The objective intraoperative findings of the occipital nerve resection performed by Dr. Hagan demonstrated significant scarring of the greater occipital nerve to such an extent that Dr. Hagan noted he did not believe that neurolysis would be adequate treatment given the condition and quality of the nerve. In his last visit, Dr. Hagan agreed with Dr. Gornet's permanent restrictions. Dr. Gornet noted findings of facet arthropathy on the right at C2-3 and C3-4 with facet changes at C4-5. He initially opined that Petitioner was "between a rock and a hard place" as a fusion could cause adjacent level stress that would be mitigated by disc replacement, but disc replacement would not address facet pathology. He suggested Petitioner may require disc replacements at his other levels in the future and advised Petitioner he would always have some level of permanent restrictions since the disc pathology below the level of his C3-4 fusion required protection. The evidence does not support that Petitioner is malingering or exaggerating his symptoms. The Arbitrator finds Dr. Gornet's opinions to be more persuasive as the treating surgeon in light of Dr. deGranage's opinion that Petitioner has returned to his pre-accident baseline and could return to his pre-accident employment with Respondent, despite his findings that Petitioner suffers persistent symptoms. The Arbitrator finds that Petitioner met his burden of proof in establishing that his permanent work restrictions, and by extension his need for vocational rehabilitation, is causally connected to his undisputed work accident of 8/3/18.

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 vocational rehabilitation?**

The fundamental purpose of the Act is to afford protection to employees by providing them with prompt and equitable compensation for their injuries. *W.B. Olson, Inc. v. Illinois Workers' Comp. Comm'n*, 2012 IL App (1st) 113129WC, ¶ 50, 981 N.E.2d 25, 38. This includes maintenance and vocational rehabilitation under §8(a) of the Act. *Id.* at ¶ 39, 981 N.E.2d 25, 35. The Act treats vocational rehabilitation as a medical expense, providing that vocational rehabilitation shall be paid for along with physical and mental rehabilitation. *Butts v. Salem Mfg. and Modular Homes*, 18 MR 0064 (Ill. 4th Cir. Marion Cnty. Ct., Nov. 7, 2018); *Daniels v. M-Class Mining*, 18 MR 0063 (Ill. 2nd Cir. Franklin Cnty. Ct., Oct. 31, 2018). "Generally, a claimant has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity." *Howlett's Tree Serv. v. Indus. Comm'n of Illinois*, 160 Ill. App. 3d 190, 194, 513 N.E.2d 82, 84 (1987), citing *National Tea Co. v. Industrial Comm'n*, 97 Ill.2d 424, 454 N.E.2d 672 (1983).

In determining reasonableness of rehabilitation, factors to consider include relative costs and benefits to be derived from the program, the employee's work-life expectancy, his ability and motivation to undertake the program, and his prospects for recovering work capacity through medical rehabilitation or other means. *Nat'l Tea Co. v. Indus. Comm'n*, 97 Ill. 2d 424, 454 N.E.2d 672 (1983). These factors, however, are not exclusive factors. *Howlett's Tree Serv. v. Indus. Comm'n of Illinois*, 160 Ill. App. 3d 190, 195, 513 N.E.2d 82, 85 (1987).

Having determined that Petitioner has permanent restrictions which are causally connected to his injury, and those restrictions preclude him from returning to work for Respondent, he is entitled to vocational rehabilitation benefits from the date he was released at MMI with respect to the injury which necessitated such restrictions. Dr. Gornet released Petitioner with permanent restrictions on 7/20/20 with respect to his cervical spine.

The Arbitrator next considers whether the proposed vocational rehabilitation plan is reasonable and necessary. Mr. Kaver advised Petitioner to consider enrollment in a two-year college program after completion of computer literacy coursework. Petitioner testified that this same coursework was recommended as a part of his rehabilitation from a prior work injury. However, he did not complete same and instead found a manual labor position that did not require such skills within his residual functional capacity. Following his current injury, Petitioner again suffered from diminished residual functional capacity and can now only obtain a job within the light demand category. Dr. Kaver recommended a tutor for Petitioner to obtain the necessary training due to the pandemic. However, Petitioner continued his job search and has not had any job interviews.

While employees are entitled vocational rehabilitation when they have suffered loss in earning capacity, a claimant's ability and motivation to undertake an educational program is a consideration. The Arbitrator, taking into consideration Petitioner's opting out of pursuing

education in the past and the present, does not find that pursuit of a college degree is a reasonable vocational rehabilitation option at this time, as Petitioner has not yet demonstrated the desire or ability to pursue same. Petitioner is motivated and able to conduct job searches. However, given the lack of opportunity for Petitioner thus far, and taking into account a global pandemic, the Arbitrator does not believe that his doing so alone is effective. The Arbitrator finds it reasonable for Mr. Kaver to continue aiding Petitioner in his job search and providing modest short-term training, such as computer literacy tutoring, to increase the productivity of Petitioner's job search. The Arbitrator finds Petitioner's testimony persuasive inasmuch as the Arbitrator believes it will be difficult for Petitioner to conduct an effective job search or increase his earning capacity absent such assistance, given that most employers require application submission online and many job positions within his functional demand capacity will likely require some level of computer literacy for data entry. The Arbitrator also agrees that Petitioner's on-the-job value, and by extension his opportunity for advancement and earning capacity, will be diminished without same as well.

With respect to whether Petitioner began his vocational rehabilitation efforts prematurely, based upon the above findings as to causal connection and that the permanent restrictions of Dr. Gornet were reasonable and necessary, the Arbitrator finds that Petitioner did not undertake his job search efforts too soon. Petitioner's permanent restrictions by Dr. Gornet were placed on 7/20/20, which precluded him from returning to his pre-accident job for Respondent. There was no testimony or evidence that Petitioner could return to employment for Respondent with his current light physical demand restrictions. Further, Petitioner's permanent restrictions remained unchanged despite undergoing further treatment by Dr. Blake and Dr. Hagan that significantly improved his headaches and dizziness.

Respondent stipulated that the only medical bills in dispute relate to vocational rehabilitation and not medical treatment provided to Petitioner. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's group exhibit 1 pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. Respondent shall further pay the reasonable and necessary vocational rehabilitation expenses outlined in Petitioner's group exhibit 1.

Respondent shall authorize and pay for the vocational rehabilitation benefits to Petitioner to aid him with computer literacy and his job search efforts, including short-term training and computer literacy tutoring, but specifically excluding a formal educational program as recommended by Mr. Kaver.

Issue (K): What temporary benefits are in dispute? (Maintenance)

Based upon the above findings as to entitlement to vocational rehabilitation benefits, Respondent shall pay further maintenance benefits for a period of seven weeks, commencing May 6, 2021 through the date of arbitration, June 23, 2021.

This award shall in no instance 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.

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC028825
Case Name	Joseph Demauro v. State of Illinois – Illinois Department of Corrections
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0339
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Derek Dominguez
Respondent Attorney	Charlene Copeland

DATE FILED: 8/31/2022

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH DEMAURO,

Petitioner,

vs. NO: 15 WC 28825

STATE OIF ILLINOIS – DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator found that Petitioner proved that stipulated work-related accidents on October 21, 2012 & April 22, 2015, caused a current condition of ill-being of his right knee. He also found that Respondent paid all current medical expenses, awarded Respondent credit of $70,562.80 for paid TTD, and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Levi including partial knee replacement and associated treatment. We agree with the reasoning, analysis, and the award of the Arbitrator and accordingly affirm and adopt the Decision of the Arbitrator.

However, the Commission notes that in Petitioner's brief, he argues that Respondent raised several new arguments not raised in its original proposed decision and these arguments should be disregarded as being outside the scope of the review. Petitioner then attached Respondent's proposed decision to its brief. For purposes of clarification the Commission notes that the Act mandates that "Decisions of an arbitrator or a Commissioner shall be based **exclusively** on evidence in the record of the proceeding and material that has been officially noticed." 820 ILCS 305/1.1(e), (emphasis added). Proposed decisions submitted by the parties are neither evidence in the record nor something about which the Commission can take official judicial notice. Therefore, the Commission did not consider any proposed decision submitted in these proceedings.

Finally, on a procedural/administrative note, the instant claim was consolidated and arbitrated with Petitioner's other claim in 12 WC 37475. The Arbitrator issued a single decision and Respondent filed a single Petition for Review in these cases. Nevertheless, the Commission has now instituted an electronic filing and a record keeping system coined CompFile. Because of our switching to that system, the Commission is required to issue separate decisions for each claim number that is under review by the Commission. Therefore, we issue two decisions, one for the instant claim and one for the consolidated case 12 WC 37475. These decisions each specify the entirety of benefits representing the awards for both work-related accidents and injuries the Arbitrator found in these consolidated claims. The Commission stresses that these decisions do not constitute individual awards that can both be collected separately.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator issued on June 8, 2020, is hereby affirmed and adopted with the explanation above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses 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 shall authorize and pay for the prospective medical procedure recommended by Dr. Gabriel Levi, namely a partial knee replacement, and all reasonable and necessary ancillary and rehabilitative postoperative care.

IT IS FURTHER ORDERED BY THE COMMISSION 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 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.

August 31, 2022

DLS/dw
O-7/13/22
46

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Steven J. Mathis*
Steven J. Mathis

/s/*Thomas J. Tyrrell*
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION 22IWCC0339
NOTICE OF 19(b) ARBITRATOR DECISION

DEMAURO, JOSEPH
Employee/Petitioner

Case# **12WC037475**
15WC028825

ILLINOIS DEPT OF CORRECTIONS
Employer/Respondent

On 6/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.17% 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:

1927 HUGHES SOCOL PIERS RESNICK
DEREK D DOMINGUEZ
70 W MADISON ST SUITE 4000
CHICAGO, IL 60602

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

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

JUN -8 2020

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

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSEPH DEMAURO
Employee/Petitioner

v.

Illinois Department of Corrections
Employer/Respondent

Case # **12 WC 37475**

Consolidated cases: **15 WC 28825**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **10/1/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document. 19(b)

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 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 **10/21/2012 & 4/22/2015**, 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*** causally related to the accidents.

In the year preceding the injury, Petitioner earned **$87,362.00**; the average weekly wage was **$1,680.03**.

On the dates of accident, Petitioner was **47 & 50** 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 **$70,562.80** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$70.562.80**.

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

ORDER

Respondent shall authorize and pay for the prospective medical procedure recommended by Dr. Gabriel Levi, namely a partial knee replacement, and all reasonable and necessary ancillary and rehabilitative postoperative 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

June 2, 2020
Date

JUN 8 - 2020

Joseph DeMauro v. State of Illinois Dept of Corrections
12 WC 37475, consolidated 15 WC 28825

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***K:*** Is Petitioner entitled to prospective medical care?

FINDINGS OF FACT

Petitioner Joseph DeMauro is a parole agent for the State of Illinois Department of Corrections. He has held that same position for over 19 years. Petitioner's duties and responsibilities include monitoring incarcerated individuals that are on mandatory supervised release and assisting in the location and apprehension of parolees with active warrants. During his employment, Petitioner sustained two work-related injuries to his right knee: October 21, 2012 and April 22, 2015.

On October 21, 2012, Petitioner slipped on wet stairs while walking up to meet with a parolee for a mandatory face-to-face meeting. Petitioner was treated for this injury by orthopedic surgeon Dr. Gabriel S. Levi at the Orthopaedic and Rehabilitation Centers (PX #9). Dr. Levi diagnosed a non-displaced fracture of the lateral femoral condyle in the right knee.

Petitioner had previously suffered an injury to his right knee in high school in 1982 that required an arthroscopic knee surgery at that time due to meniscus problems. Petitioner testified that at the time of his injury on October 21, 2012, he was pretty much recovered from the 1982 injury and had no lingering issues from that injury.

Dr. Levi initially treated Petitioner conservatively. Dr. Levi noted that in the following months Petitioner was having increased pain when walking up stairs and pain with range of motion, as well as "popping" in the right knee. Dr. Levi diagnosed a right knee lateral meniscus tear that required surgery. On April 1, 2013 Dr. Levi performed an arthroscopic partial lateral meniscectomy. He also performed a chondroplasty of the lateral tibial plateau, medial tibial plateau, and medial femoral condyle, along with extensive synovectomy and all three compartments: patellofemoral joint, medial compartment, and lateral compartments. The postoperative diagnoses were right knee lateral meniscus tear, three compartment synovitis, chondromalacia of the lateral tibial plateau, chondromalacia of the medial femoral condyle and trochlea, and grade 4 chondral defect. Dr. Levi wrote a narrative letter January 7, 2014 summarizing Petitioner's care and stating his opinion that these injuries and the ensuing treatment

procedures were directly related to the injury Petitioner sustained on October 21, 2012 (PX #9).

After surgery, Petitioner testified he felt better but still had lingering pain in the right knee. He returned to work in the early fall or late summer of 2013. He was officially released by Dr. Levi to work fully duty without restrictions on January 7, 2014. However, at that time Dr. Levi opined that although Petitioner was being released to work full duty because he had recovered from the right knee arthroscopy, he did sustain a "significant articular cartilage injury" and this could lead to post-traumatic arthritis and the recurrence of pain. Dr. Levi opined that Petitioner could need a joint replacement in the future.

Petitioner sustained a second injury while at work on April 22, 2015. On that date, while at the office, he was walking to his desk and slipped on a floor that was wet due to maintenance workers. There was no wet floor sign. Petitioner testified that when he slipped, he immediately felt a sharp pain in his right knee. He acknowledged that since his prior surgery he always had right knee pain. Petitioner testified that his right knee "never fully recovered" after the first injury. However, he continued to work full-time without restrictions despite constant pain in the period between returning to work after his first injury.

When the second accident Petitioner left work immediately to seek medical attention at Adventist LaGrange Hospital. He returned to Dr. Levi on April 29, 2015. An MRI on May 20, 2015 showed no apparent signs of a meniscus tear. Dr. Levi diagnosed a re-injury of right knee injury from October 21, 2013.

Dr. Levi the wrote another narrative report on October 21, 2016, stating:

> "In my opinion, the patient has an injury to his right knee that occurred initially in 2012 at work. This was treated with an arthroscopy of his right knee, performing a partial lateral meniscectomy, a microfracture of the trochlea, as a chondroplasty of the lateral tibial plateau, medial tibial plateau and medial femoral condyle. Most important, he was found to have articular cartilage injury as well as a lateral meniscus tear. The patient has good reason to have a re-aggravation of his knee after slipping at work on a wet floor. This is the type of knee injury that can have recurrent problems if you have twisting and slipping injuries such as the one that occurred to him on April 22, 2015." (PX #9)

Dr. Levi initially treated Petitioner with non-operative conservative therapies like pain medications, heat pads, gels, physical therapy, and injections. Dr. Levi administered Depo-Medrol and cortisone injections, as well as a series of four Orthovisc injections.

When the injections failed to relieve Petitioner's pain, Dr. Levi amended his diagnoses on July 8, 2015 to include a right knee medial meniscus tear on July 8, 2015. During this time, Dr. Levi determined Petitioner was unable to work due to this new right knee injury. Petitioner was completely off work per Dr. Levi's order from the date of the second injury through October 21, 2016.

On October 7, 2015 Dr. Levi recommended another arthroscopy of the right knee. Dr. Levi noted that Petitioner had signs and symptoms of a right knee medial meniscus tear despite the results of the MRI, and at that time, Petitioner was not improving despite non-surgical care. Dr. Levi could not determine the cause of Petitioner's persistent pain and therefore recommended arthroscopy to determine the source of his continued right knee pain.

Dr. Levi's request for authorization for this arthroscopy was not approved until early 2018.

At Respondent's request Petitioner's right knee was examined by orthopedic surgeon Dr. Shane Nho of Midwest Orthopaedics at RUSH on January 19, 2016 (RX #1). Dr. Nho conducted his records review and examination in reference to Petitioner's April 22, 2015 accident only. Dr. Nho noted Petitioner's history of a right knee arthroscopy in 1982 and a subsequent arthroscopy in 2013. Dr. Nho recorded that Petitioner reported that he slipped on a cleaned and waxed floor on April 20, 2015. Dr. Nho then reviewed Petitioner's care under Dr. Levi which included physical therapy and orthovisc injections.

On exam Dr. Nho found symmetric range of motion in both of Petitioner's knees: 2° of hyperextension and 100° of flexion. There was no right knee effusion. There was tenderness over the lateral facet of patella but none over the medial facet of the patella. There was tenderness over the medial joint line but none over the lateral joint line. Lachman and pivot shift were negative. Anterior and posterior drawer were also negative. Plain X-rays demonstrated mild medial compartment joint space narrowing and mild narrowing of the patellofemoral joint with periarticular osteophytes.

Dr. Nho completed his report, RX #1, with a series of answers to questions without reference to the questions. He did opine that Petitioner did not require further treatment. Although Petitioner's prognosis was fair, Dr. Nho opined that Petitioner could return to full duty work without restrictions because he had reached MMI.

On October 21, 2016, Dr. Levi noted that Petitioner should avoid stairs and avoid running if possible and avoid squatting and lunging. He further noted that Petitioner's workplace was not honoring his restrictions or honoring his off-work status and threatened to not cover his care or his pay if he is off work. Dr. Levi again recommended

a repeat arthroscopy and noted that Petitioner may ultimately need joint replacement in the future because Petitioner's knee had not completely resolved.

Dr. Levi performed arthroscopic surgery on Petitioner's right knee February 16, 2018. The preoperative diagnoses was posttraumatic arthritis. Dr. Levi performed a chondroplasty of the patella and medial femoral condyle, synovectomy in all three compartments, and removal of loose bodies greater than 1 cm. During the procedure Dr. Levi noted grade 4 posttraumatic arthritis of the medial femoral condyle and significant grade 3 changes with loose flaps of cartilage about the patella and trochlea. The postoperative diagnoses included posttraumatic arthritis of the medial femoral condyle, patella, and trochlea along with three compartment synovitis.

Petitioner received postoperative physical therapy. On July 18, 2018, he was still having right knee pain and still treating with Dr. Levi. Dr. Levi noted at that time, "The patient is not doing well. He continues to have pain. He is taking Tramadol for the pain. "He will need a partial knee replacement as this has not resolved with the arthroscopy and he has significant medial joint chondromalacia."

Dr. Nho performed another IME on July 2, 2018 (RX #2). Dr. Nho again reviewed petitioner's medical care since his April 22, 2015 accident. He noted Petitioner's complaints of 5–6/10 dull/achy pain in the anteromedial aspect of the right knee. Symptoms are aggravated by stairs and flexion. Petitioner complained of stiffness and clicking in the knee and that Tramadol and NSAIDs provide mild relief.

On examination Petitioner had extension to 4° and flexion to 100° in the right knee. There was mild tenderness over the anteromedial joint but none over the patella, patella tendon, lateral joint line, or popliteal fossa. McMurray, anterior drawer, and posterior drawer were negative. Lachman and pivot shift were stable. There was no joint laxity.

Dr. Nho again completed his report, RX #2, with a series of answers to questions without reference to the questions. He noted that Petitioner's current complaints are the result of his underlying, pre-existing chondromalacia. Dr. Nho opined that a total knee replacement was not reasonable or necessary nor related to any work injury. He did not state an opinion regarding the necessity of a partial knee replacement. Dr. Nho further noted that Petitioner had reached MMI as of his last IME and was able to return to fully duty work without restrictions.

On February 4, 2019 Dr. Levi noted that the delay in performing the second arthroscopy resulted in multiple large loose bodies and "now an injury to the patella and

medial femoral condyle articular cartilage. This cartilage injury is unfortunately permanent, and he will ultimately need a partial if not total knee replacement due to the extensive cartilage injury to the articular cartilage."

Dr. Levi concluded that the only reasonable long-term treatment option to this type of articular cartilage damage is partial or total knee replacement. He recommended a partial knee replacement because of Petitioner's young age but noted that Petitioner may need a total knee in the future if the pain persists.

Petitioner testified that he has had constant right knee pain since the date of his second work injury on April 22, 2015. He has had no relief in his knee pain, even after the second arthroscopy.

Petitioner testified that he is forced to work full duty without restrictions and that he has constant right knee pain. His job duties include daily walking up and down stairs "all day long" to meet with parolees, and getting in and out of his car, all of which are daily activities that increase his knee pain. He rates his knee pain as a "6 or 7" while at work. His right knee symptoms have affected his range of motion and daily living activities.

CONCLUSIONS OF LAW

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

The arbitrator finds that Petitioner proved that his current condition of ill-being was causally related in combination and concert with his two work-related injuries on October 21, 2012 and April 22, 2015.

There is no genuine dispute that Petitioner injured his right knee in a work-related accident on October 21, 2012. That injury ultimately required arthroscopic surgery performed by orthopedic surgeon Dr. Gabriel Levi on April 1, 2013. That surgery involved repair of a right lateral meniscus tear as well as articular cartilage injury to the lateral tibial plateau, medial femoral condyle, medial tibial plateau, and trochlea. Dr. Levi noted a microfracture of the trochlea. He also performed a chondroplasty of the lateral plateau, medial plateau, and medial femoral condyle. On January 7, 2014 Dr. Leavy stated his opinion that these injuries and the ensuing treatment procedures were directly related to the injury Petitioner sustained on October 21, 2012. He also stated that significant articular cartilage injury can lead to post traumatic arthritis which may worsen and cause recurrent pain. He noted this may lead to the need for joint replacement in the future.

When Petitioner reinjured his knee on April 22, 2015 he returned to Dr. Leavy for medical care. After failed conservative care Dr. Levi performed another arthroscopic procedure on Petitioner's right knee on February 16, 2018, involving chondroplasty of the

patella and medial femoral condyle, synovectomy in all three compartments, and removal of loose bodies greater than 1 cm.

Dr. Levi had noted on October 21, 2016 that Petitioner had reinjured his right knee in the April 2015 work accident and that surgery was required to treat that reinjury. Dr. Leavy opined then that Petitioner's reinjury and need for surgery were related to the April 22, 2015 work accident. He reiterated his opinion February 4, 2019, when he also opined that Petitioner required a partial total knee replacement.

Respondent has offered the opposing opinions of orthopedic surgeon Dr. Shane Nho. Dr. Nho have performed two IMEs: January 19, 2016 and July 2, 2018. On January 19 Dr. Nho summarize petitioner's medical care without reference to Petitioner's 2012 right knee injury. Dr. Nho mentioned the 2013 arthroscopy but with no mention of detailed review of Petitioner's medical care prior to or subsequent to that surgery.

On January 19, 2016 Dr. Nho opined that Petitioner did not require further medical treatment and that Petitioner was at MMI. Dr. Nho did not state with any detail or specificity the bases for his opinions. Subsequent events, namely Petitioner's continuing complaints which ultimately led to another arthroscopic surgery by Dr. Levi on February 16, 2018, disproved the validity of Dr. Nho's January 19, 2016 the opinions.

On July 2, 2018 Dr. Nho opined again that Petitioner was at MMI and did not require further medical treatment. Once again there was only a cursory review of Petitioner's medical history which was significant for a right knee injury in 2012 and arthroscopic surgery in 2013. Although Dr. Nho referred to Dr. Levi's series of Orthovisc injections he omitted reference to the Depo-Medrol and cortisone injections administered by Dr. Levi. Once again Dr. Nho did not state with any detail or specificity the bases for his opinions.

The Arbitrator does not find Dr. Nho's opinions, either in 2016 or 2018, to be reasonable or persuasive. Clearly Dr. Nho did not perform a thorough review of petitioner's medical history with Dr. Levi. There was no explanation on why Dr. Nho did not review the records relating to Petitioner's 2012 work related injury and subsequent arthroscopy in 2013. Without review of those records and a full understanding of Petitioner's history the Arbitrator finds that Dr. Nho's opinions lack bases and validity.

Correspondingly, the arbitrator finds the opinions of Dr. Levi to be reasonable and well-founded. Dr. Levi's opinions are based on his broad-based experience in treating Petitioner over the years, a foundation that Dr. Nho lacked. As noted above, the Arbitrator finds that Petitioner proved with the support of the medical evidence and the reasonable and persuasive opinions of Dr. Gabriel Levi that his current condition of ill being is causally related in combination and concert with his work related accidents on October 21, 2012 and April 22, 2015.

K: Is Petitioner entitled to prospective medical care?

The Arbitrator finds the Petitioner proved he is entitled to the prospective medical care recommended by Dr. Levi, partial replacement of his right knee. In so doing, the arbitrator adopts the findings set forth above.

The Arbitrator weighed the conflicting opinions of Petitioner's treating orthopedic surgeon, Dr. Gabriel Levi, with those of Respondent's retained examining orthopedic surgeon, Dr. Shane Nho. As noted above, the Arbitrator found Dr. Nho's opinions of no causation where ill-founded and unpersuasive. More to the point, Dr. Nho opined on January 19, 2016 that Petitioner did not require further medical care. The obvious fact of Petitioner's subsequent arthroscopy on February 16, 2018 and the objective findings during that procedure disproved the validity of Dr. Nho's 2016 opinion that no further medical treatment was required. This, plus Dr. Nho's incomplete and inadequate review of Petitioner's medical history, undermines the validity and persuasiveness of his 2018 opinion that no further medical treatment is required.

Therefore, the Arbitrator orders that Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Levi, namely a partial replacement of the right knee, as well as all necessary ancillary and reasonable rehabilitative care.

Steven J. Fruth, Arbitrator

June 2, 2020
Date