ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC040392
Case Name	VASSEL, TAMMY A v. CONWAY TWO LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0579
Number of Pages of Decision	10
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	James Jannisch

DATE FILED: 12/1/2021

/s/Stephen Mathis, 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

Tammy Vassel,

Petitioner,

vs. NO. 10WC 40392

Conway Two 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, notice, medical expenses, causal connection, prospective medical care, temporary total disability, 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 December 2, 2020 is hereby affirmed and adopted.

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

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

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

December 1, 2021

o- 11/10/21
SM/sj
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
NOTICE OF ARBITRATOR DECISION

21IWCC0579

VASSEL, TAMMY A
Employee/Petitioner

Case# **10WC040392**

CONWAY TWO LLC
Employer/Respondent

On 12/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
DAVID B MENCHETTI
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tammy A. Vassel
Employee/Petitioner

v.

Conway Two L.L.C.
Employer/Respondent

Case # **10** WC **40392**

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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **September 22, 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 **September 28, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**38,000.00**; the average weekly wage was $**730.77**.

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

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

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

ORDER

The Arbitrator finds that Petitioner failed to prove that an accident occurred which arose out of and in the course of Petitioner's employment by Respondent. 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.

Signature of Arbitrator

11/30/2020
Date

DEC 2 - 2020

STATEMENT OF FACTS

Petitioner Tammy Vassel was working for Respondent Conway Two L.L.C. on September 28, 2010 as an assistant manager. She was responsible for associates, running the floor, dealing with customers, security, deposits and receiving trucks. She would sometimes have to lift boxes off of trucks.

In June 2010, Petitioner fell down a couple of steps at home which led to back trouble. Prior to September 28, 2010 she testified that she had pain on and off, but nothing severe. Petitioner underwent an x-ray of her back following the June 2010 fall. She acknowledged at trial that she sought medical treatment after the June fall because she had pain in her back at that time.

Petitioner was working the closing shift on September 28, 2010. The store closed at 9:00 p.m. and she was the only manager in the store at that time. She testified that there were three huge boxes on the U-Boat (cart) that needed to be put out on the floor. When she went to pull the cart, Petitioner testified she pulled something in her back. Every time she went to pull it, she felt pain in her lower back. She testified under cross examination that she noticed severe pain shooting up her back. The pain became sharper and did not stop. Petitioner described the pain initially as 7 or 8 out of 10, but it then became 9 or 10 out of 10 in severity.

Petitioner testified that the incident occurred around 7:30 or 8:00 pm. Petitioner continued to feel back pain during the rest of her shift. Petitioner testified it was difficult for her to get into her car after work that night. She testified that she went home, told her husband what happened, took a shower and then went to bed. She described the pain as 8 or 9 out of 10 when she got home from work that night, but she did not go to the emergency room. Petitioner awoke at 6:00 a.m. the next day and noticed excruciating back pain and that she wasn't moving well. She testified that she had 10 out of 10 pain the next morning when she woke up. She called in sick to work but did not go the emergency room, instead choosing to seek treatment with a chiropractor. She called the district manager, whose name she could not initially recall at trial, to say she could not come to work. Petitioner testified she believed she had left a message for the district manager but didn't remember for sure. She later testified she believed the district manager's name was Theresa.

Petitioner went to a chiropractor, Dr. Kruse, the morning of September 29, 2010. She continued to treat with Dr. Kruse until approximately the end of October 2010. Petitioner acknowledged at trial that the accident was about 10 years ago and that her memory of everything that happened was much clearer the next day when she went to the chiropractor than the day of the trial. She confirmed the chiropractor asked her why she was seeking treatment and that she told him the truth. Petitioner also provided the chiropractor with her personal information, noting that "they give you a form to fill out."

The Chiropractic Registration and History form indicates Petitioner's reason for visit was "[p]ulled something in back." Under the Accident Information section, the form asks, "Is condition due to an accident?" and the form is checked "no." The form includes the question "When did your symptoms appear?" with the written answer "[l]ong term back problems." The form also includes the question and answer "How often do you have this pain? 5-6 days a week."

Petitioner testified that she told the chiropractor about when she hurt her back in June 2010 but denied telling the doctor that she had long term back problems. She testified she told the chiropractor that her pain was 8 out of 10 at the time of her first appointment. Petitioner denied telling the chiropractor the day after the occurrence that she had back pain 5 to 6 days a week. Petitioner disagreed at trial with the medical records that indicated the injury was not the result of an accident, despite stating that she had a long conversation with the chiropractor related to why she was seeking treatment.

Petitioner's medical record from the September 29, 2010 contains no history of a work injury. Additional records from Petitioner's September 29, 2010 visit reflect "[p]etitioner presented with pain and stiffness in upper back, throbbing in right arm and tingling in right arm up arm. Severe low back pain...today with difficulty getting out of bed today." The Accidental Injury Claim Form – Physician's Statement, dated October 15, 2010, documents no date of incident and a history of chronic low back pain and thoracic spine pain.

According to Petitioner, the chiropractor would pat her back with warm towel and would have Petitioner perform some type of rolling procedure. Nevertheless, she continued to have pain and he eventually sent her for an MRI. Petitioner underwent an MRI of her spine on October 11, 2010 and she returned to the chiropractor after the MRI. The October 11, 2010 MRI showed mild facet arthropathy without disc herniation or central or foraminal stenosis.

She last treated with the chiropractor on October 19, 2010. Petitioner confirmed that she told the chiropractor that she had tried to go to the orthopedic doctor, but her insurance would not approve it. Petitioner admitted she had a long conversation with the chiropractor that day and that he said he didn't know this was a work injury. The chiropractor's records from Petitioner's October 19, 2010 visit states: "I questioned her at length since I was not informed this occurred as a result of a work related incident."

Since completing her treatment with the chiropractor, Petitioner testified that her back pain got progressively worse. She indicated that it started in the low back but went to the upper back. She started having a lot of back spasms and used muscle relaxers to relieve her symptoms. Petitioner reported not being able to stand for long periods of time or sit for long periods of time during her testimony at trial. She also stated that she had to stop picking up her grandkids and could not do lawn work, including raking leaves. Petitioner does not try to shovel snow anymore and does not try to lift any longer.

According to Petitioner's testimony, the chiropractor had her insurance card, but she did not know if his bills had been paid. Petitioner never returned to work for Respondent after her treatment with the chiropractor.

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 burden lies with Petitioner to establish the elements of her right to compensation. *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App.3d 1103, 1106, 204 Ill.Dec.354, 641 N.E. 2d 578, 581 (1994). After reviewing the record in its entirety, the Arbitrator finds Petitioner has not met her burden in this matter based on the evidence presented at trial.

Petitioner testified that she injured her back while pulling a cart at work on September 28, 2010. She described the pain initially as 8 out of 10. She testified that she had difficulty getting out of bed the next morning and the pain had increased to a 10 out of 10 level. Petitioner did not seek treatment at a hospital emergency room, instead opting to go to a chiropractor that day.

Petitioner confirmed in her trial testimony that the accident was nearly 10 years ago so her memory of what occurred was better the day after the alleged work accident than it was as she testified at trial. Petitioner testified that she was asked by the chiropractor why she was seeking treatment and that she had told the chiropractor the truth. She also testified that "they give you a form to fill out." However, in reviewing the form completed by Petitioner, the Arbitrator notes that Petitioner failed to report that her pain was due to an accident at work. In fact, regarding the question, "Is condition due to an accident?" Petitioner checked no. The Arbitrator

further notes that under that question there is a box that prompts a response to different types of accidents. One of the boxes that can be selected is "Work" and, again, Petitioner did not check that box.

Additionally, the "Patient Condition" section asks, "When did your symptoms appear?" and the answer provided by Petitioner was "long term back problems." Another question in this section of the form asks, "How often do you have this pain?" to which Petitioner responded "5 – 6 days a week." The Arbitrator finds Petitioner either completed this form or provided the information contained in this form the day after the alleged work accident when the information documented would have been much easier to recall than the day of trial nearly 10 years later.

Additionally, the Arbitrator notes that Dr. Kruse noted during Petitioner's September 29, 2010 visit that there was no mention of any acute injury, and specifically no work injury occurring the day before as Petitioner described at trial. The visit note simply states "severe LBP – beg today with difficulty getting out of bed today." However, Dr. Kruse noted Petitioner's fall from stairs in June 2010.

The Arbitrator further notes that the October 15, 2010 Accidental Injury Claim Form – Physician's Statement contains a section which asks for the "[d]ate of incident" and for Petitioner to "[d]escribe where and how the incident occurred." No date was provided for the date of incident. In the description of incident section, the form reflects "hx of chronic LBP & thoracic spine pain." Again, there is no mention of a work injury on September 28, 2010.

Finally, the Arbitrator notes that after an initial intake at his office, nine prior treatment sessions, and an Accidental Injury Claim Form were completed, October 19, 2010 is the first time Dr. Kruse recorded that Petitioner alleged she sustained a work injury, which also happens to be the last time Petitioner received any treatment for her back pain.

The Arbitrator finds that none of the contemporaneous medical records support Petitioner's trial testimony. Additionally, the Arbitrator notes that Petitioner indicated at trial that she reported the truth when she went to the chiropractor. As such, the Arbitrator finds the information in the medical records more credible than Petitioner's testimony regarding the alleged accident 10 years later.

Therefore, the Arbitrator finds that Petitioner's back condition as of September 29, 2010 was not the result of a September 28, 2010 work accident. As such, the Arbitrator finds that Petitioner's injuries did not arise out of and in the course of her employment with Respondent. Accordingly, all benefits under the Illinois Workers' Compensation Act are denied.

WITH RESPECT TO ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act are denied and the issue of date of accident is moot.

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

The Arbitrator adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied and the issue of notice is moot.

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 adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied and the issue of causal connection is moot.

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

The Arbitrator adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied and the issue of medical expenses is moot.

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

The Arbitrator adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied and the issue of temporary total disability is moot.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section C above. Accordingly, Petitioner's claim for benefits under the Illinois Workers' Compensation Act is denied and the issue of permanent disability is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC003660
Case Name	DJOLIC, FRANK v.
Consolidated Cases	COSTCO WHOLESALE
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0580
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Michael Rom
Respondent Attorney	Michelle LaFayette

DATE FILED: 12/1/2021

/s/Stephen Mathis, 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

Frank Djolic,

Petitioner,

vs. NO. 17WC003660

Costco Wholesale,

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 medical expenses, reasonableness, "amount payable for CPT Code 29807 and 29826 under Illinois Medical Fee Schedule" 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 9, 2020 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,00.00. 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.

December 1, 2021

o- 10/13/21
SM/sj
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

21IWCC0580

NOTICE OF ARBITRATOR DECISION

CORRECTED

DJOLIC, FRANK
Employee/Petitioner

Case# **17WC003660**

COSTCO WHOLESALE
Employer/Respondent

On 11/9/2020, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
MICHAEL A ROM
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0210 GANAN & SHAPIRO PC
MICHELLE LaFAYETTE
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Frank Djolic
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **17WC 3660**

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 **William McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **August 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 **12/02/2016**, 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 $**24,864.84**; the average weekly wage was $**478.17**.

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

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

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

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

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

ORDER

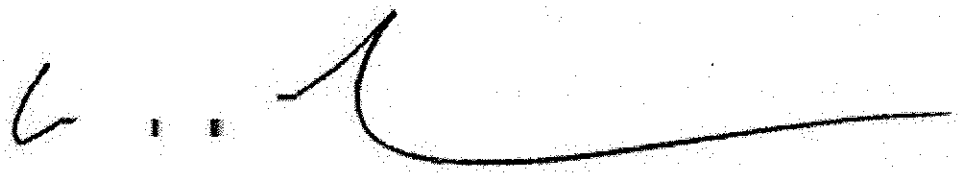
Respondent shall pay reasonable and necessary medical services of $1,800.00, as provided in Section 8(a) of the Act.

Respondent shall pay Orthopedic Network $22,001.12 pursuant to 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $286.90/week for 104.5 weeks, because the injuries sustained caused the 20.9% 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

11/03/2020
Date

NOV 9 - 2020

STATEMENT OF FACTS

Petitioner worked for Respondent as a stocker. On December 2, 2016, Petitioner was moving a bundle of Christmas trees when he sustained an injury to his right shoulder. Petitioner reported the incident to Respondent and shortly thereafter sought medical treatment at Concentra Medical Center. An MRI study from January 7, 2017 demonstrated mild supraspinatus tendinitis, a possible labral tear and minimal to mild degenerative changes of the acromioclavicular joint.

A course of conservative treatment and modified activities was first tried, but did not alleviate his symptoms. Dr. Giannoulias recommended Petitioner undergo a right shoulder arthroscopy, which was done on May 3, 2017. Following surgery, Petitioner progressed through a course of physical therapy and work conditioning. An FCE was performed at the end of work conditioning, and Petitioner demonstrated residual limitations. Dr. Giannoulias released Petitioner to return to work with permanent restrictions of no lifting over 50 lbs. and no above shoulder reaching over 10 lbs.

Respondent held a Job Accommodation Assessment and determined the restrictions could not be accommodated in his pre-injury position as a stocker. Petitioner eventually returned to work for Respondent first as a full-time Front End Cashier Assistant. At the time of the hearing, Petitioner was working as a

pharmacy stocker, which is within his restrictions. The parties reached an agreement as to the permanent partial disability pursuant to Section 8(d) 2 of the Act for 20.9% of the person as a whole and an additional $1,800.00 to resolve the two medical expenses in Petitioner's Exhibit No. 8 and 9 for the negotiated resolution Petitioner's counsel reached with the two providers. The remaining dispute between the parties is for two billing codes charged by ION for the surgical center and assistant surgeon (Brittany Macleod) for the surgery on May 3, 2017 in Petitioner's Exhibit No. 9.

For the surgery on May 3, 2017, the assistant surgeon billed code 29807 with the modifier 80. Respondent had the bills reviewed and paid pursuant to the Illinois Medical Fee Schedule. In support of its review for CPT code 29807, Respondent offered the testimony of Charlene Mathiot, a Senior Clinical Review Specialist with Liberty Mutual Insurance for 16 years, a registered nurse and a Certified Professional Coder. (RX 2 p. 3-4).

Ms. Mathiot testified that code 29807 was billed for professional services and the provider used modifier 80 to designate the services were provided by an assistant, which the Illinois Medical Fee Schedule allows a provider to do. Ms. Mathiot testified that the Illinois Fee Schedule provides no payment for this code when billed by an assistant surgeon. (RX 2, p.10) Ms. Mathiot testified that the reason no payment is allowed for this code is that an assistant is not necessary for this portion of the surgery. (RX 2, p. 31) The Respondent did not enter a utilization review for this medical treatment.

In support of the provider's position that the assistant surgeon was to be paid for CPT code 29807, Petitioner offered the testimony of April Kelly, an employee of IMS, Injury Medical Solutions, a registered nurse and Certified Billing Coder. (PX 10)

Ms. Kelly testified that the Illinois Medical Fee Schedule allows allied health care professionals, such as an assistant surgeon, to report a billing code if they performed the procedure with the primary surgeon. (R.33). In support of her testimony, she referenced the Fee Schedule's "Instructions and Guidelines." (*Id.*). Section 9 of the Illinois Workers' Compensation Commission Medical Fee Schedule Instructions and Guidelines which is codified in the Illinois Administrative Code, Title 50: Insurance, Part 9110.90 (j) and states:

"An allied health care professional, such as certified registered nurse anesthetist (CRNA), physician assistant (PA) or nurse practitioner (NP), is to be reimbursed at the same rate as other health care professionals when the allied health care professional is performing coding and billing for the same services as other health care professionals."

Ms. Kelly testified that Section 9 should be utilized and analyzed to move beyond the finding of zero in the fee schedule. (R. 48)

The second code in dispute was 29826, which was billed by the surgical center for the May 3, 2017 surgery. When 29826 is billed as a professional service, which would be for the physician surgeon's services, the Illinois Medical Fee Schedule assigns the code an actual, payable value. (RX 2, p. 18 & Ex. No. 6). When code 29826 is billed as an ambulatory surgical center charge, the Illinois Medical Fee Schedule says it has no monetary value for payment. (RX 2 p.18 and Ex. No. 7).

Ms. Mathiot testified the assigned value of zero for code 29826 is found in the "Outpatient Prospective Payment System" of CMS for calendar year 2017 and the Addendum AA, which covers payments to surgical centers. (RX 2 p. 20). For calendar year 2017, code 29826 is given an indicator code of N1, which identifies it as a package service or item for which no separate payment is due. (*Id.*). When code 29826 is then entered into the Illinois Medical Fee Schedule for an ambulatory surgical center, the Fee Schedule does not return a payment value. (RX 2 p. 22 & Ex. 7). Ms. Mathiot testified no payment was allowed for the code when billed as it was by ION for surgical center charges.

Ms. Kelly also testified and offered the opinion that code 29826 is payable, testifying the default payment amount for the code is 53.2% of the billed amount. (R 38-39 and 47-48). She testified that the code listed was not a minor service. (T.38). Ms. Kelly testified that since the procedure that was performed was not minor when CMS guidelines are applied it reverts to the default percentage payment, that being 53.2% of the charged amount.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to J, whether Respondent paid all reasonable, necessary and causally related medical services, the Arbitrator finds the following:

Three bills are unpaid, but the parties have an agreement as to payment for two of the bills, which the Arbitrator hereby adopts. For Petitioner's Exhibit No. 8, the charges from Advanced Physical Medicine the parties agreed to a negotiated amount of $300.00. For Exhibit No. 9, the parties agreed to a negotiated amount of $1,500.00 for the charges from Gray Medical.

The remaining dispute is over whether the charges from Illinois Orthopedic Network billed at $22,001.12 and contained in Petitioner's Exhibit No. 7 are payable under the Illinois Medical Fee Schedule. The Arbitrator finds, absent evidence or testimony to the contrary, Arbitrator relies on the actions of the surgeon that an assistant surgeon was reasonable and necessary in performing the required and recommended surgery; therefore, the charges are payable subject to the fee schedule Section 8(a) and 8.2 of the Act.

Ms. Kelly testified that payment to an assistant surgeon under the Illinois Medical Fee Schedule for code 29807 is dictated by Section 9 of the Medical Fee Schedule Instructions and Guidelines as codified in Illinois Administrative Code, Title 50: Insurance, Part 9110.90 (j) which clearly states that physicians assistants are to be reimbursed at the same rate as other health care professionals.

Ms. Mathiot stated that the code denies payments because it is not necessary for an assistant to be involved in this type of surgical procedure. (RX2, p.31) The Respondent has not submitted a utilization review of the treatment at issue. Ms. Mathiot is not a health care professional qualified to make a determination regarding the medical necessity of the health care services provided by Brittany Macleod, PA-C during the course of the surgical procedure performed on May 3, 2017. Dr. Christos Giannoulias who performed the surgical procedure states in his surgical report that, "Brittany Macleod, PA-C was integral and present throughout the entire surgery. She assisted in visualization of the shoulder and decreasing operating time." (PX 6)

Ms. Kelly stated that code 29807 should be paid the lesser of 20 percent of the fee scheduled amount or 20 percent of the primary surgeon's fee. (R.37)

Arbitrator finds the testimony of Ms. Kelly and Ms. Mathiot to be equally persuasive; however, finds the actions and decision by Dr. Giannoulias to have an assistant surgeon present to be un-contradicted and necessary.

The second disputed code is code 29826. This code represents billing for the ambulatory surgical center for the procedure of an arthroscopic subacromial decompression. The coding experts disagreed on whether the procedure was minor. Arbitrator finds Ms. Kelly's testimony and interpretation that when applying CMS guidelines to be more persuasive in that the procedure was not a minor procedure applying CMS guidelines the code reverts to the default percentage and should be paid at 53.2% of the billed amount (R 39 and 48) Based on the foregoing, the procedures that were performed were reasonable, necessary and causally related to the medical services. Therefore are payable subject to 8.2 of the Act.

In support of the Arbitrator's Decision relating to L, the nature and extent of the injury, the Arbitrator finds the following:

Prior to hearing, the parties reached an agreement to resolve the permanency in this case for 20.9% loss of use of the person as a whole pursuant to Section 8(d) 2 of the Act. The Arbitrator therefore finds permanent partial disability as agreed to by the parties and awards 20.9% loss of use of a man.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC010802
Case Name	WHITE, JUDIETTE v. BI-STATE DEVELOPMENT
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0581
Number of Pages of Decision	19
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Hans Amann, Kimberly Metzger

DATE FILED: 12/1/2021

/s/Stephen Mathis, 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

Judiette White,

Petitioner,

vs. NO. 19WC 10802

Bi-State Development Agency - Metro,

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 causal connection, medical expenses, prospective medical care 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 April 21, 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.

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

December 1, 2021

o- 10/27/21
SM/sj
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	19WC010802
Case Name	WHITE, JUDIETTE v. BI-STATE DEVELOPMENT - METRO
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Linda J. Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kimberly Metzger

DATE FILED: 4/21/2021

INTEREST RATE FOR THE WEEK OF APRIL 20, 2021 0.04%

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)

Judiette White
Employee/Petitioner

v.

Bi-State Development Agency - Metro
Employer/Respondent

Case # **19** WC **10802**

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 **1/21/2021**. 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, **3/22/2019**, 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 $**45,676.80**; the average weekly wage was $**878.40**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**51,882.01** for TTD, $**1,204.62** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**53,086.63**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 1, 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 and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay reasonable and necessary prospective medical care to Petitioner's right shoulder as recommended by Dr. Bradley until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**585.60**/week for **92-6/7ths weeks** for the period **3/23/19 through 2/16/20, 3/2/20 through 3/15/20, and 3/23/20 through the present, 1/21/21**, as provided in Section 8(b) of the Act. Respondent shall receive a credit of $51,882.01 in TTD benefits paid. Respondent shall receive credit for overpayment of TTD benefits in the amount of $33.74 per week for the period 3/23/19 through 11/22/20, which amount is included in the credit of $51,882.01 paid by Respondent.

Pursuant to the stipulation of the parties, Petitioner was temporarily and partially disabled for the period 2/17/20 through 3/1/20 and 3/16/20 through 3/22/20, for a total of three (3) weeks, for which Respondent shall receive a credit of $1,204.62 in TPD benefits paid.

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

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

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

/s/ Linda J. Cantrell
Signature of Arbitrator

ICArbDec19(b)

APRIL 21, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JUDIETTE WHITE,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-10802
	)	
BI-STATE DEVELOPMENT AGENCY-METRO,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 21, 2021 pursuant to Section 19(b) of the Act. The parties stipulated that on March 22, 2019 Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent. The issues in dispute are causal connection with regard to Petitioner's right shoulder only, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 40 years old, married, with one dependent child at the time of accident. Petitioner has been employed as a bus driver for Respondent for four years. Petitioner testified that on March 22, 2019 she was assaulted by a boarding passenger who struck her in the neck and right shoulder. Petitioner testified she had not sustained any injuries to her neck or right shoulder prior to 3/22/19.

At the time of trial, Petitioner indicated that her neck pain was almost completely resolved following surgery with Dr. Rutz. Dr. Bradley performed a right shoulder surgery which completely resolved her shoulder pain. However, she continues to have limited range of motion in her right arm. Petitioner testified she is not able to move her arm and manipulate it for day to day living and she cannot move her arm above shoulder level. Petitioner attempted physical therapy but it was terminated because she could not move her arm above her shoulder. Petitioner testified she completed home exercises and injections. Petitioner has a follow up appointment with Dr. Bradley on 2/3/21 and she is hoping he would administer another injection to allow her to resume physical therapy. Petitioner testified she wanted her symptoms to resolve so she could return to work, as she could not perform her job duties in her current state.

Petitioner admitted she was diagnosed with Lupus in October 2020. She stated the condition causes inflammation, pain, and sensitivity to sun throughout her joints. Petitioner testified that Lupus may affect her shoulder somewhat but believes that physical therapy and injections would allow her to return to work. Petitioner indicated she wants to return to work for Respondent as a driver.

MEDICAL HISTORY

Immediately following the assault Petitioner presented to Barnes Care Midtown. Petitioner was noted to appear depressed and tearful. She complained of pain when light was near her eye, headaches, two superficial abrasions on the mucosal side of the top and bottom lip, and tenderness over the zygomatic process. Petitioner was assessed with a contusion of the head, upper lip, and tip of the nose and an abrasion of the inner top and bottom lip. She was prescribed Acetaminophen, Alprazolam for anxiety, an ice pack for the abrasions, and restricted to sedentary work, which included no driving. She was instructed to follow up in three days or sooner if her symptoms worsened.

Petitioner returned to Barnes Care three days later with worsened symptoms. Petitioner rated her pain as a 9 out of 10 with dull, aching, throbbing, and sharp pain all over her head. She reported shooting pain down her neck and numbness into her right arm. She had worsening throbbing headaches which were behind the ears and on top of her head and was taking Xanax to help her sleep. She had been off work since the incident. She could not raise her right arm and her right hand was numb. Examination revealed generalized tenderness to palpation of the paracervical muscles, decreased right grip strength, and an inability to move her right upper extremity to any degree. Her work restrictions were continued and Acetaminophen and Ibuprofen was prescribed, along with six physical therapy appointments for her neck.

On 4/3/19, Petitioner presented to Dr. Kevin Rutz for evaluation of her continued symptoms. Dr. Rutz took a history of accident and noted a chief complaint of neck pain following a work incident on 3/22/19. Petitioner reported no significant history of neck problems prior to the incident and admitted to having a history of low back issues which were not part of her current complaints. Since the accident, Dr. Rutz noted she had been experiencing neck pain with posterior headaches, as well as pain into the right anterior and posterior shoulder, upper right chest, and pain radiating down her right arm into her hand. She denied any pain in her left upper extremity and reported taking Tylenol and Aleve with partial pain control. Petitioner described her pain as sharp and aching and worse in the morning, with exercise, twisting, sneezing, lifting, and straining. She could only sit comfortably for less than one hour and her pain interrupted her sleep. *C*ervical x-rays showed mild to moderate disc space narrowing at C3-4 and mild disc space narrowing at C4-5. Physical examination showed diminished cervical flexion and extension with reproduction of neck pain, reproduction of right upper extremity paresthesia with cervical flexion, and tenderness over the right cervical paraspinal muscles. Diminished sensation was noted throughout her right upper extremity. Dr. Rutz diagnosed Petitioner with neck pain and cervical radiculopathy. He recommended a cervical MRI, possible injections, and prescribed Medrol Dosepak and Gabapentin.

Petitioner returned to Barnes Care Midtown on 4/10/19 where she reported feeling worse since the last visit and had no further testing or therapy since her last appointment. She rated her pain as 7 out of 10 with burning and weakness. Her pain continued to be located in her head and neck that radiated down her arm and she reported psychological issues stemming from the assault. Despite having no further testing and continued pain following the accident, Petitioner was discharged at maximum medical improvement for her injury and she was released to return to work without restrictions.

Petitioner presented to Dr. James Wade via telemedicine the next day for evaluation of her continued symptoms. Dr. Wade took her history of the assault immediate care and complaints following the incident, including mouth lacerations, neck pain and tension, headaches with blurry vision, and sensitivity to light. Dr. Wade noted she was released from care from Barnes Care the previous day and was provided no additional care, despite the fact she was still having headaches and neck pain without much relief. Petitioner reported she was willing to return to work but no accommodations were offered and she could not safely drive a bus. Dr. Wade noted tenderness to palpation and tightness in the right trapezius muscle and painful range of motion with flexion, extension, and lateral rotation of the cervical spine. Dr. Wade diagnosed a neck muscle strain, post-traumatic stress disorder, and anxiety. She was ordered to continue Zanaflex, use of a heating pad, and referred to orthopedics. Dr. Wade noted he would await the MRI results before recommending physical therapy.

The cervical MRI was performed on 4/22/19 that revealed loss of cervical lordosis with diffuse narrowing of the cervical disc spaces and spondylotic changes narrowing the exiting foramen at C3-C4 and C4-C5 on the right. Dr. Rutz reviewed the results and informed Petitioner she had a right C3-4 formainal disc herniation causing severe right neural foraminal stenosis and moderate left neural foraminal stenosis. He recommended she receive a selective nerve root injection at her right C4.

Following the MRI, Petitioner presented to Dr. Kevin Du for an appointment she scheduled before her work-related accident to address low back pain. Petitioner reported her neck pain following the 3/22/19 incident and Dr. Du noted her current neck pain was 10 out of 10. Petitioner reported that her neck pain kept her up at night and she had right arm pain. Dr. Du assessed Petitioner's lower back pain to be controlled, but noted she had severe cervical neck pain for which he ordered a cervical spine x-ray.

Petitioner returned to Dr. Wade on 4/25/19 for follow up of her cervical strain, PTSD, and anxiety. Petitioner reported her symptoms had not improved with only slight relief with icy hot patches, Ibuprofen, and Zanaflex. She continued to have parethesthias into her right upper extremity. Examination revealed continued tenderness to palpation and tightness in the right trapezius muscle and painful range of motion with flexion, extension, and lateral rotation of the cervical spine. Petitioner was ordered to continue taking Zanaflex with use of a heating pad for her neck pain and to follow up if symptoms worsened.

On 5/31/19, Petitioner underwent a cervical nerve root block. She followed up with Dr. Rutz four days later reporting the injection gave her 50% relief, but her symptoms had already started to return. She continued to have neck pain and headaches with radiation into the right

anterior and posterior shoulder and some numbness and tingling into her right hand and upper extremity. Dr. Rutz noted the cervical MRI showed foraminal stenosis at C3-4 and moderate forminal stenosis at C5-6 which could be contributing to her symptoms. He recommended another selective nerve root block at her right C6, which she underwent on 6/10/19. She returned to Dr. Rutz following the injection with no improvement in her symptoms. Dr. Rutz noted she had known pathology at C3-4 which he believed accounted for at least half of her symptoms. He recommended a discography from C4-7, and if all other levels were normal, he would recommend a C3-4 disc arthroplasty.

The discogram revealed a right foraminal full thickness annular tear at C4-5, a central full thickness annular tear and contrast extravasation into the epidural space at C5-6, and a right foraminal full thickness annular tear with contrast extravasation into the right C7 perineural space at C6-7. Petitioner followed up with Dr. Rutz on 7/23/19 where he noted concordant reproduction of her symptoms at C4-5 and C6-7, both demonstrating annular tears, and discordant symptoms at C5-6. He recommended she receive C3-4, C4-5, and C6-7 anterior cervical diskectomies and disc arthroplasties.

Respondent had Petitioner evaluated by Dr. Peter Mirkin on 7/22/19 pursuant to Section 12 of the Act. Dr. Mirkin took Petitioner's history, noting she worked as a bus operator for Bi-State for four years and was injured on 3/22/19. Petitioner reported she was driving a bus and was assaulted by a passenger who struck her in the face region, causing pain in her face, neck, and numbness over her right arm. Dr. Mirkin noted Petitioner denied any significant prior neck injury and had no medical records reflecting such. Her chief complaint was posterior and anterior neck pain, posterior and anterior right shoulder pain, and numbness and tingling around the arm and through all five fingers. He noted the surgical recommendation. Dr. Mirkin viewed footage of the 3/22/19 assault, noting it showed a rider striking the driver in the head and neck area. Dr. Mirkin reviewed the cervical MRI from 4/22/19, records from Dr. Rutz, Dr. Dusek's records of the nerve root blocks, and records from Barnes Care. He noted Petitioner had a claim of compensation for her neck, back, right lower extremity and body as a whole from 2018, where she was in a bus accident which caused her to feel pain in her low back and right leg. An x-ray report from 6/14/18 notes she had a normal cervical spine at that time. Dr. Mirkin's impression was that Petitioner suffered a cervical strain from direct contact during an assault. He believed she had significant complaints but did not believe she had herniated discs or severe foraminal compression. He recommended physical therapy, an EMG/NCS, and possibly a myelogram CT scan. Although she could not move her arm and neck without extreme pain, he believed it was safe for Petitioner to work as a bus driver without restrictions.

On 12/13/19, Dr. Rutz performed arthroplasties at Petitioner's C3-4, C4-5, and C6-7 levels. She followed up with Dr. Rutz a few weeks later and was progressing as expected, but she complained of pain in her right arm consistent with tennis elbow. Dr. Rutz placed her on work restrictions of no lifting over 20 pounds and no driving and scheduled a one month follow up.

Petitioner returned to Dr. Wade a few weeks later and reported she had a three-level disc replacement surgery with Dr. Rutz over a month prior and was feeling weakness in her arm. Dr. Wade noted right shoulder pain that went into the bilateral trapezius muscles and weakness in her right hand and arm. Petitioner reported numbness in her right hand and fingers at night and

shoulder pain. Examination revealed decreased grip strength in the right hand, limited range of motion with internal rotation and abduction of the right upper extremity, and positive impingement signs. Dr. Wade diagnosed her with weakness of the right arm, paresthesias in the right hand, carpal tunnel syndrome of the right upper limb, and chronic right shoulder pain. He ordered an EMG/NCS of the right upper extremity, a wrist splint, and an x-ray of the right shoulder.

On 2/4/20, Petitioner followed up with Dr. Rutz who noted she was six weeks post-surgery and was experiencing soreness in her neck and bilateral trapezius. X-rays of her cervical spine showed the three arthroplasties in good position. Examination revealed tenderness to palpation of the cervical paraspinal muscles and positive impingement signs in the bilateral shoulders. Dr. Rutz injected Depomedrol into her bilateral shoulder subacromial bursas due to shoulder pain which provided some immediate relief. He ordered physical therapy for her neck and shoulders, kept her work restrictions to no commercial driving, and ordered a follow up in one month.

Petitioner had an x-ray of her right shoulder taken on 2/3/20 and the EMG/NCS study was completed on 2/10/20. Dr. Wade noted the x-ray and EMG/NCS were unremarkable. Petitioner reported continued pain and spasms in her right shoulder and pain with range of motion. Examination revealed spasms and tightening in the neck with tenderness to palpation in the right trapezius muscle. Dr. Wade diagnosed her with a right trapezius muscle strain, prescribed Diclofenac, advised a heating pad, and recommended she follow up with physical therapy.

Petitioner returned to Dr. Rutz on 2/25/20 reporting pain and discomfort in her neck and shoulders. Dr. Rutz noted temporary improvement from the injection. Dr. Rutz recommended a referral to an upper extremity specialist to evaluate her persistent shoulder problems, continued her restrictions, and recommended she begin physical therapy. Petitioner presented to Belleville Memorial Hospital for her initial physical therapy evaluation on 2/28/20. It was noted she presented with pain in the cervical spine and right arm following an assault while driving, for which she received surgery. She had difficulties with sleeping and activities of daily living due to her neck and arm symptoms. Examination showed pain with full cervical range of motion at the end ranges, discomfort with full shoulder range of motion at the end ranges, and tenderness to palpation at C3-C6, bilateral upper trapeziuses, and rhomboids.

Petitioner was referred to Dr. Matthew Bradley on 3/9/20 where she reported right shoulder pain following an assault while at work. She reported no significant prior neck or right upper extremity pain. Dr. Bradley noted her cervical surgery and continued pain in her right shoulder that started in her upper back and radiated down her right arm. Petitioner described the pain as radiating, numbing, and was causing weakness. Physical examination revealed palpation along the medial border of the scapula greater on the right. Her range of motion was abnormal with abduction and flexion. Positive Neer, Jobs, Hawkins, Speed's, and Yegurson's tests were noted. X-rays of the right shoulder and cervical spine revealed no abnormalities. An ultrasound of the right shoulder revealed a partial tear of the suprapinatus. Dr. Bradley recommended Petitioner see a pain specialist to help with pain and radiation while he worked on the etiology of her symptoms. She was ordered to follow up in one month.

Petitioner followed up with Dr. Wade the next day with continued right shoulder pain and paresthesias of the right hand. Petitioner reported she was attending physical therapy, but she was unable to tolerate it more than once per week due to pain. Dr. Wade noted that only Tramadol was provided relief. Petitioner complains she was still dropping things and felt weakness in her right hand. He noted she underwent an ultrasound on the right shoulder which revealed a rotator cuff tear and was scheduled for an MRI to evaluate further. Petitioner stated she was back to work on light duty, but her employer was not accommodating her with a proper chair, as she was sitting on a stool with no back which was worsening her pain. Dr. Wade ordered Petitioner to continue her current medication and follow up with her specialist. He gave Petitioner a note for work to accommodate her with a more comfortable chair and advised her to avoid lifting at all.

Petitioner reported to Dr. Patricia Hurford's office on 4/6/20 for evaluation. She presented with a chief complaint of cervical, shoulder, and right arm pain status post injury which occurred on 3/22/19. Despite having surgery, Petitioner reported continued right shoulder, neck, and right arm pain. She described her pain as constant and radiating through the neck and right parascapular border and down her right arm. Petitioner denied any previous history of neck or upper extremity pain prior to the assault. Examination revealed pain with cervical flexion and extension, tightness in both directions, and a positive Spurling's test on the right. Petitioner was diagnosed with cervical radiculopathy and was ordered to follow up with the results of the NCS and MRI.

On 4/14/20, Petitioner returned to Dr. Rutz who noted she had begun to regain motion in her neck and she continued to take Aleve for pain. He also noted that Dr. Bradley believed she most likely suffered a rotator cuff tear in her right shoulder. Cervical x-rays showed the implants to be in good position with no signs of loosening. Dr. Rutz opined Petitioner had reached MMI from a surgical perspective on her neck. He believed Dr. Hurford could possibly help with some of her residual neck discomfort and transferred any residual care on her spine to Dr. Hurford. He continued her work restrictions of no commercial driving until cleared by Dr. Hurford.

Petitioner received MRIs of her thoracic spine and right shoulder on 4/30/20. Dr. Hurford noted the thoracic MRI revealed T8-T9 and T9-T10 disc protrusions, mild right foraminal stenosis at T8-T9 and T9-T10, and mild left foraminal stenosis at T8 and T9. She noted the majority of her symptoms were sitting on the left side of her cervical spine in the C3-4, C4-5, and C6-7 region. Dr. Hurford recommended facet injections on the right C3-4, C4-5, and C6-7 at the same levels of her cervical disc replacements.

Petitioner presented to Dr. Bradley on 5/12/20 for review of her right shoulder MRI that revealed a fairly high grade articular sided supraspinatus tear as well as a SLAP tear. Dr. Bradley found her MRI findings to be consistent with her physical examination findings as well as her mechanism of injury. Dr. Bradley recommended surgical repair of the right rotator cuff and SLAP tear. Dr. Bradley opined it was his medical opinion that the assault of 3/22/19 was a precipitating factor in her current diagnosis of right rotator cuff and SLAP type tear of her shoulder. He ordered Petitioner a right shoulder brace sling and cold wrap, Zofran, Rabeprazole, Mobic, and Diclofenac. He ordered Petitioner to remain off work until 8/10/20.

On 5/29/20, Dr. Bradley performed a right rotator cuff and SLAP repair. Intraoperatively, Dr. Bradley noted a nearly complete undersurface tear of the rotator cuff and a SLAP tear. Dr. Bradley noted Petitioner was doing well post-operatively with minimal pain. He recommended physical therapy and follow up in six weeks. Petitioner began physical therapy the next day at Apex Physical Therapy where she reported a pain level of 6 out of 10 with aggravating factors of reaching, lifting, prolonged positions, and prolonged activity. Petitioner was to engage in therapy three times per week for six weeks.

On 6/9/20, Respondent had Petitioner's medical records reviewed by Dr. Timothy Farley. Dr. Farley did not examine or speak to Petitioner as part of the records review. Dr. Farley reviewed records from BarnesCare, Dr. Rutz, Metro Imaging, Dr. Mirkin, Dr. Bradley, Dr. Hurford, and video footage of the assault. Dr. Farley agreed Petitioner had subjective complaints of right shoulder pain and an apparent cervical issue that was managed by Dr. Rutz. Despite noting Dr. Bradley performed an ultrasound which was notable for an articular sided partial tear of the supraspinatus, he did not find any specific evidence of a right shoulder related condition. Dr. Farley did not believe the 3/22/19 assault was a causative factor in her right shoulder condition and based his opinion solely on video footage of the incident. He did not base this on any other objective or subjective findings. Additionally, he believed Petitioner did not require any further medical treatment for her right shoulder.

On 6/18/20, Petitioner returned to Dr. Wade for follow up of her neck and right shoulder pain. Dr. Wade noted Petitioner was doing well after right shoulder surgery and she continued to remain off work. He recommended she continue physical therapy and medications and to follow up with Dr. Bradley. Petitioner's pain medication and Xanax continue to be refilled by Dr. Wade.

Petitioner followed up with Dr. Bradley on 7/13/20 at which time he assessed her to be doing very well. Petitioner had been participating in physical therapy and wore her sling as directed. Her range of motion had improved with unrestricted range of motion across the elbow and wrist. Dr. Bradley recommended she continue physical therapy for 4-6 weeks and remain off work.

Dr. Farley testified by way of evidence deposition on 8/11/20. His testimony was consistent with his medical report. He noted Petitioner felt pain in her neck that was associated with numbness into her right arm following the accident. He stated Petitioner had continued complaints of pain in her shoulders with pain radiating down her right arm into her hand following the incident. Dr. Farley testified it was his opinion, based solely on a records review, that the 3/22/19 assault was not a causative factor in her right shoulder diagnosis and did not believe she required any further treatment.

On cross-examination, Dr. Farley testified he performs legal examinations and records reviews about twice per week, mostly on behalf of insurance carriers and employers. Dr. Farley testified he did not take Petitioner's history directly from her as he did not evaluate or speak with her. Dr. Farley agreed that Petitioner had no prior history of right shoulder or neck symptoms or treatment prior to the assault. He testified that someone who has a shoulder injury may have difficulty raising their arm, and that Petitioner reported this specific symptom to BarnesCare just

a few days after the incident. Dr. Farley testified he viewed video footage of the assault but could not quantify the amount of force used by Petitioner to fend off the assailant by watching the video. He agreed that levels of force could differ depending on the individual using the force. Dr. Farley further agreed that Petitioner reported consistent anterior and posterior shoulder pain to her treating doctors since the accident. He testified that just because Petitioner was not punched directly in the shoulder did not mean she did not have a shoulder injury. Dr. Farley admitted that while writing his report he did not have Dr. Bradley's records after 3/9/20 or the MRIs of Petitioner's right shoulder and cervical spine. When asked if someone with a preexisting asymptomatic SLAP tear could develop symptoms following some event or trauma, he stated it was possible. Dr. Farley concluded it was his opinion Petitioner did not have a shoulder injury stemming from the 3/22/19 assault even though she had no history of any right shoulder or arm pain and had consistently reported right shoulder and arm symptoms following the incident.

Dr. Bradley also testified by way of evidence deposition on 8/18/20. Dr. Bradley, due to the current pandemic, sees a decreased number of 12 to 15 patients a day, three times per week and operates two days a week, completing eight to ten surgeries per week. His practice focuses primarily on the joints of the body, including shoulder, hip, knee, foot, and ankle problems.

Dr. Bradley reviewed the medical records of Petitioner prior to his examination and the history of injury. He viewed the video of the incident and stated it was very consistent with what Petitioner reported to him. He testified she had been treated by Dr. Rutz for her spine pain but continued to have right shoulder pain. He explained there can often be an overlap between symptoms of the shoulder and cervical spine, but it is possible for patients to have both neck and shoulder pathology. Dr. Bradley noted Petitioner reported both shoulder and neck pain in all her medical records following the accident. She also reported heaviness in her arm, which Dr. Bradley testified is a sign of a SLAP tear or rotator cuff tear. He also noted Petitioner had an injection into her shoulder which provided some short-term pain relief, specifically indicating pathology in the shoulder. He explained this was because there is a numbing medicine typically used in addition to an injection medication like cortisone, and if there is any level of relief it is suggestive of some sort of pathology in the shoulder.

Dr. Bradley testified that upon his first visit with Petitioner her greatest finding was the loss of range of motion. She was unable to abduct or flex her right shoulder to the same degree as the left. He also noted pain along her scapula and shoulder blade and tenderness around her shoulder blade muscles which is common in patients who cannot move their shoulders. An ultrasound showed some pathology at the supraspinatus tendon but he could not completely visualize a full-thickness tear, causing him to document it as a partial-thickness tear. He referred Petitioner to pain management to attempt to control her radiating pain and to ensure everything was stable with her neck before proceeding with shoulder treatment. He was eventually able to view an MRI of Petitioner's shoulder which revealed a high-grade tear to her supraspinatus tendon and a SLAP tear. He testified she had a symptomatic rotator cuff tear and a SLAP tear based on her physical exam, symptoms, and the MRI results.

Dr. Bradley opined that Petitioner's work injury of 3/22/19 was contributing to her right shoulder condition and symptoms. Dr. Bradley explained that Petitioner did not have any pain in

her shoulder and had normal motion prior to the incident. She was able to do all of her job requirements without any shoulder pain prior to the incident of 3/22/19. The mechanism is one that would certainly put the rotator cuff at a position of getting injured.

When asked about Dr. Farley's opinion that there was not enough force seen in the incident video of Petitioner to cause pathology in her right shoulder or aggravate it, he testified that rotator cuffs will tear without any "high force mechanism." He explained that the rotator cuff will tear when the shoulder gets suddenly put in a position in which the cuff can get pinched. Petitioner had a sudden reaching out of the shoulder to defend herself from the assailant which puts the rotator cuff in a position susceptible to injury without a lot of force. He noted it was possible Petitioner could have had a small tear before the incident and the kind of force described by Dr. Farley could cause it to become a bigger tear, resulting in a symptomatic condition. Dr. Bradley noted Petitioner had no indication or symptoms of a right shoulder injury prior to this accident.

Dr. Bradley testified that following the results of the MRI, he recommended surgery which was completed on 5/29/20. The pathology he found intraoperatively was identical to the MRI findings and consistent with Petitioner's symptoms. At the time of the deposition, Dr. Bradley noted Petitioner was healing and doing well and completing therapy as expected. Dr. Bradley kept her off work and extended that status through the next five weeks, noting she would most likely be able to do light duty restrictions in three months and would be able to get back to work full time around five to six months. Dr. Bradley testified his recommendations for medical treatment, time off work, light duty restrictions, and continued postoperative care were all made as a result of the 3/22/19 injury.

Dr. Bradley testified that while he only recently viewed the video footage of the incident, it did not change his opinion. He testified that the video footage solidified his opinion as it confirmed Petitioner had her arm in a position in which the rotator cuff was vulnerable to injury.

Respondent had Petitioner examined by Dr. Mirkin a second time on 8/19/20. Dr. Mirkin noted his last visit with Petitioner was one year prior and she had since undergone cervical and right shoulder surgery. Petitioner indicated her neck was still stiff and she continued to have numbness and tingling down her right arm. Dr. Mirkin noted some improvement in her neck symptoms from his previous examination. He reviewed the video footage of the incident and Petitioner's medical records, including 2018 records from BarnesCare, chiropractor Fast and 2019-2020 records from BarnesCare, Dr. Rutz, Metro Imaging, Excel Imaging, Dr. Hurford, Dr. Farley, BJC Medical Group, and one report from Dr. Bradley dated 7/13/20. Upon examination, Dr. Mirkin noted her neck range of motion was limited, she had tenderness to palpation, and she had limited range of motion in her right shoulder. It was his impression Petitioner had a cervical strain and there was no evidence of pathology at C3-4, C4-5, and C6-7 despite Petitioner receiving cervical surgery for same. He believed she had some pre-existing spondylosis in her upper cervical spine and no evidence of pathology at C6-7. He believed she was at MMI for her cervical spine and believed she could work as a bus driver without restrictions regarding her neck. Dr. Mirkin made only one comment about Petitioner's shoulder injury, noting Petitioner reported she tore her rotator cuff while driving the bus and that would be an unlikely mechanism.

Petitioner continued to follow up with Dr. Bradley for evaluation of her shoulder. Dr. Bradley noted she was advancing as expected and doing well with physical therapy. He continued therapy, light duty restrictions of lifting one pound with the right extremity and no overhead lifting or repetitive use. Petitioner followed up one month later and she had developed a trigger thumb due to the thumb strap on her sling, for which she received an injection. Dr. Bradley continued Petitioner on the same light duty restrictions and continued physical therapy. Petitioner returned one month later with complaints of generalized pain throughout her body with a particular increase in her right shoulder. He noted Petitioner had been recently diagnosed with Lupus. She continued to work with physical therapy on range of motion and strengthening. Dr. Bradley noted her examination was consistent with subacromial bursitis post rotator cuff repair and administered a subacromial corticosteroid injection for pain relief. Petitioner noted the trigger thumb had resolved following the injection and home exercise program. Petitioner continued to work with physical therapy until she was discharged on 12/7/20. Petitioner reported significant shoulder pain with any motion above the shoulder level. Dr. Bradley noted the pain was likely secondary from post-operative inflammation and scar tissue in addition to her recent diagnosis of Lupus. They discussed her options and agreed she would continue to do her home exercise program. Petitioner also received a subacromial injection in her shoulder to help with the pain. She was to follow up in a few weeks.

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982). A chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident is sufficient to satisfy the claimant's burden. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The record is clear that Petitioner was working full duty without incident prior to the undisputed accidental injury on March 22, 2019. Petitioner credibly testified that prior to that date, she suffered neither symptoms nor required any treatment or diagnostic studies for her right shoulder. Following the accident, however, Petitioner remained symptomatic and has yet to return to her pre-accident baseline. Moreover, the objective medical evidence of the right shoulder ultrasound, MRI, and negative NCS show clear evidence of pathology in Petitioner's right shoulder. The findings on these studies were further buttressed by the temporary relief Petitioner received from the right shoulder injection performed by Dr. Rutz, and by the objective intraoperative findings reported by Dr. Bradley. Based upon the evidence establishing Petitioner sustained a shoulder injury, the opinion of Dr. Farley is not persuasive. The Arbitrator finds the opinions of Dr. Bradley linking Petitioner's condition of ill-being to her traumatic work injury well-reasoned and credible. Thus, the Arbitrator finds Petitioner has met her burden of proof in

establishing causal connection between her accidental injury and her current condition of ill-being of her right shoulder.

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

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that the care and treatment Petitioner received has been reasonable and necessary. The Arbitrator finds that the injections, imaging, surgery, and therapy were of diagnostic and therapeutic value and objectively confirmed injury to Petitioner's right shoulder. The Arbitrator further finds Petitioner has not reached maximum medical improvement and is entitled to receive the additional care recommended by Dr. Bradley.

Respondent shall therefore pay the medical expenses outlined in Petitioner's group exhibit 1 as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit.

Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's right shoulder as recommended by Dr. Bradley until Petitioner reaches maximum medical improvement.

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

Respondent disputes liability for temporary total disability benefits based on its dispute of causal connection with regard to Petitioner's right shoulder injury. Based upon the above finding that Petitioner met her burden of proof that her current condition of ill-being in her right shoulder is causally connected to the injury of 3/22/19, Respondent is liable for payment of temporary total disability benefits. The parties stipulate that Petitioner's average weekly wage is $878.40, resulting in a TTD rate of $585.60. The parties further stipulate that Petitioner was temporarily and partially disabled for the period 2/17/20 through 3/1/20 and 3/16/20 through 3/22/20, for a total of three (3) weeks, for which Respondent shall receive a credit of $1,204.62 in TPD benefits paid.

Petitioner was temporarily and totally disabled for the period 3/23/19 through 2/16/20, 3/2/20 through 3/15/20, and 3/23/20 through the present, 1/21/21, for a total period of 92-6/7 weeks. Respondent shall receive a credit of $51,882.01 in TTD benefits paid. Respondent shall

receive credit for overpayment of TTD benefits in the amount of $33.74 per week for the period 3/23/19 through 11/22/20, which amount is included in the credit of $51,882.01 paid by Respondent.

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

/s/ Linda J. Cantrell April 10, 2021

Arbitrator Linda J. Cantrell DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC008325
Case Name	STONE, CHRISTIAN G v. STATE OF ILLINOIS DEPT OF NATURAL RESOURCES
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0582
Number of Pages of Decision	10
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Chelsea Grubb

DATE FILED: 12/3/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christian G. Stone,

Petitioner,

vs. NO: 17 WC 8325

State of Illinois Department of
Natural Resources,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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 June 17, 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.

December 3, 2021

MP:yl
o 12/2/21
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	17WC008325
Case Name	STONE, CHRISTIAN G v. STATE OF ILLINOIS DEPT OF NATURAL RESOURCES
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Chelsea Grubb

DATE FILED: 6/17/2021

INTEREST RATE WEEK OF JUNE 15, 2021 0.04%

/s/ Edward Lee, Arbitrator
Signature

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

June 17, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Christian Stone
Employee/Petitioner

v.

State of Illinois - Department of Natural Resources
Employer/Respondent

Case # **17** WC **08325**

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 **5/25/21**. 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. ☐ 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 **2/10/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**104,312.00**; the average weekly wage was $**2006.00**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

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

ORDER

- The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the 2/10/2017 accident.

- The Arbitrator orders the Respondent to pay all reasonable and necessary medical services as set forth in Petitioner's exhibits, as provided in Sections 8(a) and 8.2 of the Act. This includes all Petitioner's medical expenses from February 10, 2017 through Petitioner's February 19, 2019 visit at Springfield Clinic as well as all medical expenses paid by Petitioner's group health insurance carrier Health Alliance (see Petitioner's Exhibit 6).

- The Respondent shall pay the Petitioner permanent partial disability benefits of $775.18 a week for 37.626 weeks because the injury sustained caused a 17.5% loss of use of the left leg, as provided in Section 8(e) of the act.

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

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

_Edward Lee_____ **JUNE 17, 2021**
Signature of Arbitrator

FINDINGS OF FACT

The Petitioner was 47 years old at the time of the accident. The Petitioner testified that he has a Bachelor's Degree of Science from a combination of Western Illinois University and University of Illinois at Springfield. The degrees are in Political Science and English. (AT 6-7)

As of February 10, 2017 the Petitioner was employed by the Illinois Department of Natural Resources, Office of Law Enforcement. The Petitioner's formal title in February of 2017 was a Sergeant in the Conservation Police with the Illinois Department of DNR. The Petitioner had held that position for approximately 5 years as of February of 2017. (AT 8)

The Petitioner's job duties in February 2017 were that of a district supervisor responsible for officers assigned to counties. The Petitioner had roughly 7 officers that reported to him. The Petitioner would ensure the officers were doing their proper work assignments, assigning them details and approving field reports. The Petitioner also was temporarily assigned as a boating law administrator. As such, the Petitioner's job duties in February 2017 including both office work as well as work in the field. (AT 8-9)

The Petitioner testified that on February 10, 2017 it had snowed, and he had to work that morning at the Springfield office. The parking lot, which is lot 21, had snow and ice on it. The Petitioner testified that the sun had come briefly and some of the snow had melted over the ice which caused a little glaze of water on top and as he was entering the building, he hit a slick spot and slipped forward twisting his knee. (AT 9-10) The Petitioner also noticed that his knee popped at this time. (AT 10) The Petitioner noticed immediate knee pain and when he entered the building he reported it to his supervisor Roy Maul. (AT 10-11)

The Petitioner testified that prior to this accident he had never suffered from any left knee issues. No prior injuries, symptoms, complaints, or anything wrong with his left knee prior to the February 10, 2017 accident. (AT 11)

The Petitioner initially presented for medical care three days after the accident on 2/13/17 at the Springfield Clinic walk-in orthopedic facility. The Petitioner described his work accident and indicated that he had slipped on ice and his left knee twisted and he heard a pop. The Petitioner had limped around for the rest of the day and over the weekend he had rested and applied ice to the left knee. The Petitioner noted swelling and denied any prior knee injuries or surgeries. A physical examination was conducted. Mild joint effusion was noted as well as tenderness along the medial joint line. The Petitioner had positive McMurray's testing. X-rays of the left knee did not show any acute fracture or bony abnormality. The Petitioner was diagnosed with acute left knee pain and swelling secondary to a non-traumatic twisting injury with a date of accident of 2/10/17. The concern was for possible medial meniscal pathology. Conservative care was initially recommended. (PX 3)

The Petitioner initially began physical therapy at the Springfield Clinic on 2/13/17, the day he initially presented for care. (PX 3)

The Petitioner followed up with the orthopedic walk-in clinic on 3/13/17. The Petitioner still had pain in his left knee and reported a dull, constant pain that can be sharp with activity particularly with stairs, stooping and kneeling. The Petitioner would note a throbbing at rest. It is better with elevation and ice and worse with activity. The Petitioner was diagnosed with persistent left knee pain and a left knee injury. The Petitioner continued to present with a positive McMurray's test as well as decreased range of motion. At this time and MRI was recommended for the left knee. (PX 3)

The MRI of the Petitioner's left knee was conducted on 5/24/17. The impression of this study was a horizontal tear of the body of the posterior horn of the medial meniscus, knee joint effusion with associated synovitis. (PX 3)

Subsequent to the MRI the Petitioner was referred to Dr. Hillard-Sembell at the Springfield Clinic.

The Petitioner initially met with Dr. Hillard-Sembell on 6/5/17. The Petitioner described accident from February 2017. The Petitioner continued to have complaints of pain throughout the left knee and the symptoms were exacerbated by standing for long periods of time and walking stairs. Pain is constant and produces pain at night. Symptoms are improved with rest, elevation and icing the knee. Dr. Hillard-Sembell diagnosed a medial meniscus tear of the left knee and left knee pain. At this time Dr. Hillard-Sembell recommended surgical intervention for the Petitioner's left knee. (PX 3)

Dr. Hillard-Sembell performed surgery on the Petitioner's left knee on 9/22/17. Pre-operative diagnosis was a left knee medial meniscus tear and mild osteoarthritis. Post-operative diagnosis was a left knee medial meniscus tear and mild osteoarthritis. The procedure performed was a left knee arthroscopy with partial medial meniscectomy and chondral debridement. (PX 5)

The Petitioner followed up with Dr. Hillard-Sembell on 10/2/17. The Petitioner's pain had been reduced and he was not currently taking pain medication. The Petitioner did note occasional tenderness in the knee but was improving with time. Diagnosis was status post left knee arthroscopy with partial medial meniscectomy. It was encouraged that the Petitioner try to begin exercising on a stationary bike for strengthening and range of motion. The Petitioner was given a note to return to work as of 10/5/17 with no restriction. Additional range of motion and gradual strengthening exercises were recommended. The Petitioner was to continue to use as well as elevate when necessary. The Petitioner was informed he could follow up on an as-needed basis as of 10/2/17.

The Petitioner testified that when he returned to work after being released by Dr. Hillard-Sembell in October 2017, that he did still deal with pain and a lot of issues with swelling. The Petitioner's pain and swelling would depend upon how much walking he had to do during the day. The Petitioner would have problems with swelling and aching at nighttime. (AT 18-19)

When the Petitioner returned to work in October 2017 he still held the Sergeant position. This required the Petitioner to work both in the office and in the field. The Petitioner was concerned about sitting around too much as extended sitting did cause increased stiffness. The Petitioner testified that from approximately October 2017 through October 2018 he did about 70% of his work in the office and 30% in the field. Prior to his work accident, the Petitioner testified that his time spent between the office and the field was approximately 50/50. (AT 19)

The Petitioner testified that his field work included getting outdoors and checking on fishermen, doing boat enforcement, overseeing enforcement details. Petitioners field work would depend on the season. In the summertime, the Petitioner would be doing more boating oriented work and in the fall it would be more game enforcement work. (AT 20) The Petitioner's work in the fall would include checking licenses such as licensing for deer hunters as well as checking duck hunters. He would also turkey hunting licenses for hunters out in the field. (AT 20-21) The Petitioner would have to climb up and down hills and would be outside in all types of weather conditions. (AT 21-22)

The Petitioner testified that he suffered no subsequent injuries to his left knee after he returned to work in October 2017. The Petitioner testified that the pain in his left knee never completely went away after the

accident. The Petitioner testified that the surgery did help his symptoms but he continued to have daily pain that will varies depending on his activity level. (AT 22-23)

The Petitioner testified that walking across uneven terrain, which occurs often in his work in the field, would cause him increased issues after he had returned to work following his October 2017 release. The Petitioner also had increased symptoms when standing for long periods of time and in cold weather. (AT 23-24) Due to the Petitioner's ongoing problems with his left knee he did return for care at the Springfield Clinic in February 2019.

The Petitioner later followed up with the Springfield Clinic orthopedic walk-in clinic on 2/19/19. The Petitioner presented with ongoing left knee pain. The Petitioner described his prior accident as well as his prior surgery with Dr. Hillard-Sembell. The Petitioner indicated that he did okay after his surgery but the knee never felt quite right and presented to the walk-in clinic in February 2019 for further evaluation. Pain was located on the inside aspect of the knee. The Petitioner noted he would get popping and catching. The Petitioner notes his pain mostly would come from moving from a seated to a standing position as well as going up and down stairs or squatting to pick anything up. The Petitioner also noticed increased knee pain when sitting for a prolonged period of time. The Petitioner had tried rest and ice along with home exercises but none of this seemed to help. The Petitioner did have a positive McMurray's sign to the medial side. Diagnosis rendered was left knee patella femoral syndrome. It was not likely the Petitioner any sort of recurrent meniscus tear but was ongoingly symptomatic due to patella femoral syndrome. An intraarticular injection was performed on 2/19/19 and the Petitioner was to resume physical therapy on his knee. The Petitioner testified that the injection did help for a period of about 2-3 months, but then the pain returned. The Petitioner testified that the pain-relieving effects of the injection lasted for a couple of months. (AT 25)

The Petitioner testified has not returned to the Springfield Clinic since that time because he did not believe that it was worth it to continue receiving injections. The Petitioner wanted to try and manage his pain versus continually getting injections. (AT 25) The Petitioner also testified that he chose not to take pain medications because he is in law enforcement and it would not be appropriate. (AT 26)

The Petitioner at the time of trial that he has good days and bad days. Petitioner notices that if he has to sit for too long he has a lot of stiffness. The Petitioner testified that driving to work, which is about an hour, that he will have to get out at times and start moving his knee around as it will get stiff. (AT 26) The Petitioner testified that if he does a lot of squatting or standing he will experience popping and clicking. Petitioner will hear pooping is he has to kneel for prolonged periods of time. (AT 26-27) The Petitioner continues to have issues going up and down hills and on uneven terrain. The Petitioner testified that stairs are difficult for him and his current position working in a warehouse requires him to go up and down a lot of stairs which causes him increased issues. (AT 27)

The Petitioner testified that he had to take a break from his own personal hunting and fishing activities for a year or two due to his knee. The Petitioner testified his son has gotten into hunting at his encouragement. As a result he has tried to get back into hunting to help teach his son. (AT 28) The Petitioner testified that he will definitely feel his knee at the end of the day on the days he has done hunting activities with his son. (AT 28)

The Petitioner testified that he has not had one pain free day since the accident. The Petitioner testified there are days that his knee is better but he always has to be aware of his knee bothering him. (AT 30)

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. However, the Arbitrator has considered the Petitioner's treating physician, Dr. Hillard-Semball's note from the day the Petitioner was released on 10/2/2017. The doctor continued to recommend ice and elevation as necessary and to continue with exercises to increase strength and range of motion. The Arbitrator also notes that the Petitioner continued to complain of pain and did have tenderness in the knee at the 10/2/17 visit. The Arbitrator further considers the Petitioner's follow up visit on 2/19/2019. At this time, the Petitioner continued to have left knee pain located on the inside aspect of the knee. The Petitioner continued to complain of some popping and catching. Petitioner had tried rest and ice as well as the exercises that had been previously recommended. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was initially employed as a Conservation Police Sergeant with the Illinois Department of Natural Resources. The Petitioner described his work as being laborious. Prior to the accident the Petitioner would spend 50% of his time in the field which would include traversing over uneven terrain, climbing up and down hills, as well as exposure to cold temperatures. The Arbitrator notes that the Petitioner's field work decreased to approximately 30% after the accident due to his knee pain, however the Petitioner still did a significant amount of work in the field which the Arbitrator agrees is laborious. The Petitioner's position as of the time of trial had changed to a Quarter Master position. The Petitioner described this as being more of an office related position however the Petitioner would still be responsible for work such as inventory and moving things around the warehouse which included going up and down stairs which caused the Petitioner increased pain. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. The Petitioner has daily complaints of pain will have to deal with the residual effects of the injury for approximately two more decades of his work life. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the Petitioner did not suffer any loss of earnings capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner's last two visits which included 10/2/17 and 2/19/19 showed ongoing complaints which were consistent with his testimony at the time of trial. The Arbitrator finds that the Petitioner was a credible individual. The Arbitrator 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 17.5% loss of use of left leg pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC017572
Case Name	BARNETT, RENALDO v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	19WC010089 19WC017211 19WC018234 19WC019621
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0583
Number of Pages of Decision	18
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 12/3/2021

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0583

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 (Medical expenses)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Renaldo Barnett,

Petitioner,

vs. NO: 18 WC 17572

IL Dept. of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with four additional cases. Case number 19 WC 10089 involves a subsequent work injury that occurred on March 12, 2019. Case number 19 WC 17211 involves a subsequent work injury that occurred on April 17, 2019. Case number 19 WC 18234 involves a subsequent work injury that occurred on May 28, 2019. Finally, case number 19 WC 19621 involves a subsequent work injury that occurred on May 31, 2019. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Respondent raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner works as a highway maintainer for Respondent. Petitioner initially injured his cervical and lumbar spine on May 22, 2018, when the dump truck in which he was a

passenger was rear-ended at a high rate of speed. A June 2018 lumbar MRI revealed: 1) left lateral recess-foraminal annular tear and protrusion at L4-L5 resulting in mild left foraminal stenosis but no central canal or right foraminal stenosis; and 2) left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in dural displacement but no definite central canal or foraminal stenosis. A cervical MRI revealed: 1) questionable small central protrusion at C5-C6 without definite left sided foraminal component; and 2) mild right foraminal narrowing at C4-C5, possibly a small disc protrusion. Dr. Gornet, Petitioner's treating doctor, interpreted the lumbar MRI as showing a possible annular tear at L4-L5 on the left as well as small breaking of the disc on the left. He interpreted the cervical MRI as showing an annular tear at C5-C6 and a small foraminal disc protrusion at C3-C4.

Petitioner initially underwent conservative treatment including physical therapy and lumbar injections. However, this treatment failed to provide significant relief. On October 15, 2018, Dr. Gornet recommended Petitioner undergo a CT discogram at L4-L5 and MRI spectroscopy at L3-S1. However, the doctor put these diagnostic tests on hold until Petitioner lowered his weight to 280 pounds from his then current weight of 316 pounds On February 2, 2019, Petitioner complained of ongoing cervical and lumbar pain. Petitioner had not lost any weight and Dr. Gornet determined he was unable to move forward with further evaluation of Petitioner's condition until Petitioner weighed 280 pounds. He released Petitioner to return to work with a 25-pound weight limit.

Petitioner returned to work and sustained a second work-related injury on March 12, 2019. On that date, he sustained an injury to his cervical and lumbar spine while driving a dump truck in the "deer pit" on I-57. Petitioner testified that he drove over a large bump in the road and the driver's seat caused him to jerk back and forth. He testified that the jerking motion aggravated his low back and cervical spine condition. Petitioner visited the ER that day and reported that the work incident exacerbated his back pain. On April 1, 2019, Petitioner complained of continued neck and back pain to Dr. Gornet. Dr. Gornet believed this recent work incident only temporarily aggravated Petitioner's underlying condition. He continued to recommend a lumbar CT discogram and/or MRI spectroscopy once he lost the recommended amount of weight and returned Petitioner to work.

Petitioner testified he sustained a third work injury while driving a dump truck on April 17, 2019. He testified that he once again drove over a large bump in the road. Petitioner testified that he aggravated his neck and back symptoms due to this incident. He visited the ER that day and CT scans of his thoracic and lumbar spine as well as his cervical spine were performed. Petitioner continued to work and sustained a fourth work injury on May 28, 2019. On that date, he was working with a crew patching potholes on the highway when a car came speeding through the area. Petitioner testified that he had to run and dodge the speeding car, and this caused him to temporarily aggravate his low back and neck. Petitioner visited the ER that day. Petitioner again continued to work. Finally, on May 31, 2019, Petitioner temporarily aggravated his condition when he drove a dump truck over a bump in the road. Petitioner once again visited the ER and complained of increased low back pain.

On June 4, 2019, Petitioner spoke with Dr. Gornet's physician assistant via telephone. Petitioner complained of increasing low back pain. While Petitioner reported no new trauma, he stated work activities such as driving a one-ton truck and extended periods of mowing significantly

increased his low back pain. Petitioner's work restrictions were increased and included restrictions from driving the one-ton truck and mowing. Petitioner testified that Respondent was not able to accommodate these additional restrictions. Petitioner continued to follow up with Dr. Gornet and eventually underwent the recommended CT discogram and MRI spectroscopy in early fall 2019. After reviewing the results of these diagnostic studies, Dr. Gornet determined Petitioner required treatment at L5-S1. He performed an injection at L4-L5 in October 2019. Dr. Gornet recommended lumbar disc replacement surgery if Petitioner reached 270 pounds. Finally, in May 2020 Petitioner reached the recommended weight of 270 pounds and Dr. Gornet determined that he would move forward with the recommended surgery. Petitioner continues to complain of cervical and lumbar pain and testified that he would like to proceed with the surgery.

Dr. Gornet testified via evidence deposition at Petitioner's request on August 26, 2019. He testified that Petitioner never has returned to the condition he enjoyed prior to the initial work incident on May 22, 2018. He further testified that the subsequent four work incidents identified by Petitioner were temporary aggravations that did not change the trajectory of his cervical and lumbar condition. Dr. Gornet also testified that the subsequent work incidents did not change the structural pathology revealed in the MRIs performed in June 2018 following his initial work accident. He testified that MRI spectroscopy is a newer type of MRI that is FDA approved. The MRI spectroscopy takes a chemical biopsy of the disc and looks for chemicals known to be the source of back pain. Dr. Gornet testified that the diagnostic study allows him to "…get a physiologic assessment of someone's back in addition to a static MRI which is notorious for not necessarily being predictive of pain. (PX 15 at 10).

Dr. Robson, Respondent's Section 12 examiner, examined Petitioner on January 22, 2019, and September 11, 2019. He concluded that the work incidents Petitioner identified as occurring after the initial May 22, 2018, injury were temporary aggravations of Petitioner's underlying condition. However, he opined that Petitioner required no additional medical treatment and placed Petitioner at maximum medical improvement. Dr. Robson testified via evidence deposition at Respondent's request on January 14, 2020. Dr. Robson testified that "MRI spectroscopy is just…a revved-up MRI…" (RX 8 at 21-22). He testified that he does not rely on MRI spectroscopy results and is not sure the procedure offers any advantages. He testified that it is a developing technology. Dr. Robson testified that he can obtain the information he needs from "…a history, physical, and MRI in a non-contrast CT scan." *Id*. at 21.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission modifies the award of medical expenses. The Commission finds Petitioner failed to meet his burden of proving the MRI spectroscopy prescribed by Dr. Gornet and the related expenses are reasonable and necessary. The Commission also modifies one sentence. The Commission otherwise affirms and adopts the remainder of the Arbitrator's Decision.

Pursuant to Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the work accident and are required to diagnose, relieve, or

cure the effects of a claimant's injury. *See University of Illinois v. Indus. Comm'n*, 409 Ill. App. 3d 154, 164 (1992). Petitioner bears the burden of proving the medical services he received were necessary and that the expenses were reasonable. After considering the credible evidence, the Commission finds the MRI spectroscopy was neither reasonable nor necessary. The Commission finds the testimony of Dr. Robson regarding the merits of MRI spectroscopy most credible. The mere fact that the procedure is approved by the FDA does not mean its use was reasonable and necessary in this matter. Dr. Robson credibly testified that the procedure is still a developing technology. He also testified that the procedure was simply a "revved-up" MRI, and that he was unsure the procedure offers any advantage. He further testified that he does not rely on the results of the procedure. Dr. Robson also testified that he is able to obtain all the necessary information regarding a patient's condition through the medical history he takes, a physical examination of the patient, and MRI in a non-contrast CT scan.

The Arbitrator awarded medical expenses relating to the May 22, 2018, work accident, including the MRI spectroscopy. For the foregoing reasons, the Commission modifies the Arbitrator's award of medical expenses and finds Respondent is not liable for any expenses relating to the MRI spectroscopy. The Commission affirms the remainder of the medical expenses awarded by the Arbitrator.

Finally, the Commission modifies one sentence in the Decision. On page nine (9) in the final paragraph of the Decision, the Arbitrator wrote that Petitioner has not reached maximum medical improvement **and shall not do so until released by Dr. Gornet postoperatively**. The Commission strikes this language from the Decision. The Commission thus modifies the above-referenced sentence to read as follows:

> Based upon the Arbitrator's finding that Petitioner established his current condition of ill-being in his neck and back are causally related to the accidental injury of May 22, 2018, the credible opinions of Dr. Gornet that additional treatment is available that can cure and relieve Petitioner from the effects of his condition, and Petitioner's history of ongoing symptoms and inability to work, the Arbitrator finds Petitioner has not reached maximum medical improvement.

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 August 3, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being is causally related to the May 22, 2018, work accident.

IT IS FURTHER ORDERED that Respondent **is not** liable for medical expenses relating to the MRI spectroscopy because the procedure and associated expenses are not reasonable and

necessary. Respondent shall otherwise pay reasonable and necessary medical charges as awarded by the Arbitrator pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent authorize and pay for the treatment recommended by Dr. Gornet, including, but not limited to, lumbar disc replacement surgery.

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

December 3, 2021

o: 10/5/21
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0583

BARNETT, RENALDO
Employee/Petitioner

Case# **18WC017572**

19WC010089
19WC017211
19WC018234
19WC019621

IL DEPT OF TRANSPORTATION
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1430 BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

AUG 3 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Renaldo Barnett
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **18** WC **17572**

Consolidated cases:
19-WC-10089, 19-WC-17211
19-WC-18234, 19-WC-19621

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, Illinois**, on **June 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **May 22, 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 that 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 $**63,118.80**; the average weekly wage was $**1,213.82**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **4** 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 $**60,766.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,766.58**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Group Exhibit 1, as provided in §8(a) and §8.2 of the Act, as they relate to date of accident 5/22/18. The Arbitrator orders Respondent to pay $994.90 due and owing Alexander County Ambulance; $1,602.00 due and owing St. Francis Medical Center, $1,291.00 due and owing Cape Radiology Group, $23,634.20 due and owing MFG Spine, L.L.C.; $11,911.00 due and owing MRI Partners of Chesterfield; $3,128.00 due and owing Pain and Rehabilitation Specialists, LLC; $4,476.82 due and owing Orthopedic Ambulatory Surgery Center of Chesterfield; $2,366.00 due and owing CT Partners of Chesterfield; and $13,914.00 due and owing Center for Surgical Excellence. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, lumbar disc replacement surgery, as Petitioner has not reached maximum medical improvement.

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

7/29/20
Date

ICArbDec19(b)

AUG 3 - 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RENALDO BARNETT,	)		
	)		
Employee/Petitioner,	)		
	)		
v.	)	Case No.: 18-WC-17572	
	)		
ILLINOIS DEPARTMENT OF	)	Consolidated Case Nos.:	19-WC-10089
TRANSPORTATION,	)		19-WC-17211
	)		19-WC-18234
Employer/Respondent.	)		19-WC-19621

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Sections 19(b) and 8(a) of the Act. On August 19, 2019, the above-captioned case was consolidated with Case Nos. 19-WC-10089, 19-WC-17211, 19-WC-18234, and 19-WC-19621 by Arbitrator William Gallagher.

The parties agree that on May 22, 2018, Petitioner was employed by the Illinois Department of Transportation as a Highway Maintainer when he sustained injuries as the result of an automobile accident. The issues in dispute are causal connection (after MMI date determined by Section 12 examiner), medical expenses after January 22, 2019, prospective medical, and whether Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

On 5/22/18, Petitioner was a 36-year-old male employed as a Highway Maintainer with the Illinois Department of Transportation for approximately seven years. Petitioner testified that on 5/22/18 he and a co-worker were traveling along Route 3 picking up traffic signs. Petitioner was a restrained front seat passenger when his co-worker pulled off on the side of the road and came to a complete stop. Before his co-worker could shift the vehicle into park it was struck from the rear at a high rate of speed. Petitioner testified the vehicle he was in was knocked forward approximately 25 to 50 feet.

Petitioner was transported by ambulance to St. Francis Medical Center in Cape Girardeau, Missouri, where he complained of head, neck, and back pain. Petitioner testified he noticed pain in his left hip and leg, and now has occasional pain in his left foot and arm that radiates from his back and neck. Petitioner testified he has had no prior injuries, significant treatment, surgeries, or injections to his neck or back and did not have radiating pain in his leg or arm prior to this accident. Petitioner passed a pre-employment physical to begin his employment with Respondent.

Petitioner stated he was evaluated by Dr. Matthew Gornet who recommended physical therapy and advised Petitioner to lose weight. Petitioner testified he weighed 332 pounds at the time of the accident. Petitioner testified he underwent physical therapy and two injections in his low back that alleviated his symptoms for approximately one week.

On 2/2/19, Petitioner was released to return to light duty work with a 25-pound lifting restriction. Petitioner was assigned to drive a one-ton dump truck and haul tree brush. Petitioner testified he sustained an aggravation of his condition on 3/12/19 when he was driving a tandem dump truck into a deer pit to dump a load and he hit a big bump which caused the truck seat to jerk forward and then backwards. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner continued working light duty and on 4/17/19 he was driving a truck to the work site when he encountered a bumpy rock road, causing the seat to bounce and throw him sideways and forward. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner completed a third accident report that corroborates his testimony.

On 5/28/19, Petitioner suffered another injury when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed a fourth accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

Petitioner suffered another injury on 5/31/19 when he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner testified he had a physical altercation with his eighteen-year old son in February 2020 where Petitioner had to defend himself. Petitioner testified he did not sustain any

injuries as a result of that altercation. Petitioner also testified he had to defend himself against physical altercations with his wife on two occasions in July and August 2019, but did not sustain any injuries to his neck or back as a result of those altercations. At the time of arbitration Petitioner weighed 270 pounds and was losing weight in order to undergo a disc replacement surgery at L4-5 as recommended by Dr. Gornet. Petitioner testified his back surgery is scheduled on July 29, 2020.

Petitioner testified he has low back pain, numbness in his left leg, leg pain, pain in his hips, numbness in his left foot, and neck pain. He states his back pain is worse than his neck pain with daily pain being an 8 out of 10. He is currently taking Meloxicam and Cyclobenzaprine. He denies any injuries or aggravations of pain at home or around the house. He testified he wants to undergo the surgery recommended by Dr. Gornet because he wanted to get better and go back to work.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner was transported by ambulance to St. Francis Medical Center on 5/22/18 where he reported pain in his back, head, and neck as the result of a motor vehicle accident. He reported his symptoms were worsened by movement and he exhibited tenderness and pain in his cervical, thoracic, and lumbar spine. A thoracic and lumbar CT scan was performed that revealed a broad-based disc bulge at L3-4 with mild central canal stenosis, a broad-based disc bulge at L4-5 with mild central canal stenosis, and a disc protrusion at L5-S1 with moderate bilateral neural foraminal stenosis. Petitioner was discharged and instructed to follow up with further care.

On 6/4/18, Petitioner was evaluated by board certified orthopedic spine surgeon Dr. Matthew Gornet. Dr. Gornet noted Petitioner's symptoms were in his neck radiating to the left side, left trapezius, left shoulder and left scapula. Petitioner's low back pain was located in both sides of his buttocks, left hip, down the left leg and the lateral thigh to his knee with intermittent tingling. Dr. Gornet noted that after the accident, Petitioner was seen by his primary care physician at the Veterans Affairs Hospital and was taken off work. Dr. Gornet further noted that Petitioner did not have any previous significant problems with his neck or back prior to his work accident and had constant symptoms since the accident, including radicular symptoms in addition to his structural back pain. Petitioner's symptoms in his back were worsened by bending, lifting, and prolonged sitting or standing. His neck symptoms were worsened by reaching or pulling. Dr. Gornet recommended an MRI of the lumbar and cervical spine.

A lumbar MRI was performed on 6/4/18 that revealed a left lateral recess foraminal annular tear and protrusion at L4-5 resulting in mild left foraminal stenosis, and a left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in displacement. The MRI was reviewed by Dr. Gornet who noted the annular tear at L4-5 on the left as well as a small beaking of the disc on the left. He placed Petitioner off work and prescribed medications and physical therapy.

On 8/2/18, Petitioner returned to Dr. Gornet who noted Petitioner's low back pain continued into both sides and both buttocks, but more pronounced in the left buttock and left hip.

Petitioner's neck pain was also located more to the left side. A cervical MRI was performed that revealed an annular tear at C5-6 and a small foraminal disc protrusion at C3-4. Petitioner had undergone physical therapy to no benefit and Dr. Gornet recommended a steroid injection at L4-5 on the left. Dr. Gornet further recommended that Petitioner lose weight as he currently weighed 332 pounds.

Petitioner underwent a left L4-5 epidural steroid injection on 8/21/18 that provided temporary relief. When Petitioner returned to Dr. Gornet on 10/15/18 the short-term relief of his symptoms had worn off and his symptoms had returned. Dr. Gornet observed that Petitioner had lost 16 pounds since his last visit and encouraged him to continue losing weight. Dr. Gornet recommended additional diagnostic testing but wanted Petitioner's weight to reach 280 pounds. He continued Petitioner's medications and kept him off work.

On 1/22/19, Petitioner was evaluated by Dr. David Robson pursuant to Section 12 of the Act. Petitioner reported a consistent history of the accident and stated his neck pain had benefited from physical therapy but his main concern was the radiating low back and left anterior lateral thigh pain. Dr. Robson noted Petitioner underwent an epidural steroid injection that provided relief for only a few days. He noted no previous cervical or lumbar problems. Upon physical examination, Dr. Robson found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain. When considering the records, Dr. Robson noted that the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. However, Dr. Robson believed that Petitioner should accept his condition of ill-being because he did not believe Petitioner was a surgical candidate due to his weight. He opined that Petitioner required no further treatment.

Petitioner followed up with Dr. Gornet on 2/2/19 and reported persistent pain. Dr. Gornet again encouraged Petitioner to achieve his weight loss goals and get closer to 280 pounds. Dr. Gornet allowed Petitioner to return to work with a 25-pound lifting restriction.

Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. He further noted that Petitioner continued to lose weight and was 301 pounds on that date. He encouraged him to continue losing weight before obtaining additional studies.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

On 7/22/19, Petitioner returned to Dr. Gornet with continued discogenic neck and low back pain and radicular symptoms. Dr. Gornet observed that Petitioner had greatly reduced his weight and was down to 285 pounds. Dr. Gornet ordered a new MRI and a CT discogram at L4-5 and L5-S1, as well as an MRI spectroscopy of Petitioner's low back at L3 and S1.Petitioner

provided Dr. Gornet with a copy of the Section 12 report of Dr. Robson and Dr. Gornet disagreed with Dr. Robson's opinion that there was no indication for further treatment. Dr. Gornet dispensed medication to help manage Petitioner's symptoms.

Dr. Gornet was deposed on 8/26/19 and testified that after his review of Petitioner's medical records and his examination, he believed Petitioner's symptoms were consistent with a disc injury. Dr. Gornet testified the MRI showed an annular tear at L4-5 on the left, a small beaking of the disc, which represents a changing contour of the annulus, stating that normal changes in contour often represent a disc injury. Dr. Gornet observed changes at C5-6, and the left foraminal views showed an annular tear at C5-6 and a disc protrusion or a low herniation at C3-4.

Dr. Gornet testified that Petitioner had failed physical therapy and so a steroid injection was recommended at L4-5 on the left side. Dr. Gornet testified he did not believe Petitioner's weight was the cause of any of Petitioner's issues, only that it complicated treatment.

Dr. Gornet testified that the injection at L4-5 provided Petitioner with temporary relief, but the result was indicative that they were addressing the correct problem. He recommended Petitioner stay on anti-inflammatories and muscle relaxants, with the understanding that more testing and treatment were needed. Dr. Gornet ordered further imaging studies, including an MRI spectroscopy, where a chemical biopsy of the disc is taken and chemicals known to be a source of back pain are sought. He testified the study provides a physiologic assessment of a patient's back in addition to a static MRI, which is not predictive of pain. Dr. Gornet also clarified the importance of foraminal views of an MRI, stating that approximately 30 percent of disc pathology will be missed on a standard MRI, so the foraminal views give the most accurate diagnosis.

Dr. Gornet testified that Petitioner remained temporarily totally disabled as of 2/2/19, but was released to work with restrictions on 2/4/19. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet disagreed with Dr. Robson's opinion that nothing further should be done, noting that Petitioner was experiencing persistent pain, and he had not returned to his pre-accident baseline. Moreover, additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions. Dr. Gornet also believed Petitioner was highly motivated to alleviate his symptoms and was participating in his own treatment by losing approximately 50 pounds.

Petitioner underwent a CT discogram on 8/28/19, with facet blocks at left L4-5 and L5-S1, that revealed a provocative disc at L5-S1 with a posterior annular tear.

Petitioner was again evaluated by Dr. Robson at Respondent's request on 9/11/19. Petitioner reported additional dates of injury, including the injury on 4/17/19. Dr. Robson's diagnosis remained the same and he opined that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He continued to believe that Petitioner should accept his condition and symptoms and that no further treatment was needed. He opined that Petitioner could return to work without restrictions and had reached maximum medical improvement.

Petitioner returned to Dr. Gornet on 9/30/19 weighing 273 pounds. Dr. Gornet reviewed the imaging studies and noted the MRI spectroscopy revealed chemicals at L5-S1 and the CT discogram revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with a posterior annular tear. Dr. Gornet opined that based on the objective evidence, L5-S1 would require treatment. Dr. Gornet recommended one more injection at L5-S1, but noted once Petitioner reduced his weight to the 260s he would be a candidate for a lumbar disc replacement at L5-S1. He continued Petitioner's light duty work restrictions, although Petitioner was not working due to light duty not being available.

Dr. Robson was deposed on 1/4/20. Dr. Robson testified he met with Petitioner on two occasions, a second time due to receiving incomplete records. He testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant. Dr. Robson testified that his pertinent findings were that Petitioner had a normal neurologic exam of upper and lower extremities, reduction of sensation in the aspect of his left calf and minimal decrease in forward flexion of the lumbar spine. Dr. Robson testified he felt Petitioner had a cervical and lumbar strain as a result of the combination of accidents, where "the most recent one had made him worse".

Dr. Robson's diagnosis for Petitioner was cervical and lumbar strain, as well as disc protrusion at L4-5 and L5-S1. He testified that this condition was caused by the initial motor vehicle accident of 5/22/18. He believed that Petitioner riding in a one-ton work truck over bumpy roads would not worsen his symptoms, and there was no structural change with the CT scan when compared to the previous MRI. Dr. Robson testified that the structure of Petitioner's spine was fine and he could tolerate regular work. He opined no further treatment was necessary and Petitioner was at MMI as of 1/22/19. He testified that in September 2019 Petitioner remained in exactly the same condition.

Dr. Robson testified that if Petitioner's weight was reduced he could take on physical therapy on his own and live with his condition. He believed that Petitioner would have good days and bad days, he would have to learn what aggravates his symptoms and "back off that", and he would have to take anti-inflammatories depending on his job duties. Rather than restrictions at work, Dr. Robson opined Petitioner would need to be smart about his management of his spine. When asked his opinion of Petitioner's physical exertion level required at work, Dr. Robson opined it was heavy to very heavy.

Dr. Robson was not provided with Dr. Gornet's office notes from 9/3/19 or 1/6/20, or the MRI spectroscopy. Dr. Robson testified that while he believes disc replacement surgery is a good

procedure, he no longer performs the procedure due to the impossibility to get insurance approval.

As of 1/6/20, Dr. Gornet noted Petitioner's symptoms and planned treatment stayed the same, and he planned on a reevaluation in six to eight weeks to allow Petitioner more time to reach his target weight. On 5/30/20, Petitioner followed up with Dr. Gornet weighing 270 pounds. Dr. Gornet believed Petitioner was a surgical candidate and Petitioner wanted to move forward with surgery. A surgery date was tentatively scheduled. Medication and restrictions were continued and Dr. Gornet stated he believed Petitioner's ongoing symptoms were related to his work injury of 5/22/18.

CONCLUSIONS OF LAW

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

The parties stipulated Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 22, 2018. Respondent stipulated that it disputes causal connection only after the Section 12 examination by Dr. Robson on 1/22/19 who opined Petitioner reached MMI as of that date. Petitioner testified credibly and without rebuttal that prior to May 22, 2018, he was working full duty as a Highway Maintainer and did not have any pain, prior injuries, prior treatment, or restrictions with regard to his low back or neck. Petitioner's testimony and the medical records support that since May 22, 2018 Petitioner has suffered low back and neck pain requiring him to be kept off work or on light duty restrictions.

The Arbitrator finds Petitioner's testimony to be credible in light of the medical records submitted into evidence. There was no evidence presented at arbitration or in the depositions of Dr. Gornet or Dr. Robson to refute Petitioner's testimony with regard to his low back and neck symptoms or treatment prior to or after May 22, 2018. The Arbitrator also relies on the credible opinion of Dr. Gornet in finding a causal connection between Petitioner's low back and neck conditions and the May 22, 2018 work accident. The Arbitrator finds the opinions of Dr. Gornet to be persuasive, given the objective findings on Petitioner's MRI and CT discogram, the consistent history in Petitioner's medical records, Petitioner's lack of any significant pre-existing symptoms or treatment to his low back and neck before May 22, 2018, and his persistent complaints of pain in his low back and neck since the accident.

Further, Section 12 examiner, Dr. Robson, found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain upon examination. Dr. Robson agreed the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson also opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. The Arbitrator does not find persuasive Dr. Robson's opinion that Petitioner should accept his condition of ill-being, is not a surgical candidate due to his weight, that Petitioner reached MMI as of 1/22/19, or that Petitioner did not require further treatment as of that date.

Dr. Gornet credibly opined that additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. Dr. Gornet opined and the testimony supports that Petitioner is highly motivated to alleviate his symptoms by losing approximately 50 pounds to undergo surgery.

Based upon the foregoing, the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his neck and back are causally related to the accidental injury of May 22, 2018.

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

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Based upon the above findings as to causal connection and Dr. Gornet and Dr. Robson's testimony that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses thus far and is entitled to prospective care as he has not reached maximum medical improvement. Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1 as they relate to date of accident 5/22/18. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care for date of accident 5/22/18, and therefore orders Respondent to pay $994.90 due and owing Alexander County Ambulance; $1,602.00 due and owing St. Francis Medical Center, $1,291.00 due and owing Cape Radiology Group, $23,634.20 due and owing MFG Spine, L.L.C.; $11,911.00 due and owing MRI Partners of Chesterfield; $3,128.00 due and owing Pain and Rehabilitation Specialists, LLC; $4,476.82 due and owing Orthopedic Ambulatory Surgery Center of Chesterfield; $2,366.00 due and owing CT Partners of Chesterfield; and $13,914.00 due and owing Center for Surgical Excellence.

The Arbitrator further finds Petitioner is entitled to prospective medical care and orders Respondent to authorize and pay for the necessary treatment recommended by Dr. Gornet, including, but not limited to, lumbar disc replacement surgery.

Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for

any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Issue (O): Has Petitioner reached maximum medical improvement?

Based upon the Arbitrator's finding that Petitioner established his current condition of ill-being in his neck and back are causally related to the accidental injury of May 22, 2018, the credible opinions of Dr. Gornet that additional treatment is available that can cure and relieve Petitioner from the effects of his condition; and Petitioner's history of ongoing symptoms and the inability to work, the Arbitrator finds Petitioner has not reached maximum medical improvement and will not do so until released by Dr. Gornet postoperatively.

Arbitrator Linda J. Cantrell

7/29/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC010089
Case Name	BARNETT, RENALDO v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	18WC017572 19WC017211 19WC018234 19WC019621
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0584
Number of Pages of Decision	20
Decision Issued By	Thomas Tyrrell, Commisioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 12/3/2021

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0584

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 (Causation)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Renaldo Barnett,

Petitioner,

vs. NO: 19 WC 10089

IL Dept. of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with four additional cases. Case number 18 WC 17572 involves an earlier work injury that occurred on May 22, 2018. Case number 19 WC 17211 involves a subsequent work injury that occurred on April 17, 2019. Case number 19 WC 18234 involves a subsequent work injury that occurred on May 28, 2019. Finally, case number 19 WC 19621 involves a subsequent work injury that occurred on May 31, 2019. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Respondent raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner works as a highway maintainer for Respondent. Petitioner initially

injured his cervical and lumbar spine on May 22, 2018, when the dump truck in which he was a passenger was rear-ended at a high rate of speed. A June 2018 lumbar MRI revealed: 1) left lateral recess-foraminal annular tear and protrusion at L4-L5 resulting in mild left foraminal stenosis but no central canal or right foraminal stenosis; and 2) left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in dural displacement but no definite central canal or foraminal stenosis. A cervical MRI revealed: 1) questionable small central protrusion at C5-C6 without definite left sided foraminal component; and 2) mild right foraminal narrowing at C4-C5, possibly a small disc protrusion. Dr. Gornet, Petitioner's treating doctor, interpreted the lumbar MRI as showing a possible annular tear at L4-L5 on the left as well as small breaking of the disc on the left. He interpreted the cervical MRI as showing an annular tear at C5-C6 and a small foraminal disc protrusion at C3-C4.

Petitioner initially underwent conservative treatment including physical therapy and lumbar injections. However, this treatment failed to provide significant relief. On October 15, 2018, Dr. Gornet recommended Petitioner undergo a CT discogram at L4-L5 and an MRI spectroscopy at L3-S1. However, the doctor put these diagnostic tests on hold until Petitioner lowered his weight to 280 pounds from his then current weight of 316 pounds On February 2, 2019, Petitioner complained of ongoing cervical and lumbar pain. Petitioner had not lost any weight and Dr. Gornet determined he was unable to move forward with further evaluation of Petitioner's condition until Petitioner weighed 280 pounds. He released Petitioner to return to work with a 25-pound weight limit.

Petitioner returned to work and sustained this current injury on March 12, 2019. On that date, he sustained an injury to his cervical and lumbar spine while driving a dump truck in the "deer pit" on I-57. Petitioner testified that he drove over a large bump in the road and the driver's seat caused him to jerk back and forth. He testified that the jerking motion aggravated his low back and cervical spine condition. Petitioner visited the ER that day and reported that the work incident exacerbated his back pain. On April 1, 2019, Petitioner complained of continued neck and back pain to Dr. Gornet. Dr. Gornet believed this recent work incident only temporarily aggravated Petitioner's underlying condition. He continued to recommend a lumbar CT discogram and/or MRI spectroscopy once he lost the recommended amount of weight and returned Petitioner to work.

Petitioner testified he sustained a third work injury while driving a dump truck on April 17, 2019. He testified that he once again drove over a large bump in the road. Petitioner testified that he aggravated his neck and back symptoms due to this incident. He visited the ER that day and CT scans of his thoracic and lumbar spine as well as his cervical spine were performed. Petitioner continued to work and sustained a fourth work injury on May 28, 2019. On that date, he was working with a crew patching potholes on the highway when a car came speeding through the area. Petitioner testified that he had to run and dodge the speeding car, and this caused him to temporarily aggravate his low back and neck. Petitioner visited the ER that day. Petitioner again continued to work. Finally, on May 31, 2019, Petitioner temporarily aggravated his condition when he drove a dump truck over a bump in the road. Petitioner once again visited the ER and complained of increased low back pain.

On June 4, 2019, Petitioner spoke with Dr. Gornet's physician assistant via telephone. Petitioner complained of increasing low back pain. While Petitioner reported no new trauma, he

stated work activities such as driving a one-ton truck and extended periods of mowing significantly increased his low back pain. Petitioner's work restrictions were increased and included restrictions from driving the one-ton truck and mowing. Petitioner testified that Respondent was not able to accommodate these additional restrictions. Petitioner continued to follow up with Dr. Gornet and eventually underwent the recommended CT discogram and MRI spectroscopy in early fall 2019. After reviewing the results of these diagnostic studies, Dr. Gornet determined Petitioner required treatment at L5-S1. He performed an injection at L4-L5 in October 2019. Dr. Gornet recommended lumbar disc replacement surgery if Petitioner reached 270 pounds. Finally, in May 2020 Petitioner reached the recommended weight of 270 pounds and Dr. Gornet determined that he would move forward with the recommended surgery. Petitioner continues to complain of cervical and lumbar pain and testified that he would like to proceed with the surgery.

Dr. Gornet testified via evidence deposition at Petitioner's request on August 26, 2019. He testified that Petitioner never has returned to the condition he enjoyed prior to the initial work incident on May 22, 2018. He further testified that the subsequent four work incidents identified by Petitioner were temporary aggravations that did not change the trajectory of his cervical and lumbar condition. Dr. Gornet also testified that the subsequent work incidents did not change the structural pathology revealed in the MRIs performed in June 2018 following his initial work accident. Dr. Robson, Respondent's Section 12 examiner, also concluded that the work incidents Petitioner identified as occurring after the initial May 22, 2018, injury were temporary aggravations of Petitioner's underlying condition.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's conclusion that Petitioner's current condition of ill-being is causally related to the March 12, 2019, work incident. The Commission otherwise affirms and adopts the remainder of the Arbitrator's Decision.

Illinois courts have stated that it is irrelevant whether a subsequent event aggravated a claimant's condition. *See Par Electric v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC at ¶56. An employer is liable for every natural consequence that flows from a work-related injury unless the chain of causation is broken by an independent intervening accident. *See id*. at ¶63. The subsequent incident is an intervening cause only if it "…completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being." *Id*. at ¶56.

The Commission finds the credible evidence shows that Petitioner suffered only a temporary aggravation of his underlying condition due to this work incident. The only treatment Petitioner received relating to this incident occurred during his ER visit on the date of accident. Petitioner testified that he did not sustain a new injury due to this incident. Dr. Gornet, testified that none of the identified work incidents that occurred after May 22, 2018, changed the structural pathology seen in the MRIs taken soon after that initial injury. Likewise, both Drs. Gornet and Robson determined that the work incidents that occurred after the initial May 22, 2018, accident resulted in only temporary aggravations of Petitioner's underlying condition. Furthermore,

Petitioner testified that the increased pain he felt following this incident resolved that same day. Following this incident, Petitioner continued to work, and no doctor limited his work capabilities as a result of this incident. The medical records show that Petitioner's symptoms did not significantly or permanently change as a result of this incident. There is simply no evidence in the record that the May 12, 2019, work incident was an intervening event that broke the chain of causation from Petitioner's May 22, 2018, injury to his current complaints and the pending surgical recommendation.

The Commission notes that the Arbitrator appears to have reached this same conclusion. In explaining her reasoning, the Arbitrator wrote, "The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18." (Arb. Dec. at pg. 9). The Arbitrator also determined that Petitioner was not entitled to prospective medical treatment because this work incident was only a temporary aggravation of Petitioner's condition that resolved that same day. However, the Arbitrator later wrote, "…the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of March 12, 2019." (Arb. Dec. at pg. 10). In a separate Decision, the Commission affirmed the Arbitrator's conclusion that Petitioner's current condition is causally related to his original May 22, 2018, work incident. The Commission also affirmed the Arbitrator's award of prospective medical treatment in the form of the lumbar surgery recommended by Dr. Gornet. Illinois law does not allow for a finding that a claimant's current condition is causally related to more than one incident.

For the foregoing reasons the Commission finds the March 12, 2019, work incident resulted in only a temporary aggravation of Petitioner's condition that resolved that same day. Thus, the Commission finds Petitioner's current condition of ill-being is not causally related to this work incident.

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 August 3, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being **is not** causally related to the March 12, 2019, work accident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges as awarded by the Arbitrator pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that prospective medical treatment is denied as Petitioner's current condition of ill-being and the need for additional treatment is causally related to his May 22, 2018, work injury.

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

December 3, 2021

o: 10/5/21
TJT/jds
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

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

21IWCC0584

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

BARNETT, RENALDO
Employee/Petitioner

Case# **19WC010089**

18WC017572
19WC017211
19WC018234
19WC019621

IL DEPT OF TRANSPORTATON
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
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0558 ASSISTANT ATTORNEY GENERAL
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1430 BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

AUG 3 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Renaldo Barnett
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **19**-WC-**10089**

Consolidated cases: **18-WC-17572**
19-WC-17211
19-WC-18234
19-WC-19621

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, Illinois**, on **June 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **March 12, 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 that 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 $**63,118.80**; the average weekly wage was $**1,213.82**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **4** 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 $**60,766.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,766.58**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Group Exhibit 1, as provided in §8(a) and §8.2 of the Act, as they relate to date of accident 3/12/19. The Arbitrator orders Respondent to pay $1,804.14 due and owing St. Francis Medical Center and $197.00 due and owing MFG Spine, L.L.C. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Petitioner is not entitled to prospective medical care as Petitioner has reached maximum medical improvement related to the temporary aggravation of his low back condition on 3/12/19.

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

7/29/20
Date

ICArbDec19(b)

AUG 3 - 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RENALDO BARNETT,	)		
	)		
Employee/Petitioner,	)		
	)		
v.	)	Case No.: 19-WC-10089	
	)		
ILLINOIS DEPARTMENT OF	)	Consolidated Case Nos.:	18-WC-17572
TRANSPORTATION,	)		19-WC-17211
	)		19-WC-18234
Employer/Respondent.	)		19-WC-19621

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Sections 19(b) and 8(a) of the Act. On August 19, 2019, the above-captioned case was consolidated with Case Nos. 18-WC-17572, 19-WC-17211, 19-WC-18234, and 19-WC-19621 by Arbitrator William Gallagher.

The parties agree that on March 12, 2019 Petitioner was employed by the Illinois Department of Transportation as a Highway Maintainer. The issues in dispute are accident, causal connection, medical expenses, prospective medical, and whether Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner has worked as a Highway Maintainer for Respondent's Department of Transportation for seven years and was 36 years old at the time of this accident. Petitioner alleges he initially injured his neck and back on May 22, 2018 (Consolidated Case No. 18-WC-17572) and aggravated his low back condition on March 12, 2019 while operating a one-ton dump truck for Respondent.

Petitioner testified that on 5/22/18 he and a co-worker were traveling along Route 3 picking up traffic signs. Petitioner was a restrained front seat passenger when his co-worker pulled off on the side of the road and came to a complete stop. Before his co-worker could shift the vehicle into park it was struck from the rear at a high rate of speed. Petitioner testified the vehicle he was in was knocked forward approximately 25 to 50 feet.

Petitioner was transported by ambulance to St. Francis Medical Center in Cape Girardeau, Missouri, where he complained of head, neck, and back pain. Petitioner testified he noticed pain in his left hip and leg, and now has occasional pain in his left foot and arm that radiates from his back and neck. Petitioner testified he has had no prior injuries, significant treatment, surgeries, or injections to his neck or back and did not have radiating pain in his leg or arm prior to this accident. Petitioner passed a pre-employment physical to begin his employment with Respondent.

Petitioner stated he was evaluated by Dr. Matthew Gornet who recommended physical therapy and advised Petitioner to lose weight. Petitioner testified he weighed 332 pounds at the time of the accident. Petitioner testified he underwent physical therapy and two injections in his low back that alleviated his symptoms for approximately one week.

On 2/2/19, Petitioner was released to return to light duty work with a 25-pound lifting restriction. Petitioner was assigned to drive a one-ton dump truck and haul tree brush. Petitioner testified he sustained an aggravation of his condition on 3/12/19 when he was driving a tandem dump truck into a deer pit to dump a load and he hit a big bump which caused the truck seat to jerk forward and then backwards. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner continued working light duty and on 4/17/19 he was driving a truck to the work site when he encountered a bumpy rock road, causing the seat to bounce and throw him sideways and forward. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner completed a third accident report that corroborates his testimony.

On 5/28/19, Petitioner suffered another injury when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed a fourth accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

Petitioner suffered another injury on 5/31/19 when he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner testified he had a physical altercation with his eighteen-year old son in February 2020 where Petitioner had to defend himself. Petitioner testified he did not sustain any

injuries as a result of that altercation. Petitioner also testified he had to defend himself against physical altercations with his wife on two occasions in July and August 2019, but did not sustain any injuries to his neck or back as a result of those altercations. At the time of arbitration Petitioner weighed 270 pounds and was losing weight in order to undergo a disc replacement surgery at L4-5 as recommended by Dr. Gornet. Petitioner testified his back surgery is scheduled on July 29, 2020.

Petitioner testified he has low back pain, numbness in his left leg, leg pain, pain in his hips, numbness in his left foot, and neck pain. He states his back pain is worse than his neck pain with daily pain being an 8 out of 10. He is currently taking Meloxicam and Cyclobenzaprine. He denies any injuries or aggravations of pain at home or around the house. He testified he wants to undergo the surgery recommended by Dr. Gornet because he wanted to get better and go back to work.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner was transported by ambulance to St. Francis Medical Center on 5/22/18 where he reported pain in his back, head, and neck as the result of a motor vehicle accident. He reported his symptoms were worsened by movement and he exhibited tenderness and pain in his cervical, thoracic, and lumbar spine. A thoracic and lumbar CT scan was performed that revealed a broad-based disc bulge at L3-4 with mild central canal stenosis, a broad-based disc bulge at L4-5 with mild central canal stenosis, and a disc protrusion at L5-S1 with moderate bilateral neural foraminal stenosis. Petitioner was discharged and instructed to follow up with further care.

On 6/4/18, Petitioner was evaluated by board certified orthopedic spine surgeon Dr. Matthew Gornet. Dr. Gornet noted Petitioner's symptoms were in his neck radiating to the left side, left trapezius, left shoulder and left scapula. Petitioner's low back pain was located in both sides of his buttocks, left hip, down the left leg and the lateral thigh to his knee with intermittent tingling. Dr. Gornet noted that after the accident, Petitioner was seen by his primary care physician at the Veterans Affairs Hospital and was taken off work. Dr. Gornet further noted that Petitioner did not have any previous significant problems with his neck or back prior to his work accident and had constant symptoms since the accident, including radicular symptoms in addition to his structural back pain. Petitioner's symptoms in his back were worsened by bending, lifting, and prolonged sitting or standing. His neck symptoms were worsened by reaching or pulling. Dr. Gornet recommended an MRI of the lumbar and cervical spine.

A lumbar MRI was performed on 6/4/18 that revealed a left lateral recess foraminal annular tear and protrusion at L4-5 resulting in mild left foraminal stenosis, and a left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in displacement. The MRI was reviewed by Dr. Gornet who noted the annular tear at L4-5 on the left as well as a small beaking of the disc on the left. He placed Petitioner off work and prescribed medications and physical therapy.

On 8/2/18, Petitioner returned to Dr. Gornet who noted Petitioner's low back pain continued into both sides and both buttocks, but more pronounced in the left buttock and left hip.

Petitioner's neck pain was also located more to the left side. A cervical MRI was performed that revealed an annular tear at C5-6 and a small foraminal disc protrusion at C3-4. Petitioner had undergone physical therapy to no benefit and Dr. Gornet recommended a steroid injection at L4-5 on the left. Dr. Gornet further recommended that Petitioner lose weight as he currently weighed 332 pounds.

Petitioner underwent a left L4-5 epidural steroid injection on 8/21/18 that provided temporary relief. When Petitioner returned to Dr. Gornet on 10/15/18 the short-term relief of his symptoms had worn off and his symptoms had returned. Dr. Gornet observed that Petitioner had lost 16 pounds since his last visit and encouraged him to continue losing weight. Dr. Gornet recommended additional diagnostic testing but wanted Petitioner's weight to reach 280 pounds. He continued Petitioner's medications and kept him off work.

On 1/22/19, Petitioner was evaluated by Dr. David Robson pursuant to Section 12 of the Act. Petitioner reported a consistent history of the accident and stated his neck pain had benefited from physical therapy but his main concern was the radiating low back and left anterior lateral thigh pain. Dr. Robson noted Petitioner underwent an epidural steroid injection that provided relief for only a few days. He noted no previous cervical or lumbar problems. Upon physical examination, Dr. Robson found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain. When considering the records, Dr. Robson noted that the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. However, Dr. Robson believed that Petitioner should accept his condition of ill-being because he did not believe Petitioner was a surgical candidate due to his weight. He opined that Petitioner required no further treatment.

Petitioner followed up with Dr. Gornet on 2/2/19 and reported persistent pain. Dr. Gornet again encouraged Petitioner to achieve his weight loss goals and get closer to 280 pounds. Dr. Gornet allowed Petitioner to return to work with a 25-pound lifting restriction.

Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. He further noted that Petitioner continued to lose weight and was 301 pounds on that date. He encouraged him to continue losing weight before obtaining additional studies.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

On 7/22/19, Petitioner returned to Dr. Gornet with continued discogenic neck and low back pain and radicular symptoms. Dr. Gornet observed that Petitioner had greatly reduced his weight and was down to 285 pounds. Dr. Gornet ordered a new MRI and a CT discogram at L4-5 and L5-S1, as well as an MRI spectroscopy of Petitioner's low back at L3 and S1.Petitioner

provided Dr. Gornet with a copy of the Section 12 report of Dr. Robson and Dr. Gornet disagreed with Dr. Robson's opinion that there was no indication for further treatment. Dr. Gornet dispensed medication to help manage Petitioner's symptoms.

Dr. Gornet was deposed on 8/26/19 and testified that after his review of Petitioner's medical records and his examination, he believed Petitioner's symptoms were consistent with a disc injury. Dr. Gornet testified the MRI showed an annular tear at L4-5 on the left, a small beaking of the disc, which represents a changing contour of the annulus, stating that normal changes in contour often represent a disc injury. Dr. Gornet observed changes at C5-6, and the left foraminal views showed an annular tear at C5-6 and a disc protrusion or a low herniation at C3-4.

Dr. Gornet testified that Petitioner had failed physical therapy and so a steroid injection was recommended at L4-5 on the left side. Dr. Gornet testified he did not believe Petitioner's weight was the cause of any of Petitioner's issues, only that it complicated treatment.

Dr. Gornet testified that the injection at L4-5 provided Petitioner with temporary relief, but the result was indicative that they were addressing the correct problem. He recommended Petitioner stay on anti-inflammatories and muscle relaxants, with the understanding that more testing and treatment were needed. Dr. Gornet ordered further imaging studies, including an MRI spectroscopy, where a chemical biopsy of the disc is taken and chemicals known to be a source of back pain are sought. He testified the study provides a physiologic assessment of a patient's back in addition to a static MRI, which is not predictive of pain. Dr. Gornet also clarified the importance of foraminal views of an MRI, stating that approximately 30 percent of disc pathology will be missed on a standard MRI, so the foraminal views give the most accurate diagnosis.

Dr. Gornet testified that Petitioner remained temporarily totally disabled as of 2/2/19, but was released to work with restrictions on 2/4/19. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet disagreed with Dr. Robson's opinion that nothing further should be done, noting that Petitioner was experiencing persistent pain, and he had not returned to his pre-accident baseline. Moreover, additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions. Dr. Gornet also believed Petitioner was highly motivated to alleviate his symptoms and was participating in his own treatment by losing approximately 50 pounds.

Petitioner underwent a CT discogram on 8/28/19, with facet blocks at left L4-5 and L5-S1, that revealed a provocative disc at L5-S1 with a posterior annular tear.

Petitioner was again evaluated by Dr. Robson at Respondent's request on 9/11/19. Petitioner reported additional dates of injury, including the injury on 4/17/19. Dr. Robson's diagnosis remained the same and he opined that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He continued to believe that Petitioner should accept his condition and symptoms and that no further treatment was needed. He opined that Petitioner could return to work without restrictions and had reached maximum medical improvement.

Petitioner returned to Dr. Gornet on 9/30/19 weighing 273 pounds. Dr. Gornet reviewed the imaging studies and noted the MRI spectroscopy revealed chemicals at L5-S1 and the CT discogram revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with a posterior annular tear. Dr. Gornet opined that based on the objective evidence, L5-S1 would require treatment. Dr. Gornet recommended one more injection at L5-S1, but noted once Petitioner reduced his weight to the 260s he would be a candidate for a lumbar disc replacement at L5-S1. He continued Petitioner's light duty work restrictions, although Petitioner was not working due to light duty not being available.

Dr. Robson was deposed on 1/4/20. Dr. Robson testified he met with Petitioner on two occasions, a second time due to receiving incomplete records. He testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant. Dr. Robson testified that his pertinent findings were that Petitioner had a normal neurologic exam of upper and lower extremities, reduction of sensation in the aspect of his left calf and minimal decrease in forward flexion of the lumbar spine. Dr. Robson testified he felt Petitioner had a cervical and lumbar strain as a result of the combination of accidents, where "the most recent one had made him worse".

Dr. Robson's diagnosis for Petitioner was cervical and lumbar strain, as well as disc protrusion at L4-5 and L5-S1. He testified that this condition was caused by the initial motor vehicle accident of 5/22/18. He believed that Petitioner riding in a one-ton work truck over bumpy roads would not worsen his symptoms, and there was no structural change with the CT scan when compared to the previous MRI. Dr. Robson testified that the structure of Petitioner's spine was fine and he could tolerate regular work. He opined no further treatment was necessary and Petitioner was at MMI as of 1/22/19. He testified that in September 2019 Petitioner remained in exactly the same condition.

Dr. Robson testified that if Petitioner's weight was reduced he could take on physical therapy on his own and live with his condition. He believed that Petitioner would have good days and bad days, he would have to learn what aggravates his symptoms and "back off that", and he would have to take anti-inflammatories depending on his job duties. Rather than restrictions at work, Dr. Robson opined Petitioner would need to be smart about his management of his spine. When asked his opinion of Petitioner's physical exertion level required at work, Dr. Robson opined it was heavy to very heavy.

Dr. Robson was not provided with Dr. Gornet's office notes from 9/3/19 or 1/6/20, or the MRI spectroscopy. Dr. Robson testified that while he believes disc replacement surgery is a good

procedure, he no longer performs the procedure due to the impossibility to get insurance approval.

As of 1/6/20, Dr. Gornet noted Petitioner's symptoms and planned treatment stayed the same, and he planned on a reevaluation in six to eight weeks to allow Petitioner more time to reach his target weight. On 5/30/20, Petitioner followed up with Dr. Gornet weighing 270 pounds. Dr. Gornet believed Petitioner was a surgical candidate and Petitioner wanted to move forward with surgery. A surgery date was tentatively scheduled. Medication and restrictions were continued and Dr. Gornet stated he believed Petitioner's ongoing symptoms were related to his work injury of 5/22/18.

CONCLUSIONS OF LAW

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

The Supreme Court held that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

Petitioner's injuries were aggravated in the course of his duties. 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*, 117 Ill.2d 38 (1987). Stated another way:

> [A]n injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003).

In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** (when the risk is a neutral risk encountered during the course of employment) that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.*; *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC. This increased risk may be **qualitative**, such as some aspect of employment that contributes to risk, **or** quantitative, such as the number of times they are required to encounter the risk. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 284, 290 (4th Dist. 2013).

As noted by the Appellate Court in *Accolade*, one cannot dismiss an injury that occurs during a routine, uneventful motion such as reaching, simply because the motion itself is not peculiar, if at the time of the occurrence the "claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties." *Accolade v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 901, 908. (3d Dist. 2013). In *Don Young v. Illinois Workers' Comp. Comm'n*, the Court held that even if the act of "reaching" was one performed by the general public on a daily basis, the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury. *Don Young v. Illinois Workers' Comp. Comm'n*, 13 N.E.3d 1252 (4th Dist. 2014). The Court stated, "When a claimant is injured due to an employment-related risk – a risk distinctly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Id.* N.E.2d at 1258-1259. Moreover, a claim a neutral risk is not barred where a claimant can prove an increased risk of injury by this neutral risk. *Village of Villa Park v. Illinois Workers' Comp. Comm'n*, 3 N.E.3d 885 (2nd Dist. 2013).

In *Adcock v. Illinois Workers' Comp. Comm'n*, the Appellate Court found that a welder, who was constantly "swiveling" in his work chair, was subject to a qualitative increased risk of injury, because his job required him to turn in his chair more frequently than members of the general public. The Court thus found that his injury arose out of his employment. *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC.

The Commission has concluded in several cases that distractions caused by interaction with students or patients constitute an increased risk of injury. In *Gloria McGlasson v. SOI/Alton Mental Health*, the claimant was a Social Worker who suffered injury when she "stepped off the sidewalk," fell, and broke her left arm and shoulder. *Gloria McGlasson v. SOI/Alton Mental Health Ctr.*, 18 I.W.C.C. 0373. At the time she fell, she had diverted her attention to a patient behind her who queried her about the progress on his paperwork. *Id.* She "turned her head to answer him and as she went forward she fell on the sidewalk in front of the building." *Id.* In awarding compensation for a compensable accident, the Arbitrator and the Commission concluded that the distraction constituted an increased risk that arose out of her employment and stated, "Although Petitioner actually fell because of her own misstep, the Arbitrator finds the misstep was caused by her attention being focused on the patient with whom she was talking, rather than on where she was walking." *Id.*

In *Donna Miller v. Berwyn North School Dist. # 98*, the claimant was a school teacher going to pick up her students from recess. *Donna Miller v. Berwyn North School Dist. # 98*, 18 I.W.C.C. 0409. As she was walking down the stairs, a student from a co-teacher's class walked by and said, "Hi, Ms. Miller." *Id.* She then turned and looked over her left shoulder to say hello, at which point she stepped and fell down the stairs. *Id.* The employer disputed accident, but the Arbitrator and the Commission concluded that the petitioner's injuries arose out of and in the course of her employment, stating, "[T]he basis for which compensation is being awarded here is not based upon any defect but rather Petitioner's increased risk of injury because she was distracted by a student talking to her . . ." *Id.*

In *Kram v. SOI/Vienna Correctional Center.*, the Commission held that the claimant, a Correctional Officer, sustained a compensable injury when he injured his knee while stepping

down stairs to the landing on his way to take corrective action against two inmates breaking line formation. *Kram v. SOI/Vienna Corr. Ctr.*, 15 I.W.C.C. 0286. He testified that the insubordinate inmates diverted his attention from where he was stepping and resulted in his left knee injury. *Id.* The Commission confirmed the Arbitrator's award of benefits, finding that such a distraction constituted a qualitative increased risk. *Id.*

Petitioner testified and the accident report reflects he was performing tasks at the direction of Respondent and exposed to a risk of injury greater than that of the general public when he was operating a dump truck, driving on uneven terrain, and jerked in various directions. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner's supervisor was present at trial as a representative of Respondent and was not called to testify to rebut Petitioner's testimony.

Based upon the aforementioned law and Petitioner's credible testimony, the Arbitrator finds that Petitioner met his burden in proving he sustained accidental injuries that arose out of and the course of his employment with Respondent.

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

The parties stipulated Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 22, 2018 (Consolidated Case No. 18-WC-17572). However, Respondent disputes that Petitioner's accident on 3/12/19 aggravated his condition and takes the position that any treatment after Dr. Robson's Section 12 examination on 1/22/19 is not causally related to Petitioner's injuries. The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18.

Petitioner testified credibly and without rebuttal that prior to May 22, 2018 he was working full duty as a Highway Maintainer and did not have any pain, prior injuries, prior treatment, or restrictions with regard to his low back or neck. Petitioner's testimony and the medical records support that since 5/22/18 Petitioner has suffered low back and neck pain requiring him to be kept off work or on light duty restrictions.

Petitioner was released to return to light duty work on 2/2/19 as the result of his injuries that occurred on 5/22/18. Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner testified he felt an immediate onset of aggravating pain in his low back and into his left leg after the 3/12/19 incident. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner's physical exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. Dr. Gornet related that Petitioner

experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions.

The Arbitrator finds Petitioner's testimony to be credible in light of the medical records submitted into evidence. There was no evidence presented at arbitration or in the depositions of Dr. Gornet or Dr. Robson to refute Petitioner's testimony with regard to his low back and neck symptoms or treatment prior to or after May 22, 2018. The Arbitrator also relies on the credible opinion of Dr. Gornet in finding a causal connection between Petitioner's low back condition and the March 12, 2019 aggravation.

Based upon the foregoing, the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of March 12, 2019.

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

Based upon the above findings as to causal connection and Dr. Gornet's testimony that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses related to the aggravation of his injuries on 3/12/19. Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1 as they relate to date of accident 3/12/19. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care, and therefore orders Respondent to pay $1,804.14 due and owing St. Francis Medical Center and $197.00 due and owing MFG Spine, L.L.C.

Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Gornet opined that the incident on 3/12/19 was a temporary aggravation of Petitioner's low back condition and Petitioner's job duties would continue to aggravate Petitioner's condition unless more stringent restrictions were ordered. On 6/4/19, Dr. Gornet provided further work restrictions

to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions and has been off work since. Therefore, the Arbitrator finds the incident dated 3/12/19 caused a temporary aggravation of Petitioner's condition for which he was taken off work in order that his condition return to a pre-accident baseline and he is not entitled to prospective medical care related to the aggravation that occurred on 3/12/19.

Issue (O): Has Petitioner reached maximum medical improvement?

Based upon the Arbitrator's finding that the incident dated 3/12/19 caused a temporary aggravation of Petitioner's low back condition for which he was taken off work in order that his condition return to pre-accident baseline, the Arbitrator finds Petitioner has reached maximum medical improvement for the aggravation that occurred on 3/12/19.

Arbitrator Linda J. Cantrell

7/29/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC017211
Case Name	BARNETT, RENALDO v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	18WC017572 19WC010089 19WC018234 19WC019621
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0585
Number of Pages of Decision	20
Decision Issued By	Thomas Tyrrell, Commisioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 12/3/2021

/s/ Thomas Tyrrell, Commissioner

Signature

21IWCC0585

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 (Causation)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Renaldo Barnett,

Petitioner,

vs. NO: 19 WC 17211

IL Dept. of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with four additional cases. Case number 18 WC 17572 involves an earlier work injury that occurred on May 22, 2018. Case number 19 WC 10089 involves an earlier work injury that occurred on May 12, 2019. Case number 19 WC 18234 involves a subsequent work injury that occurred on May 28, 2019. Finally, case number 19 WC 19621 involves a subsequent work injury that occurred on May 31, 2019. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Respondent raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner works as a highway maintainer for Respondent. Petitioner initially injured his cervical and lumbar spine on May 22, 2018, when the dump truck in which he was a

passenger was rear-ended at a high rate of speed. A June 2018 lumbar MRI revealed: 1) left lateral recess-foraminal annular tear and protrusion at L4-L5 resulting in mild left foraminal stenosis but no central canal or right foraminal stenosis; and 2) left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in dural displacement but no definite central canal or foraminal stenosis. A cervical MRI revealed: 1) questionable small central protrusion at C5-C6 without definite left sided foraminal component; and 2) mild right foraminal narrowing at C4-C5, possibly a small disc protrusion. Dr. Gornet, Petitioner's treating doctor, interpreted the lumbar MRI as showing a possible annular tear at L4-L5 on the left as well as small breaking of the disc on the left. He interpreted the cervical MRI as showing an annular tear at C5-C6 and a small foraminal disc protrusion at C3-C4.

Petitioner initially underwent conservative treatment including physical therapy and lumbar injections. However, this treatment failed to provide significant relief. On October 15, 2018, Dr. Gornet recommended Petitioner undergo a CT discogram at L4-L5 and an MRI spectroscopy at L3-S1. However, the doctor put these diagnostic tests on hold until Petitioner lowered his weight to 280 pounds from his then current weight of 316 pounds On February 2, 2019, Petitioner complained of ongoing cervical and lumbar pain. Petitioner had not lost any weight and Dr. Gornet determined he was unable to move forward with further evaluation of Petitioner's condition until Petitioner weighed 280 pounds. He released Petitioner to return to work with a 25-pound weight limit.

Petitioner returned to work and sustained a second work-related injury on March 12, 2019. On that date, he sustained an injury to his cervical and lumbar spine while driving a dump truck in the "deer pit" on I-57. Petitioner testified that he drove over a large bump in the road and the driver's seat caused him to jerk back and forth. He testified that the jerking motion aggravated his low back and cervical spine condition. Petitioner visited the ER that day and reported that the work incident exacerbated his back pain. On April 1, 2019, Petitioner complained of continued neck and back pain to Dr. Gornet. Dr. Gornet believed this recent work incident only temporarily aggravated Petitioner's underlying condition. He continued to recommend a lumbar CT discogram and/or MRI spectroscopy once he lost the recommended amount of weight and returned Petitioner to work.

Petitioner testified he sustained this current work injury while driving a dump truck on April 17, 2019. He testified that he once again drove over a large bump in the road. He visited the ER that day and reported his chronic low back pain worsened when he was jolted while riding in a dump truck. CT scans of his thoracic and lumbar spine as well as his cervical spine were performed that day. Petitioner testified that he aggravated his neck and back symptoms due to this incident. Petitioner continued to work and sustained a fourth work injury on May 28, 2019. On that date, he was working with a crew patching potholes on the highway when a car came speeding through the area. Petitioner testified that he had to run and dodge the speeding car, and this caused him to temporarily aggravate his low back and neck. Petitioner visited the ER that day. Petitioner again continued to work. Finally, on May 31, 2019, Petitioner temporarily aggravated his condition when he drove a dump truck over a bump in the road. Petitioner once again visited the ER and complained of increased low back pain.

On June 4, 2019, Petitioner spoke with Dr. Gornet's physician assistant via telephone. Petitioner complained of increasing low back pain. While Petitioner reported no new trauma, he

stated work activities such as driving a one-ton truck and extended periods of mowing significantly increased his low back pain. Petitioner's work restrictions were increased and included restrictions from driving the one-ton truck and mowing. Petitioner testified that Respondent was not able to accommodate these additional restrictions. Petitioner continued to follow up with Dr. Gornet and eventually underwent the recommended CT discogram and MRI spectroscopy in early fall 2019. After reviewing the results of these diagnostic studies, Dr. Gornet determined Petitioner required treatment at L5-S1. He performed an injection at L4-L5 in October 2019. Dr. Gornet recommended lumbar disc replacement surgery if Petitioner reached 270 pounds. Finally, in May 2020 Petitioner reached the recommended weight of 270 pounds and Dr. Gornet determined that he would move forward with the recommended surgery. Petitioner continues to complain of cervical and lumbar pain and testified that he would like to proceed with the surgery.

Dr. Gornet testified via evidence deposition at Petitioner's request on August 26, 2019. He testified that Petitioner never has returned to the condition he enjoyed prior to the initial work incident on May 22, 2018. He further testified that the subsequent four work incidents identified by Petitioner were temporary aggravations that did not change the trajectory of his cervical and lumbar condition. Dr. Gornet also testified that the subsequent work incidents did not change the structural pathology revealed in the MRIs performed in June 2018 following his initial work accident. Dr. Robson, Respondent's Section 12 examiner, also concluded that the work incidents Petitioner identified as occurring after the initial May 22, 2018, injury were temporary aggravations of Petitioner's underlying condition.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's conclusion that Petitioner's current condition of ill-being is causally related to the April 17, 2019, work incident. The Commission otherwise affirms and adopts the remainder of the Arbitrator's Decision.

Illinois courts have stated that it is irrelevant whether a subsequent event aggravated a claimant's condition. *See Par Electric v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC at ¶56. An employer is liable for every natural consequence that flows from a work-related injury unless the chain of causation is broken by an independent intervening accident. *See id*. at ¶63. The subsequent incident is an intervening cause only if it "…completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being." *Id*. at ¶56.

The Commission finds the credible evidence shows that Petitioner suffered only a temporary aggravation of his underlying condition due to this work incident. The only treatment Petitioner received relating to this incident occurred during his ER visit on the date of accident. Petitioner testified that he did not sustain a new injury due to this incident. Dr. Gornet, testified that none of the identified work incidents that occurred after May 22, 2018, changed the structural pathology seen in the MRIs taken soon after that initial injury. Likewise, both Drs. Gornet and Robson determined that the work incidents that occurred after the initial May 22, 2018, accident resulted in only temporary aggravations of Petitioner's underlying condition. Furthermore,

Petitioner testified that the increased pain he felt following this incident resolved that same day. Following this incident, Petitioner continued to work, and no doctor limited his work capabilities specifically due to this incident. The medical records show that Petitioner's symptoms did not significantly or permanently change as a result of this incident. The overwhelming evidence supports a finding that the April 17, 2019, work incident was not an intervening event that broke the chain of causation from Petitioner's May 22, 2018, injury to his current complaints and the pending surgical recommendation.

The Commission notes that the Arbitrator appears to have reached this same conclusion. In explaining her reasoning, the Arbitrator wrote, "The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18." (Arb. Dec. at pg. 9). The Arbitrator also determined that Petitioner was not entitled to prospective medical treatment because this work incident was only a temporary aggravation of Petitioner's condition that has resolved. The Arbitrator further determined that Petitioner has reached maximum medical improvement for the temporary aggravation resulting from this incident. However, the Arbitrator later wrote, "…the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of April 17, 2019." (Arb. Dec. at pg. 10). In a separate Decision, the Commission affirmed the Arbitrator's conclusion that Petitioner's current condition is causally related to his original May 22, 2018, work incident. The Commission also affirmed the Arbitrator's award of prospective medical treatment in the form of the lumbar surgery recommended by Dr. Gornet. Illinois law does not allow a finding that a claimant's current condition is causally related to more than one incident.

For the foregoing reasons the Commission finds the April 17, 2019, work incident resulted in only a temporary aggravation of Petitioner's condition that has resolved. Thus, the Commission finds Petitioner's current condition of ill-being is not causally related to this work incident.

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 August 3, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being **is not** causally related to the April 17, 2019, work accident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges as awarded by the Arbitrator pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that prospective medical treatment is denied as Petitioner's current condition of ill-being and need for additional treatment is causally related to his May 22, 2018, work injury.

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

December 3, 2021

o: 10/5/21
TJT/jds
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

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

21IWCC0585

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

BARNETT, RENALDO
Employee/Petitioner

Case# **19WC017211**

18WC017572
19WC010089
19WC018234
19WC019621

IL DEPT OF TRANSPORTATION
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1430 BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

AUG 3 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Renaldo Barnett
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **19**-WC-**17211**

Consolidated cases: **18-WC-17572**
19-WC-10089
19-WC-18234
19-WC-19621

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, Illinois**, on **June 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **April 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 that 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 $**63,118.80**; the average weekly wage was $**1,213.82**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **4** 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 $**60,766.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,766.58**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Group Exhibit 1, as provided in §8(a) and §8.2 of the Act, as they relate to date of accident 4/17/19. The Arbitrator orders Respondent to pay $10,749.25 due and owing St. Francis Medical Center. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Petitioner is not entitled to prospective medical care as Petitioner has reached maximum medical improvement related to the temporary aggravation of his low back condition on 4/17/19.

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

7/29/20
Date

ICArbDec19(b)

AUG 3 - 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RENALDO BARNETT,	)		
	)		
Employee/Petitioner,	)		
	)		
v.	)	Case No.: 19-WC-17211	
	)		
ILLINOIS DEPARTMENT OF	)	Consolidated Case Nos.:	18-WC-17572
TRANSPORTATION,	)		19-WC-10089
	)		19-WC-18234
Employer/Respondent.	)		19-WC-19621

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Sections 19(b) and 8(a) of the Act. On August 19, 2019, the above-captioned case was consolidated with Case Nos. 18-WC-17572, 19-WC-10089, 19-WC-18234, and 19-WC-19621 by Arbitrator William Gallagher.

The parties agree that on April 17, 2019 Petitioner was employed by the Illinois Department of Transportation as a Highway Maintainer. The issues in dispute are accident, causal connection, medical expenses, prospective medical, and whether Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner has worked as a Highway Maintainer for Respondent's Department of Transportation for seven years and was 37 years old at the time of this accident. Petitioner alleges he initially injured his neck and back on May 22, 2018 (Consolidated Case No. 18-WC-17572) and aggravated his low back condition on April 17, 2019 while operating a one-ton dump truck for Respondent.

Petitioner testified that on 5/22/18 he and a co-worker were traveling along Route 3 picking up traffic signs. Petitioner was a restrained front seat passenger when his co-worker pulled off on the side of the road and came to a complete stop. Before his co-worker could shift the vehicle into park it was struck from the rear at a high rate of speed. Petitioner testified the vehicle he was in was knocked forward approximately 25 to 50 feet.

Petitioner was transported by ambulance to St. Francis Medical Center in Cape Girardeau, Missouri, where he complained of head, neck, and back pain. Petitioner testified he noticed pain in his left hip and leg, and now has occasional pain in his left foot and arm that radiates from his back and neck. Petitioner testified he has had no prior injuries, significant treatment, surgeries, or injections to his neck or back and did not have radiating pain in his leg or arm prior to this accident. Petitioner passed a pre-employment physical to begin his employment with Respondent.

Petitioner stated he was evaluated by Dr. Matthew Gornet who recommended physical therapy and advised Petitioner to lose weight. Petitioner testified he weighed 332 pounds at the time of the accident. Petitioner testified he underwent physical therapy and two injections in his low back that alleviated his symptoms for approximately one week.

On 2/2/19, Petitioner was released to return to light duty work with a 25-pound lifting restriction. Petitioner was assigned to drive a one-ton dump truck and haul tree brush. Petitioner testified he sustained an aggravation of his condition on 3/12/19 when he was driving a tandem dump truck into a deer pit to dump a load and he hit a big bump which caused the truck seat to jerk forward and then backwards. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner continued working light duty and on 4/17/19 he was driving a truck to the work site when he encountered a bumpy rock road, causing the seat to bounce and throw him sideways and forward. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner completed a third accident report that corroborates his testimony.

On 5/28/19, Petitioner suffered another injury when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed a fourth accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

Petitioner suffered another injury on 5/31/19 when he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner testified he had a physical altercation with his eighteen-year old son in February 2020 where Petitioner had to defend himself. Petitioner testified he did not sustain any

injuries as a result of that altercation. Petitioner also testified he had to defend himself against physical altercations with his wife on two occasions in July and August 2019, but did not sustain any injuries to his neck or back as a result of those altercations. At the time of arbitration Petitioner weighed 270 pounds and was losing weight in order to undergo a disc replacement surgery at L4-5 as recommended by Dr. Gornet. Petitioner testified his back surgery is scheduled on July 29, 2020.

Petitioner testified he has low back pain, numbness in his left leg, leg pain, pain in his hips, numbness in his left foot, and neck pain. He states his back pain is worse than his neck pain with daily pain being an 8 out of 10. He is currently taking Meloxicam and Cyclobenzaprine. He denies any injuries or aggravations of pain at home or around the house. He testified he wants to undergo the surgery recommended by Dr. Gornet because he wanted to get better and go back to work.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner was transported by ambulance to St. Francis Medical Center on 5/22/18 where he reported pain in his back, head, and neck as the result of a motor vehicle accident. He reported his symptoms were worsened by movement and he exhibited tenderness and pain in his cervical, thoracic, and lumbar spine. A thoracic and lumbar CT scan was performed that revealed a broad-based disc bulge at L3-4 with mild central canal stenosis, a broad-based disc bulge at L4-5 with mild central canal stenosis, and a disc protrusion at L5-S1 with moderate bilateral neural foraminal stenosis. Petitioner was discharged and instructed to follow up with further care.

On 6/4/18, Petitioner was evaluated by board certified orthopedic spine surgeon Dr. Matthew Gornet. Dr. Gornet noted Petitioner's symptoms were in his neck radiating to the left side, left trapezius, left shoulder and left scapula. Petitioner's low back pain was located in both sides of his buttocks, left hip, down the left leg and the lateral thigh to his knee with intermittent tingling. Dr. Gornet noted that after the accident, Petitioner was seen by his primary care physician at the Veterans Affairs Hospital and was taken off work. Dr. Gornet further noted that Petitioner did not have any previous significant problems with his neck or back prior to his work accident and had constant symptoms since the accident, including radicular symptoms in addition to his structural back pain. Petitioner's symptoms in his back were worsened by bending, lifting, and prolonged sitting or standing. His neck symptoms were worsened by reaching or pulling. Dr. Gornet recommended an MRI of the lumbar and cervical spine.

A lumbar MRI was performed on 6/4/18 that revealed a left lateral recess foraminal annular tear and protrusion at L4-5 resulting in mild left foraminal stenosis, and a left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in displacement. The MRI was reviewed by Dr. Gornet who noted the annular tear at L4-5 on the left as well as a small beaking of the disc on the left. He placed Petitioner off work and prescribed medications and physical therapy.

On 8/2/18, Petitioner returned to Dr. Gornet who noted Petitioner's low back pain continued into both sides and both buttocks, but more pronounced in the left buttock and left hip.

Petitioner's neck pain was also located more to the left side. A cervical MRI was performed that revealed an annular tear at C5-6 and a small foraminal disc protrusion at C3-4. Petitioner had undergone physical therapy to no benefit and Dr. Gornet recommended a steroid injection at L4-5 on the left. Dr. Gornet further recommended that Petitioner lose weight as he currently weighed 332 pounds.

Petitioner underwent a left L4-5 epidural steroid injection on 8/21/18 that provided temporary relief. When Petitioner returned to Dr. Gornet on 10/15/18 the short-term relief of his symptoms had worn off and his symptoms had returned. Dr. Gornet observed that Petitioner had lost 16 pounds since his last visit and encouraged him to continue losing weight. Dr. Gornet recommended additional diagnostic testing but wanted Petitioner's weight to reach 280 pounds. He continued Petitioner's medications and kept him off work.

On 1/22/19, Petitioner was evaluated by Dr. David Robson pursuant to Section 12 of the Act. Petitioner reported a consistent history of the accident and stated his neck pain had benefited from physical therapy but his main concern was the radiating low back and left anterior lateral thigh pain. Dr. Robson noted Petitioner underwent an epidural steroid injection that provided relief for only a few days. He noted no previous cervical or lumbar problems. Upon physical examination, Dr. Robson found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain. When considering the records, Dr. Robson noted that the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. However, Dr. Robson believed that Petitioner should accept his condition of ill-being because he did not believe Petitioner was a surgical candidate due to his weight. He opined that Petitioner required no further treatment.

Petitioner followed up with Dr. Gornet on 2/2/19 and reported persistent pain. Dr. Gornet again encouraged Petitioner to achieve his weight loss goals and get closer to 280 pounds. Dr. Gornet allowed Petitioner to return to work with a 25-pound lifting restriction.

Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. He further noted that Petitioner continued to lose weight and was 301 pounds on that date. He encouraged him to continue losing weight before obtaining additional studies.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

On 7/22/19, Petitioner returned to Dr. Gornet with continued discogenic neck and low back pain and radicular symptoms. Dr. Gornet observed that Petitioner had greatly reduced his weight and was down to 285 pounds. Dr. Gornet ordered a new MRI and a CT discogram at L4-5 and L5-S1, as well as an MRI spectroscopy of Petitioner's low back at L3 and S1.Petitioner

provided Dr. Gornet with a copy of the Section 12 report of Dr. Robson and Dr. Gornet disagreed with Dr. Robson's opinion that there was no indication for further treatment. Dr. Gornet dispensed medication to help manage Petitioner's symptoms.

Dr. Gornet was deposed on 8/26/19 and testified that after his review of Petitioner's medical records and his examination, he believed Petitioner's symptoms were consistent with a disc injury. Dr. Gornet testified the MRI showed an annular tear at L4-5 on the left, a small beaking of the disc, which represents a changing contour of the annulus, stating that normal changes in contour often represent a disc injury. Dr. Gornet observed changes at C5-6, and the left foraminal views showed an annular tear at C5-6 and a disc protrusion or a low herniation at C3-4.

Dr. Gornet testified that Petitioner had failed physical therapy and so a steroid injection was recommended at L4-5 on the left side. Dr. Gornet testified he did not believe Petitioner's weight was the cause of any of Petitioner's issues, only that it complicated treatment.

Dr. Gornet testified that the injection at L4-5 provided Petitioner with temporary relief, but the result was indicative that they were addressing the correct problem. He recommended Petitioner stay on anti-inflammatories and muscle relaxants, with the understanding that more testing and treatment were needed. Dr. Gornet ordered further imaging studies, including an MRI spectroscopy, where a chemical biopsy of the disc is taken and chemicals known to be a source of back pain are sought. He testified the study provides a physiologic assessment of a patient's back in addition to a static MRI, which is not predictive of pain. Dr. Gornet also clarified the importance of foraminal views of an MRI, stating that approximately 30 percent of disc pathology will be missed on a standard MRI, so the foraminal views give the most accurate diagnosis.

Dr. Gornet testified that Petitioner remained temporarily totally disabled as of 2/2/19, but was released to work with restrictions on 2/4/19. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet disagreed with Dr. Robson's opinion that nothing further should be done, noting that Petitioner was experiencing persistent pain, and he had not returned to his pre-accident baseline. Moreover, additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions. Dr. Gornet also believed Petitioner was highly motivated to alleviate his symptoms and was participating in his own treatment by losing approximately 50 pounds.

Petitioner underwent a CT discogram on 8/28/19, with facet blocks at left L4-5 and L5-S1, that revealed a provocative disc at L5-S1 with a posterior annular tear.

Petitioner was again evaluated by Dr. Robson at Respondent's request on 9/11/19. Petitioner reported additional dates of injury, including the injury on 4/17/19. Dr. Robson's diagnosis remained the same and he opined that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He continued to believe that Petitioner should accept his condition and symptoms and that no further treatment was needed. He opined that Petitioner could return to work without restrictions and had reached maximum medical improvement.

Petitioner returned to Dr. Gornet on 9/30/19 weighing 273 pounds. Dr. Gornet reviewed the imaging studies and noted the MRI spectroscopy revealed chemicals at L5-S1 and the CT discogram revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with a posterior annular tear. Dr. Gornet opined that based on the objective evidence, L5-S1 would require treatment. Dr. Gornet recommended one more injection at L5-S1, but noted once Petitioner reduced his weight to the 260s he would be a candidate for a lumbar disc replacement at L5-S1. He continued Petitioner's light duty work restrictions, although Petitioner was not working due to light duty not being available.

Dr. Robson was deposed on 1/4/20. Dr. Robson testified he met with Petitioner on two occasions, a second time due to receiving incomplete records. He testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant. Dr. Robson testified that his pertinent findings were that Petitioner had a normal neurologic exam of upper and lower extremities, reduction of sensation in the aspect of his left calf and minimal decrease in forward flexion of the lumbar spine. Dr. Robson testified he felt Petitioner had a cervical and lumbar strain as a result of the combination of accidents, where "the most recent one had made him worse".

Dr. Robson's diagnosis for Petitioner was cervical and lumbar strain, as well as disc protrusion at L4-5 and L5-S1. He testified that this condition was caused by the initial motor vehicle accident of 5/22/18. He believed that Petitioner riding in a one-ton work truck over bumpy roads would not worsen his symptoms, and there was no structural change with the CT scan when compared to the previous MRI. Dr. Robson testified that the structure of Petitioner's spine was fine and he could tolerate regular work. He opined no further treatment was necessary and Petitioner was at MMI as of 1/22/19. He testified that in September 2019 Petitioner remained in exactly the same condition.

Dr. Robson testified that if Petitioner's weight was reduced he could take on physical therapy on his own and live with his condition. He believed that Petitioner would have good days and bad days, he would have to learn what aggravates his symptoms and "back off that", and he would have to take anti-inflammatories depending on his job duties. Rather than restrictions at work, Dr. Robson opined Petitioner would need to be smart about his management of his spine. When asked his opinion of Petitioner's physical exertion level required at work, Dr. Robson opined it was heavy to very heavy.

Dr. Robson was not provided with Dr. Gornet's office notes from 9/3/19 or 1/6/20, or the MRI spectroscopy. Dr. Robson testified that while he believes disc replacement surgery is a good

procedure, he no longer performs the procedure due to the impossibility to get insurance approval.

As of 1/6/20, Dr. Gornet noted Petitioner's symptoms and planned treatment stayed the same, and he planned on a reevaluation in six to eight weeks to allow Petitioner more time to reach his target weight. On 5/30/20, Petitioner followed up with Dr. Gornet weighing 270 pounds. Dr. Gornet believed Petitioner was a surgical candidate and Petitioner wanted to move forward with surgery. A surgery date was tentatively scheduled. Medication and restrictions were continued and Dr. Gornet stated he believed Petitioner's ongoing symptoms were related to his work injury of 5/22/18.

CONCLUSIONS OF LAW

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

The Supreme Court held that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

Petitioner's injuries were aggravated in the course of his duties. 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*, 117 Ill.2d 38 (1987). Stated another way:

> [A]n injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003).

In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** (when the risk is a neutral risk encountered during the course of employment) that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.*; *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC. This increased risk may be **qualitative**, such as some aspect of employment that contributes to risk, **or** quantitative, such as the number of times they are required to encounter the risk. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 284, 290 (4th Dist. 2013).

As noted by the Appellate Court in *Accolade*, one cannot dismiss an injury that occurs during a routine, uneventful motion such as reaching, simply because the motion itself is not peculiar, if at the time of the occurrence the "claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties." *Accolade v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 901, 908. (3d Dist. 2013). In *Don Young v. Illinois Workers' Comp. Comm'n*, the Court held that even if the act of "reaching" was one performed by the general public on a daily basis, the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury. *Don Young v. Illinois Workers' Comp. Comm'n*, 13 N.E.3d 1252 (4th Dist. 2014). The Court stated, "When a claimant is injured due to an employment-related risk – a risk distinctly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Id.* N.E.2d at 1258-1259. Moreover, a claim a neutral risk is not barred where a claimant can prove an increased risk of injury by this neutral risk. *Village of Villa Park v. Illinois Workers' Comp. Comm'n*, 3 N.E.3d 885 (2nd Dist. 2013).

In *Adcock v. Illinois Workers' Comp. Comm'n*, the Appellate Court found that a welder, who was constantly "swiveling" in his work chair, was subject to a qualitative increased risk of injury, because his job required him to turn in his chair more frequently than members of the general public. The Court thus found that his injury arose out of his employment. *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC.

The Commission has concluded in several cases that distractions caused by interaction with students or patients constitute an increased risk of injury. In *Gloria McGlasson v. SOI/Alton Mental Health*, the claimant was a Social Worker who suffered injury when she "stepped off the sidewalk," fell, and broke her left arm and shoulder. *Gloria McGlasson v. SOI/Alton Mental Health Ctr.*, 18 I.W.C.C. 0373. At the time she fell, she had diverted her attention to a patient behind her who queried her about the progress on his paperwork. *Id.* She "turned her head to answer him and as she went forward she fell on the sidewalk in front of the building." *Id.* In awarding compensation for a compensable accident, the Arbitrator and the Commission concluded that the distraction constituted an increased risk that arose out of her employment and stated, "Although Petitioner actually fell because of her own misstep, the Arbitrator finds the misstep was caused by her attention being focused on the patient with whom she was talking, rather than on where she was walking." *Id.*

In *Donna Miller v. Berwyn North School Dist. # 98*, the claimant was a school teacher going to pick up her students from recess. *Donna Miller v. Berwyn North School Dist. # 98*, 18 I.W.C.C. 0409. As she was walking down the stairs, a student from a co-teacher's class walked by and said, "Hi, Ms. Miller." *Id.* She then turned and looked over her left shoulder to say hello, at which point she stepped and fell down the stairs. *Id.* The employer disputed accident, but the Arbitrator and the Commission concluded that the petitioner's injuries arose out of and in the course of her employment, stating, "[T]he basis for which compensation is being awarded here is not based upon any defect but rather Petitioner's increased risk of injury because she was distracted by a student talking to her . . ." *Id.*

In *Kram v. SOI/Vienna Correctional Center.*, the Commission held that the claimant, a Correctional Officer, sustained a compensable injury when he injured his knee while stepping

down stairs to the landing on his way to take corrective action against two inmates breaking line formation. *Kram v. SOI/Vienna Corr. Ctr.*, 15 I.W.C.C. 0286. He testified that the insubordinate inmates diverted his attention from where he was stepping and resulted in his left knee injury. *Id.* The Commission confirmed the Arbitrator's award of benefits, finding that such a distraction constituted a qualitative increased risk. *Id.*

Petitioner testified he filled out an accident report on 4/17/19 reporting that while driving the dump truck he hit a bump in the road causing his seat to throw him sideways and forward jerking his back out of place. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner's supervisor was present at trial as a representative of Respondent and was not called to testify to rebut Petitioner's testimony. Petitioner's unrebutted testimony and the corroborating accident report clearly demonstrate Petitioner was performing tasks at the direction of Respondent and exposed to a risk of injury greater than that of the general public when he was operating a dump truck, driving on uneven terrain, and jerked in various directions.

Based upon the aforementioned law and Petitioner's credible testimony, the Arbitrator finds that Petitioner met his burden in proving he sustained accidental injuries that arose out of and the course of his employment with Respondent.

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

The parties stipulated Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 22, 2018 (Consolidated Case No. 18-WC-17572). However, Respondent disputes that Petitioner's accident on 4/17/19 aggravated his condition and takes the position that any treatment after Dr. Robson's Section 12 examination on 1/22/19 is not causally related to Petitioner's injuries. The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18.

Petitioner testified he filled out an accident report on 4/17/19 reporting the forward and sideways jerking of the truck through his back out of place. He reported sharp pain in his lower back to his left buttock and leg and numbness in his foot. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner was released to return to light duty work on 2/2/19 as the result of his injuries that occurred on 5/22/18. Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. Dr. Gornet related that Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. On 9/11/19, Dr. Robson testified that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He also testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant.

Petitioner's supervisor was present at trial as a representative of Respondent and was not called to testify to rebut Petitioner's testimony.

The Arbitrator finds Petitioner's testimony to be credible in light of the medical records submitted into evidence. There was no evidence presented at arbitration or in the depositions of Dr. Gornet or Dr. Robson to refute Petitioner's testimony with regard to his low back and neck symptoms or treatment prior to or after May 22, 2018. The Arbitrator also relies on the credible opinion of Dr. Gornet in finding a causal connection between Petitioner's low back condition and the April 17, 2019 aggravation.

Based upon the foregoing, the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of April 17, 2019.

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

Based upon the above findings as to causal connection and Dr. Gornet's testimony that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses related to the aggravation of his injuries on 4/17/19. Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1 as they relate to date of accident 4/17/19. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care, and therefore orders Respondent to pay $10,749.25 due and owing St. Francis Medical Center.

Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Gornet opined that the incident on 4/17/19 was a temporary aggravation of Petitioner's low back condition and Petitioner's job duties would continue to aggravate Petitioner's condition unless more stringent restrictions were ordered. On 6/4/19, Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions and has been off work since. Therefore, the Arbitrator finds the incident dated 4/17/19 caused a temporary aggravation of Petitioner's condition for which he was taken off work in order that his condition return to a pre-accident baseline and he is not entitled to prospective medical care related to the aggravation that occurred on 4/17/19.

Issue (O): Has Petitioner reached maximum medical improvement?

Based upon the Arbitrator's finding that the incident dated 4/17/19 caused a temporary aggravation of Petitioner's low back condition for which he was taken off work in order that his condition return to pre-accident baseline, the Arbitrator finds Petitioner has reached maximum medical improvement for the aggravation that occurred on 4/17/19.

Arbitrator Linda J. Cantrell

7/29/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC018234
Case Name	BARNETT, RENALDO v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	18WC017572 19WC010089 19WC017211 19WC019621
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0586
Number of Pages of Decision	18
Decision Issued By	Thomas Tyrrell, Commisioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 12/3/2021

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0586

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 (Causation)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Renaldo Barnett,

Petitioner,

vs. NO: 19 WC 18234

IL Dept. of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with four additional cases. Case number 18 WC 17572 involves an earlier work injury that occurred on May 22, 2018. Case number 19 WC 10089 involves an earlier work injury that occurred on May 12, 2019. Case number 19 WC 17211 involves an earlier work injury that occurred on April 17, 2019. Finally, case number 19 WC 19621 involves a subsequent work injury that occurred on May 31, 2019. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Respondent raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner works as a highway maintainer for Respondent. Petitioner initially injured his cervical and lumbar spine on May 22, 2018, when the dump truck in which he was a

passenger was rear-ended at a high rate of speed. A June 2018 lumbar MRI revealed: 1) left lateral recess-foraminal annular tear and protrusion at L4-L5 resulting in mild left foraminal stenosis but no central canal or right foraminal stenosis; and 2) left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in dural displacement but no definite central canal or foraminal stenosis. A cervical MRI revealed: 1) questionable small central protrusion at C5-C6 without definite left sided foraminal component; and 2) mild right foraminal narrowing at C4-C5, possibly a small disc protrusion. Dr. Gornet, Petitioner's treating doctor, interpreted the lumbar MRI as showing a possible annular tear at L4-L5 on the left as well as small breaking of the disc on the left. He interpreted the cervical MRI as showing an annular tear at C5-C6 and a small foraminal disc protrusion at C3-C4.

Petitioner initially underwent conservative treatment including physical therapy and lumbar injections. However, this treatment failed to provide significant relief. On October 15, 2018, Dr. Gornet recommended Petitioner undergo a CT discogram at L4-L5 and an MRI spectroscopy at L3-S1. However, the doctor put these diagnostic tests on hold until Petitioner lowered his weight to 280 pounds from his then current weight of 316 pounds On February 2, 2019, Petitioner complained of ongoing cervical and lumbar pain. Petitioner had not lost any weight and Dr. Gornet determined he was unable to move forward with further evaluation of Petitioner's condition until Petitioner weighed 280 pounds. He released Petitioner to return to work with a 25-pound weight limit.

Petitioner returned to work and sustained a work-related injury on March 12, 2019. On that date, he sustained an injury to his cervical and lumbar spine while driving a dump truck in the "deer pit" on I-57. Petitioner testified that he drove over a large bump in the road and the driver's seat caused him to jerk back and forth. He testified that the jerking motion aggravated his low back and cervical spine condition. Petitioner visited the ER that day and reported that the work incident exacerbated his back pain. On April 1, 2019, Petitioner complained of continued neck and back pain to Dr. Gornet. Dr. Gornet believed this recent work incident only temporarily aggravated Petitioner's underlying condition. He continued to recommend a lumbar CT discogram and/or MRI spectroscopy once he lost the recommended amount of weight and returned Petitioner to work.

Petitioner testified he next sustained a work injury while driving a dump truck on April 17, 2019. He testified that he once again drove over a large bump in the road. He visited the ER that day and reported his chronic low back pain worsened when he was jolted while riding in a dump truck. CT scans of his thoracic and lumbar spine as well as his cervical spine were performed that day. Petitioner testified that he aggravated his neck and back symptoms due to this incident. Petitioner continued to work and sustained this current work injury on May 28, 2019. On that date, he was working with a crew patching potholes on the highway when a car came speeding through the area. Petitioner testified that he had to run and dodge the speeding car, and this caused him to temporarily aggravate his low back and neck. Petitioner visited the ER that day. Petitioner again continued to work. Finally, on May 31, 2019, Petitioner temporarily aggravated his condition when he drove a dump truck over a bump in the road. Petitioner once again visited the ER and complained of increased low back pain.

On June 4, 2019, Petitioner spoke with Dr. Gornet's physician assistant via telephone. Petitioner complained of increasing low back pain. While Petitioner reported no new trauma, he

stated work activities such as driving a one-ton truck and extended periods of mowing significantly increased his low back pain. Petitioner's work restrictions were increased and included restrictions from driving the one-ton truck and mowing. Petitioner testified that Respondent was not able to accommodate these additional restrictions. Petitioner continued to follow up with Dr. Gornet and eventually underwent the recommended CT discogram and MRI spectroscopy in early fall 2019. After reviewing the results of these diagnostic studies, Dr. Gornet determined Petitioner required treatment at L5-S1. He performed an injection at L4-L5 in October 2019. Dr. Gornet recommended lumbar disc replacement surgery if Petitioner reached 270 pounds. Finally, in May 2020 Petitioner reached the recommended weight of 270 pounds and Dr. Gornet determined that he would move forward with the recommended surgery. Petitioner continues to complain of cervical and lumbar pain and testified that he would like to proceed with the surgery.

Dr. Gornet testified via evidence deposition at Petitioner's request on August 26, 2019. He testified that Petitioner never has returned to the condition he enjoyed prior to the initial work incident on May 22, 2018. He further testified that the subsequent four work incidents identified by Petitioner were temporary aggravations that did not change the trajectory of his cervical and lumbar condition. Dr. Gornet also testified that the subsequent work incidents did not change the structural pathology revealed in the MRIs performed in June 2018 following his initial work accident. Dr. Robson, Respondent's Section 12 examiner, also concluded that the work incidents Petitioner identified as occurring after the initial May 22, 2018, injury were temporary aggravations of Petitioner's underlying condition.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's conclusion that Petitioner's current condition of ill-being is causally related to the May 28, 2019, work incident. The Commission otherwise affirms and adopts the remainder of the Arbitrator's Decision.

Illinois courts have stated that it is irrelevant whether a subsequent event aggravated a claimant's condition. *See Par Electric v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC at ¶56. An employer is liable for every natural consequence that flows from a work-related injury unless the chain of causation is broken by an independent intervening accident. *See id*. at ¶63. The subsequent incident is an intervening cause only if it "…completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being." *Id*. at ¶56.

The Commission finds the credible evidence shows that Petitioner suffered only a temporary aggravation of his underlying condition due to this work incident. The only treatment Petitioner received relating to this incident occurred during his ER visit on the date of accident. Petitioner testified that he did not sustain a new injury due to this incident. Dr. Gornet, testified that none of the identified work incidents that occurred after May 22, 2018, changed the structural pathology seen in the MRIs taken soon after that initial injury. Likewise, both Drs. Gornet and Robson determined that the work incidents that occurred after the initial May 22, 2018, accident resulted in only temporary aggravations of Petitioner's underlying condition. Furthermore,

Petitioner testified that the increased pain he felt following this incident resolved that same day. Following this incident, Petitioner continued to work, and no doctor limited his work capabilities specifically due to this incident. The medical records show that Petitioner's symptoms did not significantly or permanently change as a result of this incident. The overwhelming evidence supports a finding that the May 28, 2019, work incident was not an intervening event that broke the chain of causation from Petitioner's May 22, 2018, injury to his current complaints and the pending surgical recommendation.

The Commission notes that the Arbitrator appears to have reached this same conclusion. In explaining her reasoning, the Arbitrator wrote, "The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18." (Arb. Dec. at pg. 7). The Arbitrator also determined that Petitioner was not entitled to prospective medical treatment because this work incident was only a temporary aggravation of Petitioner's condition that has resolved. The Arbitrator further determined that Petitioner has reached maximum medical improvement for the temporary aggravation resulting from this incident. However, the Arbitrator later wrote, "…the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of May 28, 2019." (Arb. Dec. at pg. 8). In a separate Decision, the Commission affirmed the Arbitrator's conclusion that Petitioner's current condition is causally related to his original May 22, 2018, work incident. The Commission also affirmed the Arbitrator's award of prospective medical treatment in the form of the lumbar surgery recommended by Dr. Gornet. Illinois law does not allow a finding that a claimant's current condition is causally related to more than one incident.

For the foregoing reasons the Commission finds the May 28, 2019, work incident resulted in only a temporary aggravation of Petitioner's condition that has completely resolved. Thus, the Commission finds Petitioner's current condition of ill-being is not causally related to this work incident.

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 August 3, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being **is not** causally related to the May 28, 2019, work accident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges as awarded by the Arbitrator pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that prospective medical treatment is denied as Petitioner's current condition of ill-being and need for additional treatment is causally related to his May 22, 2018, work injury.

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

December 3, 2021

o: 10/5/21
TJT/jds
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

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

21IWCC0586

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

BARNETT, RENALDO
Employee/Petitioner

Case# **19WC018234**

18WC017572
19WC010089
19WC017211
19WC019621

IL DEPT OF TRANSPORTATION
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH COOKSEY & CHAPPELL
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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

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

AUG 3 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Renaldo Barnett
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **19-**WC-**18234**

Consolidated cases: **18-WC-17572**
19-WC-10089
19-WC-17211
19-WC-19621

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, Illinois**, on **June 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **May 28, 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 that 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 $**63,118.80**; the average weekly wage was $**1,213.82**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **4** 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 $**60,766.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,766.58**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Group Exhibit 1, as provided in §8(a) and §8.2 of the Act, as they relate to date of accident 5/28/19. The Arbitrator orders Respondent to pay $7,425.13 due and owing St. Francis Medical Center. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Petitioner is not entitled to prospective medical care as Petitioner has reached maximum medical improvement related to the temporary aggravation of his low back condition on 5/28/19.

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

7/29/20
Date

ICArbDec19(b)

AUG 3 - 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RENALDO BARNETT,	)		
	)		
Employee/Petitioner,	)		
	)		
v.	)	Case No.: 19-WC-18234	
	)		
ILLINOIS DEPARTMENT OF	)	Consolidated Case Nos.:	18-WC-17572
TRANSPORTATION,	)		19-WC-10089
	)		19-WC-17211
Employer/Respondent.	)		19-WC-19621

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Sections 19(b) and 8(a) of the Act. On August 19, 2019, the above-captioned case was consolidated with Case Nos. 18-WC-17572, 19-WC-10089, 19-WC-17211, and 19-WC-19621 by Arbitrator William Gallagher.

The parties agree that on May 28, 2019 Petitioner was employed by the Illinois Department of Transportation as a Highway Maintainer. The issues in dispute are causal connection, medical expenses, prospective medical, and whether Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner has worked as a Highway Maintainer for Respondent's Department of Transportation for seven years and was 37 years old at the time of this accident. Petitioner alleges he initially injured his neck and back on May 22, 2018 (Consolidated Case No. 18-WC-17572) and aggravated his low back condition on May 28, 2019 when he ran off the road to avoid being struck by an oncoming vehicle while working for Respondent.

Petitioner testified that on 5/22/18 he and a co-worker were traveling along Route 3 picking up traffic signs. Petitioner was a restrained front seat passenger when his co-worker pulled off on the side of the road and came to a complete stop. Before his co-worker could shift the vehicle into park it was struck from the rear at a high rate of speed. Petitioner testified the vehicle he was in was knocked forward approximately 25 to 50 feet.

Petitioner was transported by ambulance to St. Francis Medical Center in Cape Girardeau, Missouri, where he complained of head, neck, and back pain. Petitioner testified he noticed pain in his left hip and leg, and now has occasional pain in his left foot and arm that radiates from his back and neck. Petitioner testified he has had no prior injuries, significant treatment, surgeries, or injections to his neck or back and did not have radiating pain in his leg or arm prior to this accident. Petitioner passed a pre-employment physical to begin his employment with Respondent.

Petitioner stated he was evaluated by Dr. Matthew Gornet who recommended physical therapy and advised Petitioner to lose weight. Petitioner testified he weighed 332 pounds at the time of the accident. Petitioner testified he underwent physical therapy and two injections in his low back that alleviated his symptoms for approximately one week.

On 2/2/19, Petitioner was released to return to light duty work with a 25-pound lifting restriction. Petitioner was assigned to drive a one-ton dump truck and haul tree brush. Petitioner testified he sustained an aggravation of his condition on 3/12/19 when he was driving a tandem dump truck into a deer pit to dump a load and he hit a big bump which caused the truck seat to jerk forward and then backwards. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner continued working light duty and on 4/17/19 he was driving a truck to the work site when he encountered a bumpy rock road, causing the seat to bounce and throw him sideways and forward. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner completed a third accident report that corroborates his testimony.

On 5/28/19, Petitioner suffered another injury when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed a fourth accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

Petitioner suffered another injury on 5/31/19 when he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner testified he had a physical altercation with his eighteen-year old son in February 2020 where Petitioner had to defend himself. Petitioner testified he did not sustain any

injuries as a result of that altercation. Petitioner also testified he had to defend himself against physical altercations with his wife on two occasions in July and August 2019, but did not sustain any injuries to his neck or back as a result of those altercations. At the time of arbitration Petitioner weighed 270 pounds and was losing weight in order to undergo a disc replacement surgery at L4-5 as recommended by Dr. Gornet. Petitioner testified his back surgery is scheduled on July 29, 2020.

Petitioner testified he has low back pain, numbness in his left leg, leg pain, pain in his hips, numbness in his left foot, and neck pain. He states his back pain is worse than his neck pain with daily pain being an 8 out of 10. He is currently taking Meloxicam and Cyclobenzaprine. He denies any injuries or aggravations of pain at home or around the house. He testified he wants to undergo the surgery recommended by Dr. Gornet because he wanted to get better and go back to work.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner was transported by ambulance to St. Francis Medical Center on 5/22/18 where he reported pain in his back, head, and neck as the result of a motor vehicle accident. He reported his symptoms were worsened by movement and he exhibited tenderness and pain in his cervical, thoracic, and lumbar spine. A thoracic and lumbar CT scan was performed that revealed a broad-based disc bulge at L3-4 with mild central canal stenosis, a broad-based disc bulge at L4-5 with mild central canal stenosis, and a disc protrusion at L5-S1 with moderate bilateral neural foraminal stenosis. Petitioner was discharged and instructed to follow up with further care.

On 6/4/18, Petitioner was evaluated by board certified orthopedic spine surgeon Dr. Matthew Gornet. Dr. Gornet noted Petitioner's symptoms were in his neck radiating to the left side, left trapezius, left shoulder and left scapula. Petitioner's low back pain was located in both sides of his buttocks, left hip, down the left leg and the lateral thigh to his knee with intermittent tingling. Dr. Gornet noted that after the accident, Petitioner was seen by his primary care physician at the Veterans Affairs Hospital and was taken off work. Dr. Gornet further noted that Petitioner did not have any previous significant problems with his neck or back prior to his work accident and had constant symptoms since the accident, including radicular symptoms in addition to his structural back pain. Petitioner's symptoms in his back were worsened by bending, lifting, and prolonged sitting or standing. His neck symptoms were worsened by reaching or pulling. Dr. Gornet recommended an MRI of the lumbar and cervical spine.

A lumbar MRI was performed on 6/4/18 that revealed a left lateral recess foraminal annular tear and protrusion at L4-5 resulting in mild left foraminal stenosis, and a left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in displacement. The MRI was reviewed by Dr. Gornet who noted the annular tear at L4-5 on the left as well as a small beaking of the disc on the left. He placed Petitioner off work and prescribed medications and physical therapy.

On 8/2/18, Petitioner returned to Dr. Gornet who noted Petitioner's low back pain continued into both sides and both buttocks, but more pronounced in the left buttock and left hip.

Petitioner's neck pain was also located more to the left side. A cervical MRI was performed that revealed an annular tear at C5-6 and a small foraminal disc protrusion at C3-4. Petitioner had undergone physical therapy to no benefit and Dr. Gornet recommended a steroid injection at L4-5 on the left. Dr. Gornet further recommended that Petitioner lose weight as he currently weighed 332 pounds.

Petitioner underwent a left L4-5 epidural steroid injection on 8/21/18 that provided temporary relief. When Petitioner returned to Dr. Gornet on 10/15/18 the short-term relief of his symptoms had worn off and his symptoms had returned. Dr. Gornet observed that Petitioner had lost 16 pounds since his last visit and encouraged him to continue losing weight. Dr. Gornet recommended additional diagnostic testing but wanted Petitioner's weight to reach 280 pounds. He continued Petitioner's medications and kept him off work.

On 1/22/19, Petitioner was evaluated by Dr. David Robson pursuant to Section 12 of the Act. Petitioner reported a consistent history of the accident and stated his neck pain had benefited from physical therapy but his main concern was the radiating low back and left anterior lateral thigh pain. Dr. Robson noted Petitioner underwent an epidural steroid injection that provided relief for only a few days. He noted no previous cervical or lumbar problems. Upon physical examination, Dr. Robson found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain. When considering the records, Dr. Robson noted that the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. However, Dr. Robson believed that Petitioner should accept his condition of ill-being because he did not believe Petitioner was a surgical candidate due to his weight. He opined that Petitioner required no further treatment.

Petitioner followed up with Dr. Gornet on 2/2/19 and reported persistent pain. Dr. Gornet again encouraged Petitioner to achieve his weight loss goals and get closer to 280 pounds. Dr. Gornet allowed Petitioner to return to work with a 25-pound lifting restriction.

Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. He further noted that Petitioner continued to lose weight and was 301 pounds on that date. He encouraged him to continue losing weight before obtaining additional studies.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

On 7/22/19, Petitioner returned to Dr. Gornet with continued discogenic neck and low back pain and radicular symptoms. Dr. Gornet observed that Petitioner had greatly reduced his weight and was down to 285 pounds. Dr. Gornet ordered a new MRI and a CT discogram at L4-5 and L5-S1, as well as an MRI spectroscopy of Petitioner's low back at L3 and S1.Petitioner

provided Dr. Gornet with a copy of the Section 12 report of Dr. Robson and Dr. Gornet disagreed with Dr. Robson's opinion that there was no indication for further treatment. Dr. Gornet dispensed medication to help manage Petitioner's symptoms.

Dr. Gornet was deposed on 8/26/19 and testified that after his review of Petitioner's medical records and his examination, he believed Petitioner's symptoms were consistent with a disc injury. Dr. Gornet testified the MRI showed an annular tear at L4-5 on the left, a small beaking of the disc, which represents a changing contour of the annulus, stating that normal changes in contour often represent a disc injury. Dr. Gornet observed changes at C5-6, and the left foraminal views showed an annular tear at C5-6 and a disc protrusion or a low herniation at C3-4.

Dr. Gornet testified that Petitioner had failed physical therapy and so a steroid injection was recommended at L4-5 on the left side. Dr. Gornet testified he did not believe Petitioner's weight was the cause of any of Petitioner's issues, only that it complicated treatment.

Dr. Gornet testified that the injection at L4-5 provided Petitioner with temporary relief, but the result was indicative that they were addressing the correct problem. He recommended Petitioner stay on anti-inflammatories and muscle relaxants, with the understanding that more testing and treatment were needed. Dr. Gornet ordered further imaging studies, including an MRI spectroscopy, where a chemical biopsy of the disc is taken and chemicals known to be a source of back pain are sought. He testified the study provides a physiologic assessment of a patient's back in addition to a static MRI, which is not predictive of pain. Dr. Gornet also clarified the importance of foraminal views of an MRI, stating that approximately 30 percent of disc pathology will be missed on a standard MRI, so the foraminal views give the most accurate diagnosis.

Dr. Gornet testified that Petitioner remained temporarily totally disabled as of 2/2/19, but was released to work with restrictions on 2/4/19. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet disagreed with Dr. Robson's opinion that nothing further should be done, noting that Petitioner was experiencing persistent pain, and he had not returned to his pre-accident baseline. Moreover, additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions. Dr. Gornet also believed Petitioner was highly motivated to alleviate his symptoms and was participating in his own treatment by losing approximately 50 pounds.

Petitioner underwent a CT discogram on 8/28/19, with facet blocks at left L4-5 and L5-S1, that revealed a provocative disc at L5-S1 with a posterior annular tear.

Petitioner was again evaluated by Dr. Robson at Respondent's request on 9/11/19. Petitioner reported additional dates of injury, including the injury on 4/17/19. Dr. Robson's diagnosis remained the same and he opined that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He continued to believe that Petitioner should accept his condition and symptoms and that no further treatment was needed. He opined that Petitioner could return to work without restrictions and had reached maximum medical improvement.

Petitioner returned to Dr. Gornet on 9/30/19 weighing 273 pounds. Dr. Gornet reviewed the imaging studies and noted the MRI spectroscopy revealed chemicals at L5-S1 and the CT discogram revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with a posterior annular tear. Dr. Gornet opined that based on the objective evidence, L5-S1 would require treatment. Dr. Gornet recommended one more injection at L5-S1, but noted once Petitioner reduced his weight to the 260s he would be a candidate for a lumbar disc replacement at L5-S1. He continued Petitioner's light duty work restrictions, although Petitioner was not working due to light duty not being available.

Dr. Robson was deposed on 1/4/20. Dr. Robson testified he met with Petitioner on two occasions, a second time due to receiving incomplete records. He testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant. Dr. Robson testified that his pertinent findings were that Petitioner had a normal neurologic exam of upper and lower extremities, reduction of sensation in the aspect of his left calf and minimal decrease in forward flexion of the lumbar spine. Dr. Robson testified he felt Petitioner had a cervical and lumbar strain as a result of the combination of accidents, where "the most recent one had made him worse".

Dr. Robson's diagnosis for Petitioner was cervical and lumbar strain, as well as disc protrusion at L4-5 and L5-S1. He testified that this condition was caused by the initial motor vehicle accident of 5/22/18. He believed that Petitioner riding in a one-ton work truck over bumpy roads would not worsen his symptoms, and there was no structural change with the CT scan when compared to the previous MRI. Dr. Robson testified that the structure of Petitioner's spine was fine and he could tolerate regular work. He opined no further treatment was necessary and Petitioner was at MMI as of 1/22/19. He testified that in September 2019 Petitioner remained in exactly the same condition.

Dr. Robson testified that if Petitioner's weight was reduced he could take on physical therapy on his own and live with his condition. He believed that Petitioner would have good days and bad days, he would have to learn what aggravates his symptoms and "back off that", and he would have to take anti-inflammatories depending on his job duties. Rather than restrictions at work, Dr. Robson opined Petitioner would need to be smart about his management of his spine. When asked his opinion of Petitioner's physical exertion level required at work, Dr. Robson opined it was heavy to very heavy.

Dr. Robson was not provided with Dr. Gornet's office notes from 9/3/19 or 1/6/20, or the MRI spectroscopy. Dr. Robson testified that while he believes disc replacement surgery is a good

procedure, he no longer performs the procedure due to the impossibility to get insurance approval.

As of 1/6/20, Dr. Gornet noted Petitioner's symptoms and planned treatment stayed the same, and he planned on a reevaluation in six to eight weeks to allow Petitioner more time to reach his target weight. On 5/30/20, Petitioner followed up with Dr. Gornet weighing 270 pounds. Dr. Gornet believed Petitioner was a surgical candidate and Petitioner wanted to move forward with surgery. A surgery date was tentatively scheduled. Medication and restrictions were continued and Dr. Gornet stated he believed Petitioner's ongoing symptoms were related to his work injury of 5/22/18.

CONCLUSIONS OF LAW

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

The parties stipulate that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 28, 2019. Petitioner testified that on 5/28/19 he suffered injuries to his neck, left arm, low back, and left leg when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed an accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18. On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions.

The Arbitrator finds Petitioner's testimony to be credible in light of the medical records submitted into evidence. There was no evidence presented at arbitration or in the depositions of Dr. Gornet or Dr. Robson to refute Petitioner's testimony with regard to his low back and neck symptoms or treatment prior to or after May 28, 2019. The Arbitrator also relies on the credible opinion of Dr. Gornet in finding a causal connection between Petitioner's low back and neck conditions and the May 28, 2019 work accident.

Based upon the foregoing, the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of May 28, 2019.

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

Based upon the above findings as to causal connection and Dr. Gornet's testimony that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses related to his injuries on 5/28/19. Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1 as they relate to date of accident 5/28/19. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care, and therefore orders Respondent to pay $7,425.13 due and owing St. Francis Medical Center.

Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Gornet opined that the incident on 5/28/19 was a temporary aggravation of Petitioner's low back condition and Petitioner's job duties would continue to aggravate Petitioner's condition unless more stringent restrictions were ordered. On 6/4/19, Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions and has been off work since. Therefore, the Arbitrator finds the incident dated 5/28/19 caused a temporary aggravation of Petitioner's condition for which he was taken off work in order that his condition return to a pre-accident baseline and he is not entitled to prospective medical care related to the aggravation that occurred on 5/28/19.

Issue (O): Has Petitioner reached maximum medical improvement?

Based upon the Arbitrator's finding that the incident dated 5/28/19 caused a temporary aggravation of Petitioner's low back condition for which he was taken off work in order that his condition return to pre-accident baseline, the Arbitrator finds Petitioner has reached maximum medical improvement for the aggravation that occurred on 5/28/19.

Arbitrator Linda J. Cantrell

7/29/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC019621
Case Name	BARNETT, RENALDO v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	18WC017572 19WC010089 19WC017211 19WC018234
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0587
Number of Pages of Decision	20
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 12/3/2021

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0587

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 (Causation)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Renaldo Barnett,

Petitioner,

vs. NO: 19 WC 19621

IL Dept. of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with four additional cases. Case number 18 WC 17572 involves an earlier work injury that occurred on May 22, 2018. Case number 19 WC 10089 involves an earlier work injury that occurred on May 12, 2019. Case number 19 WC 17211 involves an earlier work injury that occurred on April 17, 2019. Finally, case number 19 WC 18234 involves an earlier work injury that occurred on May 28, 2019. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Respondent raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner works as a highway maintainer for Respondent. Petitioner initially injured his cervical and lumbar spine on May 22, 2018, when the dump truck in which he was a

passenger was rear-ended at a high rate of speed. A June 2018 lumbar MRI revealed: 1) left lateral recess-foraminal annular tear and protrusion at L4-L5 resulting in mild left foraminal stenosis but no central canal or right foraminal stenosis; and 2) left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in dural displacement but no definite central canal or foraminal stenosis. A cervical MRI revealed: 1) questionable small central protrusion at C5-C6 without definite left sided foraminal component; and 2) mild right foraminal narrowing at C4-C5, possibly a small disc protrusion. Dr. Gornet, Petitioner's treating doctor, interpreted the lumbar MRI as showing a possible annular tear at L4-L5 on the left as well as small breaking of the disc on the left. He interpreted the cervical MRI as showing an annular tear at C5-C6 and a small foraminal disc protrusion at C3-C4.

Petitioner initially underwent conservative treatment including physical therapy and lumbar injections. However, this treatment failed to provide significant relief. On October 15, 2018, Dr. Gornet recommended Petitioner undergo a CT discogram at L4-L5 and an MRI spectroscopy at L3-S1. However, the doctor put these diagnostic tests on hold until Petitioner lowered his weight to 280 pounds from his then current weight of 316 pounds On February 2, 2019, Petitioner complained of ongoing cervical and lumbar pain. Petitioner had not lost any weight and Dr. Gornet determined he was unable to move forward with further evaluation of Petitioner's condition until Petitioner weighed 280 pounds. He released Petitioner to return to work with a 25-pound weight limit.

Petitioner returned to work and sustained a work-related injury on March 12, 2019. On that date, he sustained an injury to his cervical and lumbar spine while driving a dump truck in the "deer pit" on I-57. Petitioner testified that he drove over a large bump in the road and the driver's seat caused him to jerk back and forth. He testified that the jerking motion aggravated his low back and cervical spine condition. Petitioner visited the ER that day and reported that the work incident exacerbated his back pain. On April 1, 2019, Petitioner complained of continued neck and back pain to Dr. Gornet. Dr. Gornet believed this recent work incident only temporarily aggravated Petitioner's underlying condition. He continued to recommend a lumbar CT discogram and/or MRI spectroscopy once he lost the recommended amount of weight and returned Petitioner to work.

Petitioner testified he next sustained a work injury while driving a dump truck on April 17, 2019. He testified that he once again drove over a large bump in the road. He visited the ER that day and reported his chronic low back pain worsened when he was jolted while riding in a dump truck. CT scans of his thoracic and lumbar spine as well as his cervical spine were performed that day. Petitioner testified that he aggravated his neck and back symptoms due to this incident. Petitioner continued to work and sustained a fourth work injury on May 28, 2019. On that date, he was working with a crew patching potholes on the highway when a car came speeding through the area. Petitioner testified that he had to run and dodge the speeding car, and this caused him to temporarily aggravate his low back and neck. Petitioner visited the ER that day. Petitioner again continued to work. Finally, on May 31, 2019, Petitioner sustained this current injury wherein he temporarily aggravated his condition when he drove a dump truck over a bump in the road. Petitioner once again visited the ER and complained of increased low back pain.

On June 4, 2019, Petitioner spoke with Dr. Gornet's physician assistant via telephone. Petitioner complained of increasing low back pain. While Petitioner reported no new trauma, he

stated work activities such as driving a one-ton truck and extended periods of mowing significantly increased his low back pain. Petitioner's work restrictions were increased and included restrictions from driving the one-ton truck and mowing. Petitioner testified that Respondent was not able to accommodate these additional restrictions. Petitioner continued to follow up with Dr. Gornet and eventually underwent the recommended CT discogram and MRI spectroscopy in early fall 2019. After reviewing the results of these diagnostic studies, Dr. Gornet determined Petitioner required treatment at L5-S1. He performed an injection at L4-L5 in October 2019. Dr. Gornet recommended lumbar disc replacement surgery if Petitioner reached 270 pounds. Finally, in May 2020 Petitioner reached the recommended weight of 270 pounds and Dr. Gornet determined that he would move forward with the recommended surgery. Petitioner continues to complain of cervical and lumbar pain and testified that he would like to proceed with the surgery.

Dr. Gornet testified via evidence deposition at Petitioner's request on August 26, 2019. He testified that Petitioner never has returned to the condition he enjoyed prior to the initial work incident on May 22, 2018. He further testified that the subsequent four work incidents identified by Petitioner were temporary aggravations that did not change the trajectory of his cervical and lumbar condition. Dr. Gornet also testified that the subsequent work incidents did not change the structural pathology revealed in the MRIs performed in June 2018 following his initial work accident. Dr. Robson, Respondent's Section 12 examiner, also concluded that the work incidents Petitioner identified as occurring after the initial May 22, 2018, injury were temporary aggravations of Petitioner's underlying condition.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's conclusion that Petitioner's current condition of ill-being is causally related to the May 31, 2019, work incident. The Commission otherwise affirms and adopts the remainder of the Arbitrator's Decision.

Illinois courts have stated that it is irrelevant whether a subsequent event aggravated a claimant's condition. *See Par Electric v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC at ¶56. An employer is liable for every natural consequence that flows from a work-related injury unless the chain of causation is broken by an independent intervening accident. *See id*. at ¶63. The subsequent incident is an intervening cause only if it "…completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being." *Id*. at ¶56.

The Commission finds the credible evidence shows that Petitioner suffered only a temporary aggravation of his underlying condition due to this work incident. The only treatment Petitioner received relating to this incident occurred during his ER visit on the date of accident. Petitioner testified that he did not sustain a new injury due to this incident. Dr. Gornet, testified that none of the identified work incidents that occurred after May 22, 2018, changed the structural pathology seen in the MRIs taken soon after that initial injury. Likewise, both Drs. Gornet and Robson determined that the work incidents that occurred after the initial May 22, 2018, accident resulted in only temporary aggravations of Petitioner's underlying condition. Furthermore,

Petitioner testified that the increased pain he felt following this incident resolved that same day. No doctor limited his work capabilities specifically due to this incident. The medical records show that Petitioner's symptoms did not significantly or permanently change as a result of this incident. The overwhelming evidence supports a finding that the May 31, 2019, work incident was not an intervening event that broke the chain of causation from Petitioner's May 22, 2018, injury to his current complaints and the pending surgical recommendation.

The Commission notes that the Arbitrator appears to have reached this same conclusion. In explaining her reasoning, the Arbitrator wrote, "The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18." (Arb. Dec. at pg. 9). The Arbitrator also determined that Petitioner was not entitled to prospective medical treatment because this work incident was only a temporary aggravation of Petitioner's condition that has resolved. The Arbitrator further determined that Petitioner has reached maximum medical improvement for the temporary aggravation resulting from this incident. However, the Arbitrator later wrote, "…the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of May 31, 2019." (Arb. Dec. at pg. 10). In a separate Decision, the Commission affirmed the Arbitrator's conclusion that Petitioner's current condition is causally related to his original May 22, 2018, work incident. The Commission also affirmed the Arbitrator's award of prospective medical treatment in the form of the lumbar surgery recommended by Dr. Gornet. Illinois law does not allow a finding that a claimant's current condition is causally related to more than one incident.

For the foregoing reasons the Commission finds the May 31, 2019, work incident resulted in only a temporary aggravation of Petitioner's condition that has completely resolved. Thus, the Commission finds Petitioner's current condition of ill-being is not causally related to this work incident.

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 August 3, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being **is not** causally related to the May 31, 2019, work accident.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges as awarded by the Arbitrator pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that prospective medical treatment is denied as Petitioner's current condition of ill-being and need for additional treatment is causally related to his May 22, 2018, work injury.

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

December 3, 2021

o: 10/5/21
TJT/jds
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

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

21IWCC0587

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

BARNETT, RENALDO
Employee/Petitioner

Case# **19WC019621**

18WC017572
19WC010089
19WC017211
19WC018234

IL DEPT OF TRANSPORTATION
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1430 BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

AUG 3 - 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Renaldo Barnett
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **19**-WC-**19621**

Consolidated cases: **18-WC-17572**
19-WC-10089
19-WC-17211
19-WC-18234

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, Illinois**, on **June 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **May 31, 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 that 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 $**63,118.80**; the average weekly wage was $**1,213.82**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **4** 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 $**60,766.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,766.58**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Group Exhibit 1, as provided in §8(a) and §8.2 of the Act, as they relate to date of accident 5/31/19. The Arbitrator orders Respondent to pay $520.00 due and owing St. Francis Medical Center. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

Petitioner is not entitled to prospective medical care as Petitioner has reached maximum medical improvement related to the temporary aggravation of his low back condition on 5/31/19.

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

7/29/20
Date

ICArbDec19(b)

AUG 3 - 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RENALDO BARNETT,	)		
	)		
Employee/Petitioner,	)		
	)		
v.	)	Case No.: 19-WC-19621	
	)		
ILLINOIS DEPARTMENT OF	)	Consolidated Case Nos.:	18-WC-17572
TRANSPORTATION,	)		19-WC-10089
	)		19-WC-17211
Employer/Respondent.	)		19-WC-18234

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020, pursuant to Sections 19(b) and 8(a) of the Act. On August 19, 2019, the above-captioned case was consolidated with Case Nos. 18-WC-17572, 19-WC-10089, 19-WC-17211, and 19-WC-18234 by Arbitrator William Gallagher.

The parties agree that on May 31, 2019 Petitioner was employed by the Illinois Department of Transportation as a Highway Maintainer. The issues in dispute are accident, causal connection, medical expenses, prospective medical, and whether Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner has worked as a Highway Maintainer for Respondent's Department of Transportation for seven years and was 37 years old at the time of this accident. Petitioner alleges he initially injured his neck and back on May 22, 2018 (Consolidated Case No. 18-WC-17572) and aggravated his low back condition on May 31, 2019 while operating a one-ton dump truck for Respondent.

Petitioner testified that on 5/22/18 he and a co-worker were traveling along Route 3 picking up traffic signs. Petitioner was a restrained front seat passenger when his co-worker pulled off on the side of the road and came to a complete stop. Before his co-worker could shift the vehicle into park it was struck from the rear at a high rate of speed. Petitioner testified the vehicle he was in was knocked forward approximately 25 to 50 feet.

Petitioner was transported by ambulance to St. Francis Medical Center in Cape Girardeau, Missouri, where he complained of head, neck, and back pain. Petitioner testified he noticed pain in his left hip and leg, and now has occasional pain in his left foot and arm that radiates from his back and neck. Petitioner testified he has had no prior injuries, significant treatment, surgeries, or injections to his neck or back and did not have radiating pain in his leg or arm prior to this accident. Petitioner passed a pre-employment physical to begin his employment with Respondent.

Petitioner stated he was evaluated by Dr. Matthew Gornet who recommended physical therapy and advised Petitioner to lose weight. Petitioner testified he weighed 332 pounds at the time of the accident. Petitioner testified he underwent physical therapy and two injections in his low back that alleviated his symptoms for approximately one week.

On 2/2/19, Petitioner was released to return to light duty work with a 25-pound lifting restriction. Petitioner was assigned to drive a one-ton dump truck and haul tree brush. Petitioner testified he sustained an aggravation of his condition on 3/12/19 when he was driving a tandem dump truck into a deer pit to dump a load and he hit a big bump which caused the truck seat to jerk forward and then backwards. The accident was reported to Respondent the same day where he complained of feeling a sharp stabbing pain in his lower back, left buttock, and left leg. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out".

Petitioner continued working light duty and on 4/17/19 he was driving a truck to the work site when he encountered a bumpy rock road, causing the seat to bounce and throw him sideways and forward. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Petitioner completed a third accident report that corroborates his testimony.

On 5/28/19, Petitioner suffered another injury when he was directing traffic while his crew was patching potholes on Highway 51. Petitioner testified that a vehicle came barreling through the construction zone directly towards him. In order to avoid being run over by the car, Petitioner made a sudden jerk and ran off the roadway and aggravated his back. Petitioner completed a fourth accident report complaining of pain in his neck, numbness in his left arm and leg with stabbing pain in his lower back. Petitioner's co-worker, Jerome Carr, filled out a witness report and stated he witnessed an SUV hit the guardrail in the construction zone and Petitioner "appeared to be in severe pain after the incident".

Petitioner suffered another injury on 5/31/19 when he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner testified he had a physical altercation with his eighteen-year old son in February 2020 where Petitioner had to defend himself. Petitioner testified he did not sustain any

injuries as a result of that altercation. Petitioner also testified he had to defend himself against physical altercations with his wife on two occasions in July and August 2019, but did not sustain any injuries to his neck or back as a result of those altercations. At the time of arbitration Petitioner weighed 270 pounds and was losing weight in order to undergo a disc replacement surgery at L4-5 as recommended by Dr. Gornet. Petitioner testified his back surgery is scheduled on July 29, 2020.

Petitioner testified he has low back pain, numbness in his left leg, leg pain, pain in his hips, numbness in his left foot, and neck pain. He states his back pain is worse than his neck pain with daily pain being an 8 out of 10. He is currently taking Meloxicam and Cyclobenzaprine. He denies any injuries or aggravations of pain at home or around the house. He testified he wants to undergo the surgery recommended by Dr. Gornet because he wanted to get better and go back to work.

Respondent did not call any witnesses.

MEDICAL HISTORY

Petitioner was transported by ambulance to St. Francis Medical Center on 5/22/18 where he reported pain in his back, head, and neck as the result of a motor vehicle accident. He reported his symptoms were worsened by movement and he exhibited tenderness and pain in his cervical, thoracic, and lumbar spine. A thoracic and lumbar CT scan was performed that revealed a broad-based disc bulge at L3-4 with mild central canal stenosis, a broad-based disc bulge at L4-5 with mild central canal stenosis, and a disc protrusion at L5-S1 with moderate bilateral neural foraminal stenosis. Petitioner was discharged and instructed to follow up with further care.

On 6/4/18, Petitioner was evaluated by board certified orthopedic spine surgeon Dr. Matthew Gornet. Dr. Gornet noted Petitioner's symptoms were in his neck radiating to the left side, left trapezius, left shoulder and left scapula. Petitioner's low back pain was located in both sides of his buttocks, left hip, down the left leg and the lateral thigh to his knee with intermittent tingling. Dr. Gornet noted that after the accident, Petitioner was seen by his primary care physician at the Veterans Affairs Hospital and was taken off work. Dr. Gornet further noted that Petitioner did not have any previous significant problems with his neck or back prior to his work accident and had constant symptoms since the accident, including radicular symptoms in addition to his structural back pain. Petitioner's symptoms in his back were worsened by bending, lifting, and prolonged sitting or standing. His neck symptoms were worsened by reaching or pulling. Dr. Gornet recommended an MRI of the lumbar and cervical spine.

A lumbar MRI was performed on 6/4/18 that revealed a left lateral recess foraminal annular tear and protrusion at L4-5 resulting in mild left foraminal stenosis, and a left lateral recess protrusion at L5-S1 with a probable annular tear at its apex, resulting in displacement. The MRI was reviewed by Dr. Gornet who noted the annular tear at L4-5 on the left as well as a small beaking of the disc on the left. He placed Petitioner off work and prescribed medications and physical therapy.

On 8/2/18, Petitioner returned to Dr. Gornet who noted Petitioner's low back pain continued into both sides and both buttocks, but more pronounced in the left buttock and left hip.

Petitioner's neck pain was also located more to the left side. A cervical MRI was performed that revealed an annular tear at C5-6 and a small foraminal disc protrusion at C3-4. Petitioner had undergone physical therapy to no benefit and Dr. Gornet recommended a steroid injection at L4-5 on the left. Dr. Gornet further recommended that Petitioner lose weight as he currently weighed 332 pounds.

Petitioner underwent a left L4-5 epidural steroid injection on 8/21/18 that provided temporary relief. When Petitioner returned to Dr. Gornet on 10/15/18 the short-term relief of his symptoms had worn off and his symptoms had returned. Dr. Gornet observed that Petitioner had lost 16 pounds since his last visit and encouraged him to continue losing weight. Dr. Gornet recommended additional diagnostic testing but wanted Petitioner's weight to reach 280 pounds. He continued Petitioner's medications and kept him off work.

On 1/22/19, Petitioner was evaluated by Dr. David Robson pursuant to Section 12 of the Act. Petitioner reported a consistent history of the accident and stated his neck pain had benefited from physical therapy but his main concern was the radiating low back and left anterior lateral thigh pain. Dr. Robson noted Petitioner underwent an epidural steroid injection that provided relief for only a few days. He noted no previous cervical or lumbar problems. Upon physical examination, Dr. Robson found Petitioner to have tenderness to palpation in his low lumbar spine and associated neck and back pain. When considering the records, Dr. Robson noted that the cervical and lumbar MRIs showed a central protrusion at C5-6 and left foraminal stenosis at L4-5. Dr. Robson opined that the work accident was the cause of the cervical disc protrusion and lumbar disc derangement. He further believed that the accident caused Petitioner's need for treatment. However, Dr. Robson believed that Petitioner should accept his condition of ill-being because he did not believe Petitioner was a surgical candidate due to his weight. He opined that Petitioner required no further treatment.

Petitioner followed up with Dr. Gornet on 2/2/19 and reported persistent pain. Dr. Gornet again encouraged Petitioner to achieve his weight loss goals and get closer to 280 pounds. Dr. Gornet allowed Petitioner to return to work with a 25-pound lifting restriction.

Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's underlying condition was likely temporary. He further noted that Petitioner continued to lose weight and was 301 pounds on that date. He encouraged him to continue losing weight before obtaining additional studies.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions.

On 7/22/19, Petitioner returned to Dr. Gornet with continued discogenic neck and low back pain and radicular symptoms. Dr. Gornet observed that Petitioner had greatly reduced his weight and was down to 285 pounds. Dr. Gornet ordered a new MRI and a CT discogram at L4-5 and L5-S1, as well as an MRI spectroscopy of Petitioner's low back at L3 and S1.Petitioner

provided Dr. Gornet with a copy of the Section 12 report of Dr. Robson and Dr. Gornet disagreed with Dr. Robson's opinion that there was no indication for further treatment. Dr. Gornet dispensed medication to help manage Petitioner's symptoms.

Dr. Gornet was deposed on 8/26/19 and testified that after his review of Petitioner's medical records and his examination, he believed Petitioner's symptoms were consistent with a disc injury. Dr. Gornet testified the MRI showed an annular tear at L4-5 on the left, a small beaking of the disc, which represents a changing contour of the annulus, stating that normal changes in contour often represent a disc injury. Dr. Gornet observed changes at C5-6, and the left foraminal views showed an annular tear at C5-6 and a disc protrusion or a low herniation at C3-4.

Dr. Gornet testified that Petitioner had failed physical therapy and so a steroid injection was recommended at L4-5 on the left side. Dr. Gornet testified he did not believe Petitioner's weight was the cause of any of Petitioner's issues, only that it complicated treatment.

Dr. Gornet testified that the injection at L4-5 provided Petitioner with temporary relief, but the result was indicative that they were addressing the correct problem. He recommended Petitioner stay on anti-inflammatories and muscle relaxants, with the understanding that more testing and treatment were needed. Dr. Gornet ordered further imaging studies, including an MRI spectroscopy, where a chemical biopsy of the disc is taken and chemicals known to be a source of back pain are sought. He testified the study provides a physiologic assessment of a patient's back in addition to a static MRI, which is not predictive of pain. Dr. Gornet also clarified the importance of foraminal views of an MRI, stating that approximately 30 percent of disc pathology will be missed on a standard MRI, so the foraminal views give the most accurate diagnosis.

Dr. Gornet testified that Petitioner remained temporarily totally disabled as of 2/2/19, but was released to work with restrictions on 2/4/19. Dr. Gornet related that on 4/17/19 Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. Dr. Gornet stated that Petitioner called his office to discuss certain duties at work that were increasing his symptoms, and Dr. Gornet believed that further work restrictions were required.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet disagreed with Dr. Robson's opinion that nothing further should be done, noting that Petitioner was experiencing persistent pain, and he had not returned to his pre-accident baseline. Moreover, additional treatment that could cure and relieve Petitioner from the effects of his work accident was available if he continued to lose weight. He stated that subsequent injuries continued to aggravate Petitioner's condition, affecting his overall quality of life and force him toward further, more stringent restrictions. Dr. Gornet also believed Petitioner was highly motivated to alleviate his symptoms and was participating in his own treatment by losing approximately 50 pounds.

Petitioner underwent a CT discogram on 8/28/19, with facet blocks at left L4-5 and L5-S1, that revealed a provocative disc at L5-S1 with a posterior annular tear.

Petitioner was again evaluated by Dr. Robson at Respondent's request on 9/11/19. Petitioner reported additional dates of injury, including the injury on 4/17/19. Dr. Robson's diagnosis remained the same and he opined that the 4/17/19 accident caused a temporary aggravation of Petitioner's cervical and lumbar conditions. He continued to believe that Petitioner should accept his condition and symptoms and that no further treatment was needed. He opined that Petitioner could return to work without restrictions and had reached maximum medical improvement.

Petitioner returned to Dr. Gornet on 9/30/19 weighing 273 pounds. Dr. Gornet reviewed the imaging studies and noted the MRI spectroscopy revealed chemicals at L5-S1 and the CT discogram revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with a posterior annular tear. Dr. Gornet opined that based on the objective evidence, L5-S1 would require treatment. Dr. Gornet recommended one more injection at L5-S1, but noted once Petitioner reduced his weight to the 260s he would be a candidate for a lumbar disc replacement at L5-S1. He continued Petitioner's light duty work restrictions, although Petitioner was not working due to light duty not being available.

Dr. Robson was deposed on 1/4/20. Dr. Robson testified he met with Petitioner on two occasions, a second time due to receiving incomplete records. He testified that Petitioner sustained multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant. Dr. Robson testified that his pertinent findings were that Petitioner had a normal neurologic exam of upper and lower extremities, reduction of sensation in the aspect of his left calf and minimal decrease in forward flexion of the lumbar spine. Dr. Robson testified he felt Petitioner had a cervical and lumbar strain as a result of the combination of accidents, where "the most recent one had made him worse".

Dr. Robson's diagnosis for Petitioner was cervical and lumbar strain, as well as disc protrusion at L4-5 and L5-S1. He testified that this condition was caused by the initial motor vehicle accident of 5/22/18. He believed that Petitioner riding in a one-ton work truck over bumpy roads would not worsen his symptoms, and there was no structural change with the CT scan when compared to the previous MRI. Dr. Robson testified that the structure of Petitioner's spine was fine and he could tolerate regular work. He opined no further treatment was necessary and Petitioner was at MMI as of 1/22/19. He testified that in September 2019 Petitioner remained in exactly the same condition.

Dr. Robson testified that if Petitioner's weight was reduced he could take on physical therapy on his own and live with his condition. He believed that Petitioner would have good days and bad days, he would have to learn what aggravates his symptoms and "back off that", and he would have to take anti-inflammatories depending on his job duties. Rather than restrictions at work, Dr. Robson opined Petitioner would need to be smart about his management of his spine. When asked his opinion of Petitioner's physical exertion level required at work, Dr. Robson opined it was heavy to very heavy.

Dr. Robson was not provided with Dr. Gornet's office notes from 9/3/19 or 1/6/20, or the MRI spectroscopy. Dr. Robson testified that while he believes disc replacement surgery is a good

procedure, he no longer performs the procedure due to the impossibility to get insurance approval.

As of 1/6/20, Dr. Gornet noted Petitioner's symptoms and planned treatment stayed the same, and he planned on a reevaluation in six to eight weeks to allow Petitioner more time to reach his target weight. On 5/30/20, Petitioner followed up with Dr. Gornet weighing 270 pounds. Dr. Gornet believed Petitioner was a surgical candidate and Petitioner wanted to move forward with surgery. A surgery date was tentatively scheduled. Medication and restrictions were continued and Dr. Gornet stated he believed Petitioner's ongoing symptoms were related to his work injury of 5/22/18.

CONCLUSIONS OF LAW

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

The Supreme Court held that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

Petitioner's injuries were aggravated in the course of his duties. 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*, 117 Ill.2d 38 (1987). Stated another way:

> [A]n injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003).

In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** (when the risk is a neutral risk encountered during the course of employment) that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.*; *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC. This increased risk may be **qualitative**, such as some aspect of employment that contributes to risk, **or** quantitative, such as the number of times they are required to encounter the risk. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 284, 290 (4th Dist. 2013).

As noted by the Appellate Court in *Accolade*, one cannot dismiss an injury that occurs during a routine, uneventful motion such as reaching, simply because the motion itself is not peculiar, if at the time of the occurrence the "claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties." *Accolade v. Illinois Workers' Comp. Comm'n*, 990 N.E.2d 901, 908. (3d Dist. 2013). In *Don Young v. Illinois Workers' Comp. Comm'n*, the Court held that even if the act of "reaching" was one performed by the general public on a daily basis, the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury. *Don Young v. Illinois Workers' Comp. Comm'n*, 13 N.E.3d 1252 (4th Dist. 2014). The Court stated, "When a claimant is injured due to an employment-related risk – a risk distinctly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Id.* N.E.2d at 1258-1259. Moreover, a claim a neutral risk is not barred where a claimant can prove an increased risk of injury by this neutral risk. *Village of Villa Park v. Illinois Workers' Comp. Comm'n*, 3 N.E.3d 885 (2nd Dist. 2013).

In *Adcock v. Illinois Workers' Comp. Comm'n*, the Appellate Court found that a welder, who was constantly "swiveling" in his work chair, was subject to a qualitative increased risk of injury, because his job required him to turn in his chair more frequently than members of the general public. The Court thus found that his injury arose out of his employment. *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC.

The Commission has concluded in several cases that distractions caused by interaction with students or patients constitute an increased risk of injury. In *Gloria McGlasson v. SOI/Alton Mental Health*, the claimant was a Social Worker who suffered injury when she "stepped off the sidewalk," fell, and broke her left arm and shoulder. *Gloria McGlasson v. SOI/Alton Mental Health Ctr.*, 18 I.W.C.C. 0373. At the time she fell, she had diverted her attention to a patient behind her who queried her about the progress on his paperwork. *Id.* She "turned her head to answer him and as she went forward she fell on the sidewalk in front of the building." *Id.* In awarding compensation for a compensable accident, the Arbitrator and the Commission concluded that the distraction constituted an increased risk that arose out of her employment and stated, "Although Petitioner actually fell because of her own misstep, the Arbitrator finds the misstep was caused by her attention being focused on the patient with whom she was talking, rather than on where she was walking." *Id.*

In *Donna Miller v. Berwyn North School Dist. # 98*, the claimant was a school teacher going to pick up her students from recess. *Donna Miller v. Berwyn North School Dist. # 98*, 18 I.W.C.C. 0409. As she was walking down the stairs, a student from a co-teacher's class walked by and said, "Hi, Ms. Miller." *Id.* She then turned and looked over her left shoulder to say hello, at which point she stepped and fell down the stairs. *Id.* The employer disputed accident, but the Arbitrator and the Commission concluded that the petitioner's injuries arose out of and in the course of her employment, stating, "[T]he basis for which compensation is being awarded here is not based upon any defect but rather Petitioner's increased risk of injury because she was distracted by a student talking to her . . ." *Id.*

In *Kram v. SOI/Vienna Correctional Center.*, the Commission held that the claimant, a Correctional Officer, sustained a compensable injury when he injured his knee while stepping

down stairs to the landing on his way to take corrective action against two inmates breaking line formation. *Kram v. SOI/Vienna Corr. Ctr.*, 15 I.W.C.C. 0286. He testified that the insubordinate inmates diverted his attention from where he was stepping and resulted in his left knee injury. *Id.* The Commission confirmed the Arbitrator's award of benefits, finding that such a distraction constituted a qualitative increased risk. *Id.*

Petitioner testified that on 5/31/19 he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out". Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner's supervisor was present at trial as a representative of Respondent and was not called to testify to rebut Petitioner's testimony. Petitioner's unrebutted testimony and the corroborating accident report clearly demonstrate Petitioner was performing tasks at the direction of Respondent and exposed to a risk of injury greater than that of the general public when he was operating a dump truck, driving on uneven terrain, and jerked in various directions.

Based upon the aforementioned law and Petitioner's credible testimony, the Arbitrator finds that Petitioner met his burden in proving he sustained accidental injuries that arose out of and the course of his employment with Respondent.

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

The parties stipulated Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 22, 2018 (Consolidated Case No. 18-WC-17572). However, Respondent disputes that Petitioner's accident on 5/31/19 aggravated his condition and takes the position that any treatment after Dr. Robson's Section 12 examination on 1/22/19 is not causally related to Petitioner's injuries. The Arbitrator takes judicial notice of the findings in Consolidated Case No. 18-WC-17572 that Petitioner's current condition of ill-being is causally connected to his injuries that occurred on 5/22/18.

Petitioner testified that on 5/31/19 he was driving a dump truck and hit a bumpy part of the road causing his vehicle to bounce and shake up and down very hard. Petitioner was thrown around in his seat causing sharp pain in his back and leg. The Employer's First Report of Injury included a consistent history of Petitioner's injury. Petitioner testified that the air ride seats in the one-ton trucks were old and very uncomfortable for someone with a back injury and the seats "bottom out". Petitioner testified he did not sustain any new injuries, but an aggravation of his prior condition. Dr. Gornet took Petitioner off work following the 5/31/19 incident.

Petitioner was released to return to light duty work on 2/2/19 as the result of his injuries that occurred on 5/22/18. Petitioner returned to Dr. Gornet on 4/1/19 with increased pain. Petitioner's exam was unchanged and Dr. Gornet believed that the aggravation of Petitioner's

underlying condition was likely temporary. Dr. Gornet related that Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work.

On 6/4/19, Petitioner called Dr. Gornet's office to report an increase in low back pain and radicular symptoms due to his job duties. Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions and has remained off work since.

Dr. Gornet opined that the subsequent accidents increased Petitioner's symptoms but did not change the structural pathology from the original MRIs. Dr. Gornet related that Petitioner experienced an aggravation of his underlying condition while being jolted in his tandem truck at work. On 9/11/19, Dr. Robson testified Petitioner experienced multiple accidents at work, but felt that the 4/17/19 accident seemed to be dominant.

Petitioner's supervisor was present at trial as a representative of Respondent and was not called to testify to rebut Petitioner's testimony.

The Arbitrator finds Petitioner's testimony to be credible in light of the medical records submitted into evidence. There was no evidence presented at arbitration or in the depositions of Dr. Gornet or Dr. Robson to refute Petitioner's testimony with regard to his low back and neck symptoms or treatment prior to or after May 22, 2018. The Arbitrator also relies on the credible opinion of Dr. Gornet in finding a causal connection between Petitioner's low back condition and the May 31, 2019 aggravation.

Based upon the foregoing, the Arbitrator finds Petitioner met his burden of proof and established that his current condition of ill-being in his back is causally related to the accidental injury of May 31, 2019.

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

Based upon the above findings as to causal connection and Dr. Gornet's testimony that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses related to the aggravation of his injuries on 5/31/19. Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1 as they relate to date of accident 5/31/19. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care, and therefore orders Respondent to pay $520.00 due and owing St. Francis Medical Center.

Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit. The Arbitrator further orders Respondent to hold Petitioner harmless for

any and all health insurance subrogation claims that may or have been asserted by Blue Cross Blue Shield, as provided in Section 8(a) and Section 8.2 of the Act.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Gornet opined that the incident on 5/31/19 was a temporary aggravation of Petitioner's low back condition and Petitioner's job duties would continue to aggravate Petitioner's condition unless more stringent restrictions were ordered. On 6/4/19, Dr. Gornet provided further work restrictions to avoid further injury, including no repetitive bending, no lifting, alternating between sitting and standing, no driving a one-ton truck, and no mowing. Petitioner testified that Respondent could not accommodate these light duty restrictions and has been off work since. Therefore, the Arbitrator finds the incident dated 5/31/19 caused a temporary aggravation of Petitioner's condition for which he was taken off work in order that his condition return to a pre-accident baseline and he is not entitled to prospective medical care related to the aggravation that occurred on 5/31/19.

Issue (O): Has Petitioner reached maximum medical improvement?

Based upon the Arbitrator's finding that the incident dated 5/31/19 caused a temporary aggravation of Petitioner's low back condition for which he was taken off work in order that his condition return to pre-accident baseline, the Arbitrator finds Petitioner has reached maximum medical improvement for the aggravation that occurred on 5/31/19.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

7/29/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019802
Case Name	ELLIS, JORDAN v. KOMATSU AMERICA CORP
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0588
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kevin Elder
Respondent Attorney	Stephen Klyczek

DATE FILED: 12/3/2021

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JORDAN ELLIS,

Petitioner,

vs. NO: 18 WC 19802

KOMATSU AMERICA CORP.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of temporary total disability, causal connection, 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 April 5, 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 $4,500.00. 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.

December 3, 2021

o 12/03/21
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0588

ELLIS, JORDAN
Employee/Petitioner

Case# **18WC019802**

KOMATSU AMERICA CORP
Employer/Respondent

On 4/5/2021, 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:

0225 GOLDFINE & BOWLES PC
KEVIN ELDER/MATTHEW McCUE
4242 N KNOXVILLE AVE
PEORIA, IL 61614

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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)

Jordan Ellis
Employee/Petitioner

v.

Case # **18** WC **19802**

Consolidated cases: **N/A**

Komatsu America Corp.
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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **February 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, **March 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$61,008.48**; the average weekly wage was **$1,173.24**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** dependent children.

Respondent shall be given a credit of **$7,486.05** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational disability benefits, and **$22,204.23** in other benefits, for a total credit of **$29,690.28.**

ORDER

Respondent shall authorize the treatment recommended by Dr. Rashid, including, but not limited to, the recommended left carpal tunnel release and right ulnar nerve release with subcutaneous transposition.

Respondent shall pay Petitioner temporary total disability benefits of **$782.16**/week for **43 4/7** weeks, for the timeframe of **October 26, 2018** through **August 26, 2019**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$7,486.05** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational disability benefits, and **$22,204.23** in other benefits, for a total credit of **$29,690.28.**

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

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

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

Melinda M. Pope-Gillman

Signature of Arbitrator

3/31/2021

Date

ICArbDec19(b)

APR 5 - 2021

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Jordan Ellis
Employee/Petitioner

Case # **18** WC **19802**

v.

Consolidated cases: **N/A**

Komatsu America Corp.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner Ellis is a now 36-year-old welder that has worked full time for Respondent since February 2008, including two layoffs. Petitioner testified that he is 6 feet tall, that he weighs 210 pounds, and that he is right-hand dominant. Petitioner testified that he is not diabetic, that he has no thyroid or arthritis issues, and that he has no hand-intensive hobbies. He further testified that he quit smoking in April 2013, and that he occasionally performs light auto repair work such as brake replacements or oil changes for friends and family.

Petitioner testified that he has had two prior workers' compensation claims, the first of which was for wrist tendonitis without surgery against a former employer several years prior to 2008, and that the second claim was for metal in his eye. He testified that he has never had a personal injury claim and that he has no criminal background.

Petitioner testified that his job is very hand-intensive and that he is rarely, if ever, not using his hands at work. He testified that he regularly uses two different weld guns, a sub arc welder and "mig" welder, that he uses four different grinders, that he uses chippers, and that he uses impact guns for tightening and loosening bolts. Petitioner testified that the welders, grinders, and chippers generally required the use of both hands in a firm and often forceful grip, with the arms in awkward positions at times. He further testified that the grinders and chippers especially required that the tool be forcibly applied to the metal piece. Petitioner also testified that the welding guns have trigger locks for long welds, but that the chippers and grinders do not.

Petitioner testified that between 2014 and 2018, he primarily welded on "horse collars" which are large pieces that require 60 hours or longer of welding, grinding, and chipping to fully prepare them. He further testified that he also regularly "floats" and welds on smaller pieces as well, and that this requires the piece to be bolted into a fixture for welding.

James Smith was called as a witness by Respondent at the time of arbitration. Mr. Smith testified that he was Petitioner's supervisor from 2012 to 2017, and that he regularly observed him welding during that time. He testified that he agreed for the most part with Petitioner's description of his job and tool usage. Of particular significance to the Arbitrator, Mr. Smith specifically agreed on cross examination that Petitioner's welding job was hand-intensive, that it involved forceful gripping and vibration, and that it involved forceful use of the chippers and grinders.

The transcript of the deposition of Dr. Jeffrey Garst dated March 27, 2019 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Garst testified that he is a board-certified orthopedic surgeon and that he specializes in hand and upper extremity surgery. (PX1).

Dr. Garst testified that he first saw Petitioner on April 17, 2018. He testified that when he first saw Petitioner he ordered an EMG/NCV, and that he also performed an x-ray on that date. He testified that when Petitioner came in, he stated that his problem had been going on for many months and probably a couple of years, and that he had already had some treatment as he had already been taking an anti-inflammatory and was given a pain pill. He testified that Petitioner's complaints on April 17th were that of right hand pain and numbness with right elbow pain. He testified that he did not have recorded any complaints as to Petitioner's left wrist, and that no part of his exam included his left arm. He testified that his diagnosis on that date was that of right carpal tunnel syndrome, possible right cubital tunnel syndrome, and right lateral epicondylitis. He testified that he recommended EMG/NCV testing for work-up of carpal tunnel and cubital tunnel, and that he also recommended therapy for the lateral epicondylitis on the right. He testified that he did not inject Petitioner's right elbow on that date, nor did he recommend an MRI of the elbow. He testified that, as to Petitioner's work status, he could continue light duty. (PX1).

Dr. Garst testified that the EMG was performed by Dr. Russo on May 7, 2018, and that his impression was that of carpal tunnel syndrome on the right but otherwise negative. He agreed that he ordered the MRI of the right elbow that occurred on May 23, 2018, and that the results as reported by the radiologist were that of minimally increased signal involving the common extensor tendon origin suggesting low-grade tendinopathy. He testified that lateral epicondylitis was a condition that could develop completely independent of activities, and that the most common accident mechanism that might cause it was overuse. He testified that it could also be a specific trauma but that it was usually just using the arm too much and too often, and that it usually involved a lot of gripping activities. (PX1).

Dr. Garst testified that he performed a right carpal tunnel release on October 26, 2018, that when he saw Petitioner after surgery it was ten days after that operation, and that his diagnosis at that time was ten days post-op right carpal tunnel release along with right lateral epicondylitis and probable left carpal tunnel syndrome. He testified that the first date that he attached the diagnosis of possible left carpal tunnel syndrome to Petitioner was on June 25, 2018. He testified that he would have taken Petitioner off work right after the carpal tunnel surgery, that he kept him off work on November 5th, that he kept him off again on December 3rd, and that on December 31, 2018 he released him from his care regarding the right carpal tunnel release, but put him on a 5-pound restriction for his right elbow problems. (PX1).

Dr. Garst testified that on March 6, 2019 he performed surgery on Petitioner's right elbow, that he was seen post-operatively by his physician's assistant for his first post-op visit on March 18th, and that it looked like that was the last time that he was seen by his office. When asked whether between October 2018 when he did the right carpal tunnel release and March 6th when he did the epicondylectomy at any point Petitioner reported to him that his symptoms had completely resolved in the elbow, Dr. Garst responded that he did not believe so. He testified that when he saw Petitioner on January 28, 2019, he had continued symptoms of lateral epicondylitis on the right, that when he was seen on December 31, 2018 he still had right elbow pain, that when he saw him on December 3, 2018 his chief complaint was right elbow pain, and that when he was seen on November 5, 2018 he still had lateral epicondylitis listed as a diagnosis. When asked if an independent medical examiner was of the opinion that sometime in the fall Petitioner's epicondylitis had resolved and whether that would conflict with his treatment notes, Dr. Garst responded that it would not be consistent with his treatment notes. (PX1).

Dr. Garst testified that he stated in his operative report that there was some tearing in the extensor carpi radialis brevis, which was what one would expect to see with lateral epicondylitis. He testified that as he had just performed surgery on March 6th he still had Petitioner completely off work at that time. He testified that typical recovery was that of 6-8 weeks. He testified that he would anticipate that Petitioner

would get a full duty release as to the right elbow. He testified that one of his diagnoses for Petitioner was that of probable left carpal tunnel syndrome. He testified that he did not believe that Petitioner's right cubital tunnel syndrome had been ruled out, but that he did not think it had been too much of an issue. He testified that the cubital tunnel was not found on the EMG performed by Dr. Russo on May 7, 2018, but that it did not rule it out as sometimes there was a false/negative test. He testified that Dr. Russo did not do an EMG on Petitioner's left upper extremity, and that to his knowledge an EMG had never been done of his left upper extremity. (PX1).

When asked whether if he were going to be authorized to treat Petitioner's left wrist an EMG was a test that he would order, Dr. Garst responded that he would probably repeat the test and that if Petitioner had cubital tunnel symptoms on the right then he would have it repeated there, and that he would do the left side for what he described as clinical carpal tunnel in his notes. He testified that there was a possibility that Petitioner's left carpal tunnel syndrome would resolve on its own, but that he thought that the odds were if he was still welding and had symptoms of carpal tunnel syndrome, then it was going to be an issue down the road. (PX1).

When posed a hypothetical description of Petitioner's job duties and having been asked whether he had an opinion as to whether his work activities would cause or contribute to cause the bilateral carpal tunnel syndrome that he diagnosed in Petitioner, Dr. Garst responded that his opinion was that the bilateral carpal tunnel syndrome was caused or significantly contributed to by his work as a welder. When asked, assuming the same hypothetical, whether those job activities would cause or contribute to cause the right lateral epicondylitis, Dr. Garst responded that the Petitioner's lateral epicondylitis on the right was caused or significantly contributed to by his work as a welder. When asked whether, based on the same hypothetical, the same activities contributed in any way to the need for the two surgeries that he had performed on Petitioner, Dr. Garst responded that he thought that they did. When asked to modify the hypothetical description and whether that change in the hypothetical affected his opinions as to the carpal tunnel, the epicondylitis, and the need for surgery, Dr. Garst responded that it changed it a little bit but that he did not think it changed his opinion. (PX1).

On cross examination, Dr. Garst testified that he was not able to determine the age of the tearing that he found in the elbow when he performed surgery. (PX1).

The medical records of OSF Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner underwent a right carpal tunnel release by Dr. Garst on October 26, 2018 for a pre- and post-operative diagnosis of right carpal tunnel syndrome. The records further reflect that Petitioner underwent a right elbow lateral epicondylar release with radiocapitellar arthrotomy on March 6, 2019 for a pre- and post-operative diagnosis of right elbow lateral epicondylitis. At the time of the June 25, 2018 visit, it was noted that Petitioner had some continued right elbow pain, improved, and quite a bit of hand pain and numbness on the right side and left. It was noted that Petitioner had lateral epicondylitis on the right and carpal tunnel on the left, that he had a cortisone injection at the last office visit and had done therapy, and that it was improved. It was noted that the numbness in Petitioner's hand was not improved and was still bothering him, and that he was wanting something done. It was also noted that Petitioner had been also having a lot of troubles with numbness in the left hand with similar symptoms as the right, and that it was slowly getting worse. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis, improved; (3) probable left carpal tunnel syndrome. It was noted that Petitioner wanted to get something done for the right carpal tunnel because it was getting worse, that he had already had conservative care for it, and that Dr. Garst was recommending a right carpal tunnel release. It was noted that with respect to the elbow Petitioner was going to continue with therapy, that Dr. Garst thought they were making headway with that, and that he wanted to try to avoid surgery there. It was noted that as to Petitioner's left side they would think about EMG/NCV testing once he was finished with the right and if Petitioner was doing well on the right. It was

noted that as to Petitioner's work status, he was working light duty with the right arm and could continue on that work status. (PX2).

The records of OSF Orthopedics reflect that Petitioner underwent x-rays of the right elbow on April 17, 2018, which were interpreted as revealing normal x-rays of the right elbow. The records reflect that Petitioner underwent an MRI of the right elbow on May 23, 2018, which was interpreted as revealing minimally increased signal involving the common extensor tendon origin suggesting low-grade tendinopathy. The records reflect that Petitioner also underwent a right lateral epicondylar injection on May 29, 2018. At the time of the May 29, 2018 visit, it was noted that Petitioner was a welder at Komatsu, that he had been doing that for a long time, that he had had numbness which had been getting worse at the right hand for many months and actually probably a couple of years, also over the last several weeks, and that he had had pain at the lateral right elbow for which he was getting therapy. It was noted that Petitioner was wondering what was wrong and what could be done. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) possible right cubital tunnel syndrome; (3) right lateral epicondylitis. It was noted that it sounded like Petitioner had lateral epicondylitis but also compressive neuropathy, that they were going to get EMG/NCV testing for further work-up of the compressive neuropathy, that he was going to go ahead with the therapy for his lateral epicondylitis on the right, and that he was to return after the EMG/NCV testing. It was noted that Petitioner was working now, but apparently was put on light duty which Dr. Garst thought was fine. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on May 14, 2018, at which time it was noted that he had right elbow pain and right hand pain and numbness. It was noted that Petitioner had continued symptoms in the right arm at the hand and elbow, that therapy was not making much headway, and that the hand was bothering him a lot still. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis. It was noted that Petitioner might have cubital tunnel syndrome but that it was not showing up on the test, that Dr. Garst would "leave that alone for now," that Petitioner was already taking Meloxicam as an anti-inflammatory, and that they were going to give him a wrist cock-up splint that he could wear at night. It was noted that for Petitioner's elbow it sounded like he was not getting better with therapy, that he was wondering about getting something done there, and that they would get an MRI of the right elbow for further evaluation. It was noted that Dr. Garst wanted to keep Petitioner on light duty at work with the right arm, and that he was to return after the MRI of the right elbow. At the time of the May 29, 2018 visit, it was noted that Petitioner had continued right lateral elbow pain and that he was back with the results of his MRI. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis. It was noted that the MRI did not show any tear or a reason for surgery right now at the elbow, that Petitioner was continuing to work his regular job, and that for now Dr. Garst recommended trying conservative care. It was noted that Petitioner was going to keep wearing his wrist cock-up splint at night, that Dr. Garst suggested a cortisone shot at the elbow, and that an injection was performed. It was noted that Petitioner was going to stay on light duty at work with the right arm, and that he was to return in two months. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on July 30, 2018, at which time it was noted that he had continued right hand pain and numbness with some right elbow pain. It was noted that Petitioner had a diagnosis of right carpal tunnel syndrome with right lateral epicondylitis, that the last time that Dr. Garst saw him the elbow was improved so they had decided to hold off on anything invasive there, that the carpal tunnel was quite bad so he had recommended a carpal tunnel release, and that he was back to discuss that. It was noted that Petitioner was awaiting approval for a carpal tunnel release on the right, and that in the meantime he had been working with light duty with the right arm. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that Petitioner was basically the same as when he had been seen before although his elbow had been a little bit more symptomatic lately, that he had done therapy but that Dr. Garst did not think that it was doing too much right now for the elbow, that Dr. Garst told him to stop that and

just do a home exercise program, and that they were going to hold off on another cortisone injection at the elbow. It was noted that as to the right hand Dr. Garst was still recommending a right carpal tunnel release, that Petitioner wished to proceed, and that he was trying to get approval. It was noted that as to the left side, they were going to hold off on anything for now. It was also noted that as to his work status, Dr. Garst would keep Petitioner on light duty with the right arm and that light duty was going to be defined as 15 pounds lifting with the right arm and no lifting with the right hand palm down. Petitioner was recommended to return in six weeks and if he got authorization for surgery before then, they would simply proceed. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on September 10, 2018, at which time it was noted that he had continued right hand pain and numbness with some right elbow pain. It was noted that Petitioner had right carpal tunnel syndrome with right lateral epicondylitis, that he had clinical evidence of left carpal tunnel syndrome, and that he was there for a re-check. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that Petitioner was still having trouble at the right hand and elbow and some at the left hand as well, that Dr. Garst had recommended a right carpal tunnel release previously, that he still stood by that, and that Petitioner was awaiting approval. It was noted that as to the elbow Petitioner had previously gotten a cortisone shot, that they talked about that again but were going to hold off for now, that he was going to simply stay on his restrictions, and that they were restrictions of 15 pounds lifting with the right arm and no lifting with the right hand palm down. It was noted that Petitioner was to return in five weeks for another check to see how he was doing, and that if he were approved for his right carpal tunnel release before that then they would do the surgery. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on October 16, 2018, at which time it was noted that he had continued right hand pain and numbness with some lateral right elbow pain. It was noted that Petitioner had right carpal tunnel syndrome and lateral epicondylitis, that he was awaiting approval for the carpal tunnel surgery on the right, that he also had clinical evidence of left carpal tunnel syndrome, and that he was back for a re-check. It was noted that Petitioner recently went for an IME with Dr. Li and that he did not know the results. The diagnoses were noted to be that of (1) right carpal tunnel syndrome; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that they were awaiting approval for the right carpal tunnel release, that Petitioner was going to stay on his restrictions of 15 pounds lifting with the right arm and no lifting with the right palm down, that he was to return in five weeks for another check, and that at the elbow they might do another cortisone shot. It was noted that surgery was a consideration at the elbow but they were holding off on that for now, and that they would have to see what Dr. Li said with his IME regarding that as well. At the time of the October 24, 2018 visit, Petitioner was given pre-operative clearance. It was noted that Petitioner had had right hand numbness, tingling, and pain in the right index, long finger, and his palm, that these symptoms had gotten progressively worse since that spring, that he felt that his grip was weak, that he was dropping objects from his right hand, and that he worked as a welder and used his hands extensively. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on November 5, 2018, at which time it was noted that he was 10 days post-op from a right carpal tunnel release. It was noted that Petitioner's wound was nicely healed, that there was some swelling at the surgery site and some resolving bruising at his distal forearm, and that he was very weak with his grip and his fingers were stiff but he could make a full fist. The diagnoses were noted to be that of (1) 10 days post-op right carpal tunnel release; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that Petitioner was going to rehab on his own at his right hand and wrist, that Dr. Garst would keep him off work, and that he was to return in one month to make sure he was improved. The Telephone Encounter dated November 16, 2018 noted that Petitioner slipped and fell and caught himself with his surgical right hand about 15 minutes ago, that he stated that he mostly fell on his buttocks but that his right hand hit the ground first, and that he was concerned that the fall may have "messed up his surgery." It was noted that Petitioner stated that he had

some increased swelling at the incision site and redness after the fall, that he stated that he did not have much increased pain, and that he did not think he broke anything from this fall. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on December 3, 2018, at which time it was noted that he was six weeks post-op right carpal tunnel release, that he was doing well with that but still had weakness of the hand and soreness around the scar, that his elbow was bothering him a lot, that he did not think he could do much with the right elbow, and that he wanted to get something definitive done at the elbow and felt he was still having some troubles with the carpal tunnel, although it was improving. The diagnoses were noted to be that of (1) 6 weeks post-op carpal tunnel release, improving; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that Dr. Garst had a long talk with Petitioner about his work status and his condition, that Dr. Garst did not feel that he could go back to work the way he was, that he did not feel that light duty was available, and that he felt like he still needed to be off. It was noted that Petitioner did not think he could do the work that he normally did with his right hand the way it was and the way the elbow was, that he discussed definitive care of his right elbow, and that he had gotten a cortisone shot there before which gave him some relief but was temporary. It was noted that Petitioner wanted to hold off on another cortisone shot and that he wanted definitive care at the elbow. It was noted that Dr. Garst was keeping Petitioner off work and was suggesting a right lateral epicondylar release, and that it was stressed to him that it was probably another couple of months of recovery time and a lot of therapy afterwards. It was noted that Petitioner was going to continue rehabbing on his own with the right hand, and that they were going to schedule him for a right lateral epicondylar release in the near future. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on December 31, 2018, at which time it was noted that he was nine weeks after right carpal tunnel release and right elbow pain. It was noted that Petitioner had a long history of problems with his arms, that he had carpal tunnel on the right side which was operated on nine weeks ago, that he was doing well with regard to that although he was a little tender around the scar, that he was still tender at the elbow and had trouble gripping on the right side, and that he had some symptoms on the left. The diagnoses were noted to be that of (1) nine weeks post-op right carpal tunnel release; (2) right lateral epicondylitis; (3) probable left carpal tunnel syndrome. It was noted that Dr. Garst thought that Petitioner could go back to work with restrictions at that point, that as to the right hand and right carpal tunnel release Dr. Garst thought that he was at maximum medical improvement in another week or two, and that as to the right hand, wrist, and the carpal tunnel release he could go back to work regular duty without restriction and was released from Dr. Garst's care. It was further noted that as to the right elbow Dr. Garst placed Petitioner on a 5-pound restriction, that hopefully work could be found within that restriction, and that he was getting an IME for the right elbow in the next couple of weeks. It was noted that Petitioner was to return in one month for another check. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on January 28, 2019, at which time it was noted that he had continued symptoms of lateral epicondylitis on the right, that his carpal tunnel syndrome symptoms were improved, that he was well-healed from his previous surgery there, and that the elbow was hurting him quite a bit and he was hoping something could be done. It was noted that Petitioner recently saw an IME doctor for the right elbow and that the doctor did not give him much feedback during the appointment as to a plan for the elbow. The diagnoses were noted to be that of (1) continued right lateral epicondylitis; (2) previous right carpal tunnel release. It was noted that Petitioner had already had a course of physical therapy at the right elbow and had a cortisone shot, that he was still having a lot of pain and that the pain inhibited his work and his activities, that Dr. Garst thought it was time to do something more definitive, and that the recommendation was for a right lateral epicondylar release. It was noted that Petitioner wished to proceed. Petitioner was recommended to remain on a 5-pound restriction with the right arm. Petitioner underwent pre-operative clearance on February 27, 2019. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on March 18, 2019, at which time it was noted that he presented for 12-day follow-up of right lateral epicondylar release, that he had no

complaints on that date, that he was still taking Norco for pain but denied need for a refill, and that he stated that twisting open jars had been painful. It was noted that Petitioner had been lifting his baby with no issues. It was noted that Petitioner was to be off work for five weeks to complete physical therapy, that he requested Pekin for therapy and that an order was placed, and that he was to return in five weeks for follow-up. At the time of the April 22, 2019 visit with Dr. Garst, it was noted that Petitioner presented for a 5-week follow-up, that he was approximately seven weeks out from right lateral epicondylar release, that he was progressing some, that he still had some tightness and pain to the anterior lateral elbow, that he stated some motions with the arm still caused exquisite pain, and that he was attending therapy. The assessment was noted to be that of lateral epicondylitis of the right elbow. It was noted that Petitioner was to continue therapy for the next four weeks, that he was to continue his off work status and was given a note communicating this, and that he was to follow-up in four weeks for a progress check. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on May 20, 2019, at which time it was noted that he presented for an approximately 11 week follow-up of right elbow lateral epicondylar release, that he reported improvement with physical therapy but still had pain when twisting open jars or lifting a gallon of milk, and that he was unsure of a reasonable level of pain and requested some guidance. The assessment was noted to be that of lateral epicondylitis of right elbow. It was noted that Petitioner was to continue therapy, was to return to work next Tuesday with a 5-pound weight restriction of the right arm, was to return for follow-up in five weeks, and was given an updated work note. At the time of the June 24, 2019 visit, it was noted that Petitioner presented for almost 16-week follow-up of right lateral epicondylar release, that he was still participating in therapy, that he was unable to go back to work due to the weight restriction, and that he still had some issues with gripping and soreness but did note improvement. The assessment was noted to be that of lateral epicondylitis of the right elbow. It was noted that Petitioner was to continue therapy, that he was to return to work regular duty but that it was thought he would benefit from an hour restriction to allow for a smoother transition, that he was to return to work with a 4-hour/shift maximum and 20 hours/week maximum at regular duty, and that he was to return in five weeks. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on July 29, 2019, at which time it was noted that he was approximately 20 weeks out from surgery, that unfortunately his place of employment was unable to accommodate the hour restrictions made at the last office visit so he had stayed off work, that he stated that his elbow still hurt with some gripping and twisting motions but it had far improved, and that he felt ready to return to work. The assessment was noted to be that of lateral epicondylitis of the right elbow. It was noted that Petitioner felt that he was ready to return to work at regular duty, that he understood there would be an adjustment period but that his pain had much improved since his last visit, that he would return to work at regular duty on Monday and a note was given, and that he was to follow-up as needed. (PX2).

The records of OSF Orthopedics reflect that Petitioner was seen on August 14, 2020 by Dr. Rashid, at which time it was noted that he presented with right hand numbness, that he was status post right epicondylar release and right carpal tunnel release in 2019 and 2018, that he described numbness in the right hand when he was working with the elbow flexed specifically grinding and welding, and that he stated that he had had the numbness and tingling since the original claim. It was noted that Petitioner stated that the carpal tunnel release and the lateral epicondylar release did help but that he still had some numbness specifically in the long ring and small fingers, that he described continued numbness and tingling in the left hand when he was working as well, that a nerve conduction study was performed in 2018 which showed carpal tunnel syndrome on the right, that a left upper extremity EMG nerve conduction study was not performed, and that sometimes he described some weakness, especially when buttoning. It was noted that Petitioner had subluxation of the ulnar nerve on the right as well as the left elbows, that the right was fairly symptomatic and had been for several years since the claim was placed, that she would recommend a right ulnar nerve release with subcutaneous transposition, and that it was within a reasonable degree of medical certainty that repetitive flexion of the elbow at work was aggravating the ulnar nerve symptoms. It was

noted that at some point Dr. Rashid wanted to get an EMG nerve conduction study on the left as well, and that they would place orders for surgery and get it approved by work comp. The records reflect that Petitioner underwent x-rays of the right elbow on August 14, 2020, which were interpreted as revealing small ossicle possibly adjacent to the coronoid process, possibly suggestive of an old injury. The Indications were noted to be that of chronic right elbow pain. (PX2).

The medical records of OSF Illinois Neurological Institute were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen by Dr. Russo on May 7, 2018 for electrodiagnostic studies for a chief complaint of right hand pain and paresthesias present for roughly the last two years, with increasing in intensity over the last several months. It was noted that Petitioner related that he had been experiencing numbness, tingling, and pain involving predominantly the thumb, index, and middle fingers as well as the palmar aspect of the hand over the last several months, that it would occur with the use of the hand and at times nocturnally, that he worked as a welder for Komatsu, and that he additionally would occasionally note more diffuse paresthesias involving the entire hand, particularly when he worked in certain positions for prolonged periods and had some localized tenderness around the right elbow, exacerbated by gripping. It was noted that Petitioner found himself frequently dropping objects from his right hand, that he had no history of bony injuries in the right upper extremity, and that he occasionally experienced some symptoms in the left upper extremity but much less intense and less frequent than those noted on the right. It was also noted that Petitioner was right-hand dominant, that he had no significant complaints of cervical spine pain, that he had a family history of diabetes mellitus in a grandparent but no personal history of diabetes mellitus or thyroid disorder, and that his general health was good. The impression of the EMG/NCV was noted to be that of (1) electroneuromyographic findings are compatible with mild to moderate median neuropathy on the right at the wrist; (2) study is otherwise within normal limits including thorough evaluations of the ulnar and radial nerves with no evidence of other focal or generalized neuropathy; also no significant evidence of cervical radiculopathy or brachial plexopathy noted at this time. (PX3).

The records of OSF Illinois Neurological Institute reflect that Petitioner was seen on December 3, 2020 for electrodiagnostic studies of the upper extremities with complaints of bilateral hand numbness and tingling and pain exacerbated by activity and frequently dropping objects from both of his upper extremities. It was noted that Petitioner had had issues with both of his upper extremities over an extended period of time, that he worked as a welder for Komatsu, that he had been seen in the past for electrodiagnostic studies in 2018 which demonstrated the presence of right carpal tunnel syndrome, and that he underwent a right carpal tunnel release as well as surgery for chronic lateral epicondylitis/tennis elbow. It was noted that Petitioner noted improvement in these issues but he persisted in the right upper extremity with paresthesias, particularly in the ulnar aspect of the hand, and more diffuse paresthesias involving the left upper extremity, that these all seemed to be exacerbated by activity, that he had some complaints of weakness, and that there was no history of significant bony injuries to the upper extremity. It was also noted that Petitioner had no history of diabetes mellitus or thyroid disorder, that he had no complaints of significant cervical spine symptoms at the present time, and that he did have a history of previous leg fracture related to a motorcycle accident. The impression of the EMG/NCV was noted to be that of (1) electroneuromyographic findings compatible with mild to moderate left median focal neuropathy at the wrist; (2) electroneuromyographic findings of relatively prolonged segmental latencies for both ulnar nerves on inching studies along with a significant decrement in evoked response above the elbow on the right are consistent with mild right ulnar nerve dysfunction/neuropathy at the elbow and mild ulnar nerve dysfunction for the left ulnar nerve at the elbow; (3) studies are otherwise within normal limits with no evidence of cervical radiculopathy, brachial plexopathy, or other focal or generalized neuropathy at this time. (PX3).

The medical records of OSF Center for Occupational Health were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on April 5, 2018, at

which time it was noted that he was a right-handed welder who stated that he had had lateral right elbow pain for 2.5 weeks, that the onset was without any specific incident or accident, that with his elbow flexed he would get diffuse tingling of the right hand, that he occasionally had nighttime tingling of his right hand and fingers, and that there were no prior episodes of this type. It was noted that Petitioner had not had any upper extremity surgeries, that he took Meloxicam on an every other day basis for chronic right knee pain, and that he also took Norco occasionally for the same condition. The assessment was noted to be that of right lateral epicondylitis. Petitioner was given a prescription for Mobic and was recommended to undergo occupational therapy. Petitioner was also issued work restrictions and was recommended to return after two weeks or his therapy was completed. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on May 3, 2018, at which time it was noted that he was there for follow-up of right elbow pain and hand numbness and tingling. It was noted that Petitioner had gotten started in therapy with slight improvement, that the numbness and tingling in his hands was better, that it was predominantly in the median nerve distribution of the right hand, and that it was noted that he had undertaken treatment with Dr. Garst, who had apparently requested neurodiagnostic testing. The assessment was noted to be that of some improvement, treating with Dr. Garst. Petitioner was recommended to continue occupational therapy and was issued work restrictions. Petitioner was also recommended to follow-up after his next appointment with Dr. Garst. At the time of the May 17, 2018 visit, it was noted that the duration of Petitioner's right lateral epicondylitis symptoms was now about eight weeks, that he was continuing to have right lateral elbow pain that was improved somewhat with restrictions but was still bothersome on a daily basis, that he had consulted with Dr. Garst about this, and that an MRI of the right elbow was scheduled for May 24th. It was noted that regarding Petitioner's right hand tingling, he was continuing to have neurological symptoms in the median nerve distribution, mainly intermittent tingling, that he was also having a tightness sensation of the hand, and that the plan regarding this was continued conservative treatment for another six weeks with night bracing. It was noted that Petitioner had had neurodiagnostic studies since his last office visit. As to Dr. Moody's assessment, it was noted that Petitioner was awaiting MRI imaging of the right elbow and that Dr. Moody assumed that if a significant tear was identified that he would likely be offered surgical intervention or, if not, probably a steroid injection. It was noted that Petitioner's nerve conduction study was borderline for motor latency and that he had mild sensory carpal tunnel syndrome. It was also noted that Dr. Moody thought that Petitioner might be a candidate for carpal tunnel steroid injection if he failed to improve with continued conservative therapy. Petitioner was recommended to continue occupational therapy and was issued work restrictions. Petitioner was also recommended to return on June 6, 2018. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on June 6, 2018, at which time it was noted that he was there for follow-up of right median nerve irritation and right lateral epicondylitis. It was noted that since Petitioner's last office visit he underwent MRI imaging of the right elbow, that it showed some mild tendinosis, that he reported that he was continuing to have right lateral elbow pain that was present both at rest and with use of the arm, that he underwent steroid injection by Dr. Garst shortly after his MRI was done, that he had noted only mild improvement subsequent to injection, that he was continuing to have some numbness and tingling of his right hand but that it was less than before, and that his night symptoms were better. It was also noted that Petitioner did get daytime symptoms that he noticed mainly when using a computer, and that he had a follow-up with Dr. Garst at the end of the month. As to the assessment, it was noted that Petitioner had limited improvement with steroid injection, that his right common extensor tendon did not show any evidence of tearing on MRI, that his median nerve irritation persisted but was relatively mild based on neurodiagnostic testing, and that they would continue therapy and restrictions with a re-check after the next Orthopedic evaluation. Petitioner was issued work restrictions and was recommended to return for follow-up on June 27, 2018. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on June 27, 2018, at which time it was noted that he recently had a follow-up with Dr. Garg [*sic*] and apparently there

was agreement that his right elbow was improved but that additional therapy was warranted, that he was having some right lateral elbow burning pain, particularly with activity but not as severe as before, that he had some days where his discomfort could be described as minimal, and that he was also advised to undergo a right carpal tunnel release. It was noted that Petitioner stated that he was having numbness and tingling of the right hand that caused sleep interruption, that he sometimes dropped hand tools, and that surgery had not been scheduled. It was noted that Dr. Moody indicated that continued conservative therapy was advised for the right lateral epicondylitis, that surgery had been advised for the right carpal tunnel syndrome, and that Petitioner was to return 3-4 weeks post-operative, at which time he could return to some sort of light duty. (PX4).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on August 1, 2019, at which time it was noted that he was there for a return to work evaluation. It was noted that Petitioner's last day of work was on or about October 25, 2018, that he had been off work due to having a right carpal tunnel release followed by right lateral epicondyle release, that he was vague about his dates of surgery, and that when asked about numbness and tingling of his right hand he reported an absence of symptoms initially, but later stated that he was having intermittent problems with numbness or tingling in the 4th and 5th digits. It was noted that as to the elbow Petitioner had occasional burning pain and that he had been through physical therapy but was uncertain of what kind of weights he was lifting at the time of discharge. As to the assessment, it was noted that Petitioner had been released to full duty regarding his right elbow and right carpal tunnel release, and that Dr. Moody thought he could go back to unrestricted duty for these. It was also noted that it appeared that Dr. Garst had diagnosed other upper extremity entrapments that could predictably worsen if Petitioner resumed regular duty, and that he declined to sign consent for Dr. Moody to review his EMG/NCV so he could not make a decision regarding this. The Addendum noted that consent had been obtained for Dr. Moody to review medical records, and that surprisingly there had not been any additional neurodiagnostic studies to support a diagnosis of left upper extremity entrapment neuropathy. It was noted that Dr. Garst suddenly started mentioning left carpal tunnel syndrome and that there did not appear to be any per patient complaints documented that originated this diagnosis, and that Dr. Moody did not find any evidence of EMG/NCV support of this. It was noted that given there was nothing in Petitioner's records that supported left upper extremity entrapment neuropathy, Dr. Moody thought that he could return to work. (PX4).

The Accident Report dated March 19, 2018 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The Accident Reporting & Treatment Form dated March 19, 2018 noted that Petitioner was provided a tennis elbow support for a "Type of Injury/Illness" noted to have been that of a strain of the right elbow. The form signed by Petitioner on March 20, 2018 noted a date of injury of March 19, 2018 and that he noticed pain and tenderness while grinding, welding, and lifting, and that it started approximately one week prior to March 19, 2018. The Komatsu Medical Department Report dated March 19, 2019 noted that the date of injury was that of March 19, 2018, that the date of first treatment was that of March 19, 2018, and that Petitioner was complaining of pain to the outer aspect of the right elbow due to welding/grinding and lifting. It was noted that Petitioner was complaining of pain/tenderness to the outer aspect of the right elbow, that a tennis elbow support was given, and that he was to follow-up on March 21, 2018. (PX5).

Job Descriptions were entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The transcript of the deposition of Dr. Lawrence Li dated April 4, 2019 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Li testified that he is an orthopedic surgeon and that he is certified by the American Board of Orthopedic Surgery. (RX1).

Dr. Li testified that he saw Petitioner on two occasions for the performance of an IME. He testified that he first saw Petitioner on October 1, 2018. He testified that based on the history that Petitioner provided and the physical examination that was performed as well as the medical records that were

reviewed, he rendered a diagnosis of right carpal tunnel syndrome and right lateral epicondylitis. He testified that he thought that the lateral epicondylitis was extremely mild and was much better after the injection by Dr. Garst. He testified that his opinion was based on both the physical examination and the history provided by Petitioner. (RX1).

Dr. Li testified that Petitioner did not provide him with any complaints regarding his left hand and wrist. He testified that he would have asked Petitioner what his symptoms were, and that they only spoke of his right hand. He testified that he would not then have independently asked Petitioner about other body parts. When asked whether he came to an opinion as to whether Petitioner's job duties were a cause or an aggravating factor of his conditions of ill-being that he diagnosed him with, Dr. Li responded that he thought that his job duties were enough to aggravate his carpal tunnel syndrome. He testified that he recommended that Petitioner have a right carpal tunnel release, but that he did not feel that he needed any additional treatment for his right elbow. He testified that the basis for his opinion was that Petitioner was significantly better and that he was not having much in the way of symptoms. He testified that he recommended that there be no restrictions with regards to Petitioner's right elbow. He further testified that he believed that Petitioner was at maximum medical improvement for his right elbow, that he thought he had underlying lateral epicondylitis, that he thought there was a temporary aggravation, and that he thought he was at maximum medical improvement at that point. When asked of his opinion as to any restrictions for the right hand and/or wrist on October 1st, Dr. Li responded that he recommended that Petitioner have no repetitive gripping. (RX1).

Dr. Li testified that he saw Petitioner for a second time on January 19th (*sic*). When asked what Petitioner told him about his right elbow on January 19th, Dr. Li responded that he told him that he underwent a right carpal tunnel release on October 26, 2018, that he had not worked since then, and that sometime in November when he was using his right arm to do activities again after recovering from his right carpal tunnel he was doing things around the house, like pouring milk and pouring coffee, and that that was when his right elbow flared up. He testified that they did not have any discussion on January 19th (*sic*) regarding Petitioner's left hand or wrist. (RX1).

Dr. Li testified that, based on his examination of Petitioner on January 14th, the additional medical records that he reviewed as well as the history provided to him by Petitioner on that date, he diagnosed him with a recurrence of his right lateral epicondylitis. When asked whether he had an opinion as to whether the condition in the right elbow that he diagnosed on January 14th was related to Petitioner's work activities, Dr. Li responded that the condition that he diagnosed on January 14th was the same condition that he diagnosed in October, that lateral epicondylitis was due to degeneration of the common extensor tendon, that the common extensor tendon was temporarily aggravated by his work activities, and that it improved. He further testified that Petitioner then many months later re-aggravated it at home and that he still had the same diagnosis, but that it was not related to his work activities. (RX1).

On cross examination, Dr. Li testified that Petitioner's lateral epicondylitis could be aggravated with a lot of activities and that certainly his job activities could aggravate it. He testified that he felt that Petitioner's job duties were contributory to Petitioner's carpal tunnel syndrome. He testified that Petitioner had right carpal tunnel, rather than bilateral carpal tunnel. He agreed that he did not examine Petitioner as to his left hand. He testified that the EMG that he reviewed was dated May 7, 2018 and was of the right upper extremity. (RX1).

On cross examination, Dr. Li agreed that in his report he noted that Petitioner stated that the pain had returned some after the corticosteroid injection. He agreed that at the time of the second IME he examined medical records from the date of Petitioner's right carpal tunnel surgery onward to the date of his second examination. He agreed that Dr. Garst listed right lateral epicondylitis in Petitioner's post-operative visit on November 5th. When asked, based on those medical records and his examination of Petitioner, as to his opinion as to when his aggravation occurred, Dr. Li responded that his understanding was that it

occurred sometime in November after he was recovered enough from his carpal tunnel to start using his right arm and started doing things with his right arm again, such as pouring milk and doing other things at home. He agreed that Dr. Garst was still aware of Petitioner's subjective complaints of epicondylitis pain based on the November 5th note. (RX1).

On cross examination, Dr. Li testified that it was his opinion that sometime before October 1st Petitioner's lateral epicondylitis had gone back to a baseline. He testified that lateral epicondylitis was a degenerative condition, so that it flared up from time to time. He testified that Petitioner had work activities, that it was aggravated by work activities, that he was treated, that he got better, and that sometime in November he was doing these activities at home and aggravated it. He agreed that it was his opinion that Petitioner's work activities were an aggravating cause of his lateral epicondylitis pain prior to when he saw him in October. He further testified that it was a temporary aggravation, and that it was resolved by the time that he saw Petitioner. He further testified that it was not possible for it to be completely resolved. (RX1).

On cross examination, Dr. Li testified that he had patients who got relief from corticosteroid injections for epicondylitis, and that he had patients who had no improvement at all from the injections. He testified that there was nothing that he did that worked 100% of the time. He testified that if Petitioner had the injection before July 30th and was seen on October 1st the problem was basically resolved, that it was a temporary aggravation, and that it was resolved to the point that it could be resolved. When asked whether he would expect, if epicondylitis surgery was performed, he would still find tearing in the arm, Dr. Li responded that the tearing was due to tendinopathy and that it did not change with the injection and often did not change for the surgery either. (RX1).

On redirect when asked to refer to Dr. Garst's November 5th office note, Dr. Li testified that other than the diagnosis of right lateral epicondylitis there was nothing in the note that Petitioner was making complaints regarding his right elbow. When asked whether, based on his experience, he had an opinion whether it was common for diagnoses that had been initially made to be continued in medical records throughout the course of treating an individual patient, Dr. Li responded that it was particularly prevalent since the development of electronic medical records. He testified that there was no indication in the November 5th note that Dr. Garst was examining the right elbow and/or treating the right elbow on that date. (RX1).

Various Photos were entered into evidence at the time of arbitration as Respondent's Exhibit 2.

CONCLUSIONS OF LAW

At the outset, the Arbitrator notes that Respondent has stipulated to the issues of accident and causal connection as to Petitioner's right carpal tunnel syndrome, but denies liability for all of Petitioner's other alleged injuries.

With respect to disputed issues (C) and (F), given the commonality of facts and evidence relative to both issues, the Arbitrator addresses those jointly. The Arbitrator finds that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on March 19, 2018, and that his current condition of ill-being is causally related to his work activities for Respondent.

In so concluding that Petitioner's left carpal tunnel syndrome, right lateral epicondylitis and right cubital tunnel syndrome is related to his work activities, the Arbitrator finds the opinions of Dr. Garst to be more persuasive than those proffered by Dr. Li in this matter. The Arbitrator finds that the job duties as

testified to by Petitioner at the time of arbitration were consistent with those as proffered to Dr. Garst in the hypothetical posed by Petitioner's attorney at the time of the deposition. (PX1).

The Arbitrator finds that Petitioner's job duties for the better part of 10 years as a welder are hand-intensive, require forceful gripping with both hands regularly, require that his elbows be flexed with force and sometimes held in awkward positions for long periods of time and requires forceful application of the chippers, grinders, and impact guns, and that use of these tools exposes him to vibration. Petitioner testified in an unrebutted fashion that his arms and hands go numb and get stiff and painful while he works, and that his symptoms improve when he is absent from work and increase while at work. Significantly, Respondent's own witness, James Smith, confirmed that Petitioner's job was hand-intensive, involved vibration, and required forceful gripping and forceful use of chippers and grinders. The Arbitrator notes that Respondent's expert, Dr. Li, agreed that these types of activities contributed to cause carpal tunnel syndrome, and that he further opined that these activities at least temporarily aggravated Petitioner's epicondylitis. (RX1). Dr. Li's opinion that the epicondylitis resolved in November 2018 and returned due to pouring milk and coffee at home while he recovered from right carpal tunnel release was rebutted by both Dr. Garst's treatment records and his deposition testimony. (RX1; PX1).

The Arbitrator notes that Respondent stipulated that the Petitioner's work activities constituted a repetitive trauma as to his right carpal tunnel syndrome, but disputed the issues of both accident and causation as to Petitioner's conditions of ill-being in the left wrist and right elbow. (AX1). Having considered and reviewed the entirety of the evidence in this matter, the Arbitrator finds that Petitioner has established a repetitive trauma accident that manifested itself on March 19, 2018 as to Petitioner's bilateral hands and right elbow.

The Arbitrator notes that Petitioner has no co-morbidities that would predispose him to peripheral neuropathies. Petitioner is relatively young (34 at the time of his accident), is not obese, and has no systemic condition that could cause lateral epicondylitis, carpal tunnel syndrome, or cubital tunnel syndrome. The evidence reveals that both Dr. Garst and Dr. Rashid each provided causal connection opinions based on a sufficient understanding of Petitioner's job duties. Furthermore, the evidence reveals that Dr. Li causally related the right carpal tunnel syndrome condition, while only temporarily causally related the right lateral epicondylitis condition. (RX1). The Arbitrator does not agree with Dr. Li that the medical evidence revealed that the right lateral epicondylitis resolved in November 2018. Additionally, Dr. Garst specifically causally related the carpal tunnel syndrome and epicondylitis conditions, and Dr. Rashid causally related the right cubital tunnel syndrome in her August 14, 2020 treatment note. (PX1; PX2).

Based upon the foregoing and the record as a whole, the Arbitrator finds that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on March 19, 2018, and that his current condition of ill-being is causally related to his work activities for Respondent.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issues of accident and causation, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Rashid, including, but not limited to, the recommended left carpal tunnel release and right ulnar nerve release with subcutaneous transposition.

The Arbitrator notes that Petitioner's right carpal tunnel release was accepted by Respondent and was performed on October 26, 2018. (PX2). The records reflect that Petitioner's right lateral epicondylar release with radiocapitellar arthrotomy was disputed but performed on March 6, 2019. (PX2). Given the Arbitrator's findings as to accident and causation, the Arbitrator finds this surgery to have been reasonable, necessary, and causally related to his work activities for Respondent.

Furthermore, the medical records reveal that as of June 25, 2018 Petitioner has been diagnosed with probable left carpal tunnel syndrome, and that the diagnosis was ultimately confirmed by the EMG performed on December 3, 2020. (PX1; PX3). Based on the Arbitrator's findings as to accident and causation, the recommended left carpal tunnel release is hereby awarded.

Finally, the medical evidence reveals that Dr. Garst suspected the presence of right cubital tunnel syndrome throughout his treatment in 2018 and 2019. Petitioner returned to his same job for Respondent in August 2019 and by August 2020 was diagnosed with more severe right cubital tunnel syndrome, which was confirmed by EMG in December 2020. (PX1). The records reflect that a right nerve release with subcutaneous transposition was recommended by Dr. Rashid on August 14, 2020. (PX1). Based on the Arbitrator's findings as to accident and causation, the right ulnar nerve release with subcutaneous transposition is also hereby awarded.

In sum, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Rashid, including, but not limited to, the recommended left carpal tunnel release and right ulnar nerve release with subcutaneous transposition.

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from October 26, 2018 through August 26, 2019. (AX1).

Related thereto, the Arbitrator notes that Petitioner testified that his right carpal tunnel release was performed on October 26, 2018 and that he was off work for that particular procedure until December 31, 2018. Petitioner testified that after December 31, 2018 he continued to carry restrictions for his right elbow, and that Respondent was not able to accommodate those restrictions and required him to be at full duty before he was able to come back to work. The Arbitrator notes that Respondent offered no evidence to rebut Petitioner's testimony on this issue. As a result thereof, the Arbitrator finds that Respondent shall pay temporary total disability benefits for a period of 43 4/7 weeks, addressing the timeframe of October 26, 2018 through August 26, 2019, given the Arbitrator's findings with respect to disputed issues (C) pertaining to accident and (F) pertaining to causation.

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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC001540
Case Name	JONES SR, GARY A v. CITY OF FAIRVIEW HEIGHTS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0589
Number of Pages of Decision	26
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jeffrey Gault
Respondent Attorney	Frank Johnston

DATE FILED: 12/3/2021

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ 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

GARY JONES,

Petitioner,

vs. NO: 17 WC 01540

CITY OF FAIRVIEW HEIGHTS,

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 temporary total disability, causal connection, permanent partial disability, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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.

December 3, 2021
o 12/03/21
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	17WC001540
Case Name	JONES, GARY v. CITY OF FAIRVIEW HEIGHTS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Jeffrey Gault
Respondent Attorney	Frank Johnston

DATE FILED: 6/21/2021

INTEREST RATE FOR THE WEEK OF JUNE 15, 2021 0.04%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **St. Clair**)

☐ 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

Gary Jones
Employee/Petitioner

v.

City of Fairview Heights
Employer/Respondent

Case # **17** WC **01540**

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 **4/29/21**. 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. ☒ 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 18, 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 $**56,615.52**; the average weekly wage was $**1,088.76**.

On the date of accident, Petitioner was **56** 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 $**21,878.89** for TTD from 5/19/16 through 12/14/16, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,878.89**.

Respondent is entitled to a credit of $**33,514.14** under Section 8(j) of the Act.

ORDER

The medical treatment rendered, including the knee replacement surgery and back and neck treatment and therapy, was reasonable and necessary. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibits 13-16 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

Respondent is entitled to a credit of $**33,514.14** under Section 8(j) of the Act, for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims from any providers of the services for which Respondent is receiving this credit including any health insurance subrogation claims.

Respondent shall pay Petitioner temporary total disability benefits of $725.84/week for 22 weeks, commencing 12/15/16 through 5/19/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $725.84/week for life, commencing 5/20/17 as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

JUNE 21, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on April 29, 2021, pursuant to Sections 8(a), and 8(b)2/8(f) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's back, neck and left knee conditions; 2) liability for medical bills; 3) entitlement to TTD benefits from December 15, 2016, through May 19, 2017; and 4) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 56 years old, was employed by the Respondent in the streets department. (T. 11) He had a high-school education and a certificate from "diesel school." (T. 12)

In 1988, the Petitioner had a motorcycle accident in which he suffered a left tibia fracture that necessitated an open reduction and internal fixation pin, including implantation of a rod and screws below his left knee. (T. 35-36) He was able to work afterwards. (T. 26) In May 2010, the Petitioner had another motorcycle accident, injuring his left knee and causing the development of arthritis. (T. 37-38) The Petitioner testified that in 2013 and 2014, he had additional treatment by Dr. Thomas Fox, an orthopedic surgeon at Mid County Orthopaedic Surgery and Sports Medicine, for his knee consisting of injections, that his knee was "pretty good" afterwards and that he was able to work his normal duties until the accident at issue. (T. 26-27) He acknowledged that he discussed potential knee replacement with Dr. Fox in 2013 and 2014. (T. 40) Dr. Fox's records reflect that on April 11, 2013, Dr. Fox explained to the Petitioner that he would need both knees replaced "at some point in time." (PX9) On September 25, 2014, Dr. Fox stated: "He (the Petitioner) is getting to the point he thinks at some point he may want to get that left knee replaced." (Id.) The Petitioner also had low back surgery in the 1980s. (T. 27-28)

On May 18, 2016, the Petitioner was driving a street sweeper when he fell while climbing off it. (T. 13) He stated that he put his foot in the stirrup, missed the next step down, hit his neck, back and head on the way down and was left hanging by his left leg supporting his body weight of 325 pounds. (T. 14-16)

The Respondent sent the Petitioner to Midwest Occupational Medicine that day, where he was examined and had X-rays performed. (T. 16-17) The Petitioner testified that his knee was "killing" him, that he had pain from between his shoulder blades down into his lower back and that his neck was stiff. (T. 17) The knee X-ray showed advanced degenerative change and several suspected intra-articular loose bodies. (PX1)

The Petitioner returned to Midwest Occupational Medicine the following day and was diagnosed with a contusion to his upper right back, a knee sprain and contusion and an abrasion to his right leg. (Id.) He was placed on sedentary duties and advised to take over-the-counter anti-inflammatory medication, alternate cool and warm compresses to the areas of pain and continue dressing his abrasion. (Id.)

On May 26, 2016, the Petitioner followed up at Midwest Occupational Medicine and informed Physician Assistant Andy Colon that his left knee had begun locking up on him when he went up and down stairs. (Id.) He still had swelling and contusions over his scapular area and along the left scapular border and a tingling sensation in his hand. (Id.) PA Colon ordered an MRI of the Petitioner's left knee and continued the work restrictions and prior treatment recommendations. (Id.) The MRI showed mild soft-tissue contusion and edema, small knee effusion, old partial-thickness meniscofemoral and meniscotibial ligament tears and a full-thickness anterior cruciate ligament (ACL) tear. (Id.) A lumbar spine radiograph showed spondylosis without compression deformity or subluxation and radiopaque density in the right

upper quadrant. (Id.) A thoracic spine radiograph showed mild ventral wedging of mid-thoracic vertebral body, probably at T7, and multilevel thoracic spondylosis. (Id.)

Midwest Occupational Medicine referred the Petitioner to Dr. Mark Miller, an orthopedic surgeon at The Orthopedic Center of St. Louis. (PX3) Dr. Miller examined the Petitioner on June 8, 2016, reviewed the MRI and performed X-rays. (Id.) He diagnosed degenerative joint disease and a medial meniscus tear in the left knee and opined that the Petitioner's previously arthritic knee was exacerbated. (Id.) He gave the Petitioner a cortisone injection and ordered physical therapy. (Id.) He also allowed the Petitioner to return to work with restrictions of no prolonged standing, no kneeling or squatting and no lifting more than 20 pounds. (Id.)

The Petitioner underwent four physical therapy sessions for his knee from June 15, 2016, through June 22, 2016, at The Work Center. (PX2) He returned to Dr. Miller on June 23, 2016, and reported that the injection gave him relief for about a week, that he had a couple of episodes of his knee locking, and that he struggled going up and down stairs. (PX3) Dr. Miller recommended arthroscopic debridement of the knee and continued the work restrictions. (Id.)

The Petitioner had another visit at Midwest Occupational Medicine on June 8, 2016, at which time he complained of dull achiness in his mid back mostly on the right side at T5, 6 and 7 and continued pain in his knee. (PX1) PA Colon found the Petitioner to be at maximum medical improvement regarding his back. (Id.) On July 13, 2016, the Petitioner returned to Midwest Occupational Medicine for continued mid-back pain. (PX1) PA Colon referred the Petitioner to physical therapy. (Id.) At a follow-up visit on July 29, 2016, the Petitioner reported that the physical therapy was beginning to help. (Id.) Additional physical therapy was prescribed. (Id.) The Petitioner attended 12 sessions at The Work Center from July 15, 2016, through August 12,

2016. (PX2) On August 18, 2016, PA Colon found that the Petitioner reached maximum medical improvement regarding his back and allowed him to return to work as tolerated. (PX1)

On August 4, 2016, the Petitioner went to the office of Dr. Jason Barnett, his family medicine practitioner at Anderson Medical Group, complaining of pain in his left knee and upper back. (PX4) For the Petitioner's back, Family Nurse Practitioner Jamie Ott recommended continuing with his previous back program. (Id.) For the knee, she recommended icing and wrapping the knee and taking Tramadol. (Id.) She also recommended a referral to Dr. William Schorer, an orthopedic surgeon affiliated with SSM Health. (Id.) The Petitioner returned to Dr. Barnett's office on August 15, 2016, with the same knee complaints and reported that he had seen Dr. Schorer for evaluation and treatment. (Id.) FNP Ott recommended that the Petitioner continue with the established plan of care for the knee and encouraged him to use a brace. (Id.) No records from Dr. Schorer were offered into evidence.

The Petitioner underwent a Section 12 examination on August 10, 2016, with Dr. Michael Nogalski, an orthopedic surgeon at Orthopedic Associates. (RX1) He examined the Petitioner and reviewed X-rays, the MRI and records from Dr. Fox, Midwest Occupational Medicine, Dr. Miller and the Work Center. (Id.) Regarding the notes on the September 25, 2014, visit to Dr. Fox, Dr. Nogalski stated: "Dr. Fox indicated that he was getting to the point where he may want to get the left knee replaced." (Id.)

Dr. Nogalski diagnosed the Petitioner with a left knee strain with mechanical symptoms, preexisting degenerative disease and posttraumatic arthritis. (Id.) He recommended arthroscopy to alleviate the mechanical symptoms that came from the work accident. (Id.) He believed it was reasonable to consider a knee arthroscopy without significant guarantees that it would relieve all the Petitioner's knee symptoms. (Id.) He stated that the Petitioner had a baseline condition of

degenerative knee disease and posttraumatic arthritis, which had come to the point where Dr. Fox had recommended knee replacement. (Id.) Dr. Nogalski agreed that the Petitioner should have work restrictions of no squatting or climbing more than three feet off the ground and no lifting more than 20 pounds. (Id.)

Regarding Dr. Nogalski's examination, the Petitioner testified that Dr. Nogalski took his leg and popped his ankle, to which the Petitioner said: "I about came off the table and about took him out if I could have gotten to him. Man, that was terrible…And I told him, 'hey, I ain't no animal, you know, you don't have to treat me like that. I told you it hurt.'" (T. 24)

Dr. Nogalski issued a supplemental report on August 30, 2017, clarifying his prior opinion in that the arthroplasty he recommended was to address issues from either unstable lateral meniscus tissues or chondral tissues. (RX2) He further stated that a total knee replacement was unnecessary and not causally related to the work accident. (Id.)

The Petitioner testified that he sought a second opinion from Dr. Mark Sucher, an orthopedic surgeon at Mid County Orthopaedic Surgery and Sports Medicine, who practiced with Dr. Fox. (T. 20, PX5) At the Petitioner's initial visit on October 4, 2016, Dr. Sucher ordered X-rays, reviewed prior X-rays and the MRI and examined the Petitioner. (PX5) The Petitioner informed Dr. Sucher that "over the years" his knees have "given him trouble," with the left knee a little bit worse than the right. (Id.) He said the knee would ache at night, but overall he was able to get by. (Id.) Dr. Sucher diagnosed the Petitioner with post-traumatic tricompartmental left knee arthritis most likely secondary to the 1988 tibial plateau fracture, as well as an intramedullary nailing of a left tibial shaft fracture, complicated by an acute on chronic injury at work. (Id.) He did not believe the meniscus tears were a significant cause of the Petitioner's pain and did not recommend arthroscopy because there was a small chance the Petitioner would experience some

relief. (Id.) He recommended steroid and Synvisc injections. (Id.) He opined that the Petitioner would need a total knee replacement. (Id.) Lastly, he believed that the "prevailing factor" of the Petitioner's pain was his pre-existing degenerative joint disease and that the accident may have sparked an inflammatory response that the Petitioner "has not been able to get over." (Id.)

On November 10, 2016, Dr. Nogalski issued another addendum report rebutting Dr. Sucher's opinions. (RX3) He stated there was nothing that objectively indicated that the Petitioner's pre-existing osteoarthritic issues within the knee were worsened by the work accident. (Id.) He reiterated that it appeared medically and logically reasonable to address the mechanical issues that he believed resulted from the work accident by proceeding with arthroscopy. (Id.)

On January 12, 2017, the Petitioner returned to Dr. Barnett's office complaining of pain in his right neck with numbness and weakness in his right hand. (PX4) Physician Assistant Kasaundra Heiberger referred the Petitioner for physical therapy. (Id.) The Petitioner underwent physical therapy at ApexNetwork Physical Therapy and reported to FNP Ott on April 18, 2017, that his neck and lower back pain improved. (Id.) On May 9, 2017, and May 24, 2017, the Petitioner again reported neck pain. (Id.) It improved again after more physical therapy. (Id.) The Petitioner testified that he did not see an orthopedic surgeon for his neck or back because Dr. Barnett would not refer him unless his head wouldn't turn or his neck wouldn't go up and down. (T. 45-46)

Dr. Sucher performed total knee arthroplasty on the Petitioner's left knee on February 22, 2017, at SSM Health St. Mary's Hospital. (PX6) The Petitioner followed up with physical therapy at ApexNetwork Physical Therapy. (PX7) Records for six visits from April 10, 2017, through April 21, 2017, were admitted into evidence at Arbitration, and those records stated that the Petitioner attended 20 appointments regarding his knee, with the last six including therapy for his

neck and shoulders. (Id.) The Petitioner was discharged from therapy on April 21, 2017, due to loss of insurance authorization. (Id) The physical therapy notes state that he was progressing towards his therapy goals. (Id.) His knee was improving overall, but he was continuing to have difficulty bending his knee. (Id.) Dr. Sucher was recommending two more weeks of therapy at the time of discharge. (Id.) At his follow-up visits with Dr. Sucher on March 8, 2017, and April 19, 2017, the Petitioner's pain and range of motion had improved. (PX5)

On July 5, 2017, the Petitioner went to Dr. Barnett's office complaining of right arm and shoulder and left knee pain after a fall resulting from his right knee giving out. (PX4) He was sent for an X-ray of his left knee and was diagnosed with a contusion of his right shoulder. (Id.)

The Petitioner underwent additional chiropractic care and physical therapy for his cervical spine at Associated Physicians Group from July 20, 2017, through September 11, 2017. (PX8) At his initial visit, the Petitioner reported having neck pain for years that worsened after the work accident. (Id.) He characterized the pain as aching, cramping, dull, sharp, throbbing, tight, shooting, burning, cold and heavy. (Id.) He said the pain radiated to the right shoulder, right upper arm, right forearm and chest. (Id.) He also reported mid thoracic pain and numbness and tingling in his thumb, index finger and middle finger. (Id.) He attended 18 sessions and afterwards reported he felt the best he has felt in the past year. (Id.) He still had some intermittent mild numbness and tingling distally into his right fingers, decreased pain and headaches. (Id.) Associated Physicians Group discharged the Petitioner on September 11, 2017, with instructions to continue with home exercises. (Id.)

On August 7, 2017, the Petitioner was evaluated Dr. Dwight Woiteshek, an orthopedic surgeon at Orthopedic Consultant Services at the request of the Petitioner's attorney. (PX10, Deposition Exhibit 2) Dr. Woiteshek examined the Petitioner and reviewed the X-rays and MRI

and records from Dr. Fox, Midwest Occupational Medicine, Dr. Miller, Dr. Barnett, Dr. Nogalski, Dr. Sucher, St. Mary's Hospital and ApexNetwork. Dr. Woiteshek diagnosed the Petitioner with traumatic internal derangement of the left knee with full thickness anterior cruciate (ACL) tear and meniscal tears as well as traumatic aggravation of the prior advanced degenerative changes of the left knee. (Id.) Regarding the Petitioner's condition pre-existing the work injury, Dr. Woiteshek diagnosed the Petitioner with relatively asymptomatic advanced degenerative changes of the left knee with suspected several intra-articular loose bodies. (Id.) He opined that the work accident was the cause of the traumatic internal derangement and the traumatic aggravation of the pre-existing degenerative condition, as well as the cause for the Petitioner's need for knee replacement surgery. (Id.) Dr. Woiteshek also believed that the treatments the Petitioner received were reasonable and necessary to help relieve the effects of the work accident. (Id.) He stated that the Petitioner had achieved maximum medical improvement. (Id.)

Dr. Woiteshek testified consistently with his report at a deposition on May 10, 2018. (PX10) He stated that he would place restrictions on the Petitioner of avoiding repetitive stooping, squatting, kneeling and running and avoiding extended and walking. (Id.) Regarding the necessity of total knee replacement surgery, he testified that such surgery would be indicated for both the degenerative condition and the ACL tear, which he stated was caused by the work accident and not the degenerative process. (Id.) He stated that the ACL tear made the arthritic changes in the knee significantly worse because of instability. (Id.) He said the standard of care for an ACL rupture in the presence of degenerative arthritis is a total knee arthroplasty. (Id.) Regarding the statement in Dr. Sucher's report that the twisting motion during the work accident may have sparked an inflammatory response that the Petitioner "has not been able to get over," Dr.

Woiteshek stated that an inflammatory response would be an aggravation of the Petitioner's degenerative arthritis. (Id.)

Dr. Nogalski testified consistently with his reports at a deposition on July 23, 2018. (RX4) Regarding the ACL tear reported on the MRI, Dr. Nogalski stated that there was nothing that he saw on the study that would either rule in or rule out whether the tear was acute in nature. (Id.) He clarified the reference in his reports to mechanical symptoms by stating that the Petitioner might have had some tissue that was either catching or causing a problem within the knee. (Id.) He agreed with Dr. Woitshek's opinion that an ACL tear would not be the result of a degenerative process. (Id.) But he stated that, in his opinion, the ACL tear was not the result of the work accident because of the absence of changes in the bone and the absence of subluxation of the tibia on the femur. (Id.) He disagreed with Dr. Woiteshek's opinion that an ACL tear would be an indication for a knee replacement. (Id.)

Regarding Dr. Sucher's and Dr. Woiteshek's opinions that the work accident aggravated or exacerbated the Petitioner's arthritis, Dr. Nogalski testified he did not believe there was a permanent aggravation or elevated level of osteoarthritis that resulted from the work accident. (Id.) He also maintained his position that the Petitioner needed a knee replacement before the work accident. (Id.) He justified that position by stating that in his practice, he would never discuss knee replacement with somebody, as Dr. Fox did, unless it was indicated and would be reasonably necessary. (Id.)

On December 4, 2018, Dr. Steve Nester, a family medicine practitioner at Esse Health, performed a medical disability rating evaluation. (PX11, Deposition Exhibit 2) He testified at a deposition on February 27, 2020, that he performs such evaluations for Social Security, government agencies and insurance companies. (PX11) He examined the Petitioner's back and

left knee and reviewed medical records from Midwest Occupational Medicine, The Work Center, Dr. Fox, Dr. Miller, Dr. Barnett, Dr. Sucher, SSM St. Mary's Hospital, ApexNetwork Physical Therapy and Associated Physicians Group. (PX11, Deposition Exhibit 2) Dr. Nester opined that the work injury contributed to the degenerative/dysfunctional condition of the Petitioner's left knee and was an additive contributor to the condition for which he was treated. (Id.) He noted that after the knee replacement, the Petitioner continued to have limitations including no climbing, no crawling, limited squatting, limited walking and delayed entry and egress from vehicles. (Id.)

Dr. Nester also wrote that the Petitioner's back injuries were related to the work accident, causing limited range of motion and future increased risk of reinjury of the back. (Id.) He said the Petitioner would be restricted from standing or sitting for longer than 20-30 minutes, bending, shoveling, climbing ladders and lifting greater than 20 pounds in a future work environment. (Id.) He opined that the Petitioner was unable to resume work in his previous occupation or pursue any occupation or employment in the open labor market. (Id.) He stated that the Petitioner may benefit from evaluation by a vocationalist, but it was his understanding that the Petitioner already obtained government disability. (Id.)

Dr. Nester testified consistently with his report at a deposition on February 27, 2020. (PX11) He stated that the work accident exacerbated the Petitioner's pre-existing condition in that the ACL was torn, there was pronounced additional damage to the cartilage of the knee resulting in greater urgency for the knee replacement, and the Petitioner had greater subjective difficulties in terms of ambulation and use of the knee in the normal fashion. (Id.) He suspected that the knee replacement was "coming sooner or later" but the accident prompted the surgical intervention. (Id.)

On cross-examination, Dr. Nester testified that he did not recall reviewing records of treatment of the Petitioner's neck. (Id.) He also stated that the physical activity limitations he described in his report were based on the Petitioner's subjective complaints as well as his own findings from the examination. (Id.) He clarified his opinion about the Petitioner's ability to work in the labor market to mean physical labor. (Id.)

On January 15, 2019, the Petitioner underwent a vocational and rehabilitation assessment by J. Stephen Dolan at Dolan Career & Rehabilitation Consulting. (PX12, Deposition Exhibit 2) Mr. Dolan is a professional, rehabilitation and career counselor. (Id.) He reviewed what appeared to be all the medical records, reports and depositions to date. (Id.) He interviewed the Petitioner and collected educational, work and medical histories. (Id.) He conducted a Wide Range Achievement Test to measure the Petitioner's ability to read, spell and do math, finding that his reading abilities measure at the eight-grade level and rank in the 10th percentile compared to persons of his age. (Id.) The Petitioner's spelling was at the fifth-grade level and in the 6th percentile. (Id.) His math computation was at the end of the sixth-grade level and in the 32nd percentile. (Id.) A Beck Depression Inventory was suggestive of a moderate level of depression. (Id.) A transferrable skills analysis showed that his skills transfered to occupations involving operating heavy equipment, commercial driving and building maintenance jobs. (Id.) Mr. Dolan stated that the physical restrictions described by the Petitioner and Drs. Barrett, Woiteshek and Nester prevent the Petitioner from using his acquired skills. (Id.) He surmised that the Petitioner no longer has access to a reasonably stable labor market – based on the Petitioner's academic and work skills and the restrictions placed on his activities by Drs. Nester and Woiteshek. (Id.)

Dr. Nogalski conducted a second Section 12 evaluation on September 24, 2019, at which time the Petitioner reported difficulty walking up and down stairs and standing for long periods of

time. (RX5) He also reported soreness in his knee if he sits for a period of time. (Id.) The Petitioner told Dr. Nogalski that his pain was better after the knee replacement but he felt as though his knee sometimes locked up on him when he tried to walk. (Id.) Dr. Nogalski performed additional X-rays and reviewed records from after the surgery. (Id.) During the physical exam, the Petitioner exhibited active resistance to passive motion. (Id.) Dr. Nogalski maintained his prior opinions regarding causation, and he did not believe the Petitioner neded any additional medical care for the left knee, nor any restrictions. (Id.) He recommended a focused, self-directed exercise program to optimize his knee. (Id.) He added that the Petitioner's reports of continuing symptoms did not correlate with any objective physical findings and were consistent with symptom magnification. (Id.)

At a second deposition on October 12, 2020, Dr. Nogalski testified consistently with his report. (RX6) He elaborated on the Petitioner's active resistance to passive motion, stating that the Petitioner actively contracted his muscles when Dr. Nogalski tried to flex or extend the knee over a reasonable range of motion. (Id.) He also stated that the Petitioner's range of motion was the same as before the surgery. (Id.) Dr. Nogalski reiterated his opinion that the work accident did not aggravate the Petitioner's pre-existing osteoarthritis and stated that the accident did not accelerate the need for a knee replacement, saying: "It basically boils down to a knee replacement was a reasonable option in 2013, and that situation would not reasonably change." (Id.)

Mr. Dolan completed a second report on June 30, 2020, that took into consideration Dr. Nogalski's September 24, 2019, report and Dr. Nester's February 27, 2020, deposition. (PX11, Deposition Exhibit 3) These did not change his opinions. (Id.)

At a deposition on July 20, 2020, Mr. Dolan testified consistently with his reports. (PX11) In summary, he stated: "I don't think he's a good candidate for employment in any type of setting.

He can't do the type of work that he used to. That's all eliminated by his restrictions. And he's not a good candidate for a sedentary type job."

The Petitioner testified at Arbitration that after December 2016, workers' compensation benefits had stopped, so he used his health insurance to obtain further treatment. (T. 24-25) The health insurance provider is seeking reimbursement for the treatment it covered. (T. 34)

The Petitioner reported that he currently feels a burning sensation up the left side of his knee when he gets up and that the knee gets worse during bad weather. (T. 28) In addition, he still has trouble with his back and neck and sees a masseuse and a chiropractor. (Id.) In the past year, he has started walking and is able to walk a mile, as opposed to a half mile when he first began. (T. 29) He is able to sit for between 45 minutes to 1 ½ hours and can stand for a half hour to 45 minutes before his back starts hurting. (T. 30) He has trouble putting on his socks and shoes. (T. 34, 47-48)

The Petitioner stated that he had not worked since the date of the accident and was unable to because he could not climb up and down a ladder, get in and out of a hole or drive a truck with a clutch. (T. 31, 34) He submitted an accommodation request to the Respondent on August 22, 2017. (PX16). According to a letter to the Petitioner from the Respondent's director of public works dated August 30, 2017, the Petitioner had been on unpaid leave since July 31, 2017, and had exhausted his paid benefit time and his eligible time from the Family Medical Leave Act. (PX19, PX20) The Respondent retained the Petitioner in an "unpaid employee" status and continued to pay for his health insurance. (Id.) The Petitioner was asked at a meeting whether there were any reasonable accommodations that could be made for him to return to work, and the Petitioner said there was none. (Id.) The Respondent gave the Petitioner an ultimatum that if he

did not return to work with no restrictions by September 7, 2017, the Respondent would consider his position abandoned. (Id.) The Petitioner was terminated on September 8, 2017. (PX21)

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

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *Id*. 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*.

Regarding the Petitioner's left knee, he had a preexisting condition for which he and his doctors knew would require knee replacement at some time in the future. The necessity for knee replacement will be addressed below. Drs. Miller, Woiteshek and Nester conducted detailed evaluations of the Petitioner and concluded that the accident exacerbated the Petitioner's arthritic knee condition. Dr. Sucher believed that the "prevailing factor" of the Petitioner's pain was his pre-existing degenerative joint disease and that the accident may have sparked an inflammatory response that the Petitioner "has not been able to get over." It should be noted that the standard in Illinois workers' compensation cases is not whether the accident was a "prevailing factor" in the Petitioner's current condition. Under *Sisbro*, only aggravation or acceleration of a preexisting condition needs to be proven. The part of Dr. Sucher's opinion that bears most on the inquiry here is that the accident may have sparked an inflammatory response from which the Petitioner did not

recover. This opinion dovetails into the opinions of Drs. Miller, Woiteshek and Nester who concluded that the accident exacerbated the Petitioner's arthritic knee condition.

Dr. Nogalski referred to the Petitioner's knee condition as a left knee strain with "mechanical issues," which he clarified as some tissue that was either catching or causing a problem within the knee. The Arbitrator finds this to be a vague explanation. Dr. Nogalski acknowledged that the ACL tear would not have resulted from the Petitioner's arthritis but disagreed with Dr. Woiteshek as to the significance of the ACL tear.

Of importance is the fact that the Petitioner was able to perform his physically demanding work duties from after he received his knee injections in 2014 until the time of the work accident. Although the arthritis was present, it did not appear to hinder his job performance.

Looking at the evidence overall, the opinions of Drs. Miller, Woiteshek and Nester are more compelling than those of Dr. Nogalski.

Regarding the Petitioner's neck and back complaints, the common thread throughout the treating physicians' records was that these stemmed from the work accident. There was no evidence to negate the causal connection between the work accident and the Petitioner's neck and back complaints.

Therefore, the Arbitrator finds that the Petitioner has met his burden of proving by a preponderance of the evidence that the accident of May 26, 2016, aggravated and/or exacerbated his left knee condition to that which existed at the time of his surgery. In addition, the Petitioner has proved by a preponderance of the evidence that the Petitioner's back and neck conditions were causally related to the work accident.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

The main issue of contention is whether the total knee replacement surgery was reasonable and necessary in light of other doctors' recommendations that arthroscopy would have sufficed. The question to be answered to determine this issue is whether the time had come for knee replacement prior to the accident occurring or whether the accident accelerated the need for total knee replacement.

There were no depositions taken of Drs. Fox, Barnett or Sucher that would help answer this question. The Respondent contends that the Arbitrator must draw an inference that their testimony would be adverse to the Petitioner's position. However, a review of these doctors' records show the opposite and support the Petitioner's position. In addition, the records of Dr. Miller and the evaluations conducted by Drs. Woiteshek, Nester and Nogalski, as well as their testimony, do provide the information necessary to answer the question.

Drs. Miller, Woiteshek and Nester conducted detailed evaluations of the Petitioner and concluded that the accident accelerated the need for knee replacement surgery. Dr. Nogalski opined the opposite. The bases for their opinions are set forth above.

It is the Arbitrator's observation that in his Section 12 report from August 10, 2017, Dr. Nogalski misapprehended Dr. Fox's notes, and that misapprehension continued throughout Dr. Nogalski's work on this case. His rendition of Dr. Fox's notes made it sound as though Dr. Fox was recommending knee replacement at the time of his treatment of the Petitioner in 2013 and 2014. The Arbitrator's reading of Dr. Fox's notes is that the Petitioner was getting to the point of thinking that "at some point" he may want to get the knee replaced. To the Arbitrator, there is a

difference between Dr Fox "getting to the point where he may want to get the left knee replaced" and the Petitioner "getting to the point he thinks at some point he may want to get that left knee replaced." This latter reading does not mean the need for knee replacement was immediate. It appeared that the injections the Petitioner received in 2013 and 2014 helped his knee to the point that he could continue performing his job duties until the work accident.

Dr. Nogalski also stated in his report that Dr. Fox had recommended knee replacement. The Arbitrator reviewed Dr. Fox's notes several times but need not see a recommendation for knee replacement – just repeated statements that the Petitioner will probably need a knee replacement "at some point." From Dr. Nogalski's deposition, it appears that he believed that because Dr. Fox discussed future knee replacement with the Petitioner it could be assumed that the surgery was indicated and reasonably necessary at the time it was discussed.

Dr. Sucher, who treated the Petitioner, did not recommend arthroscopy because there was a small chance the Petitioner would experience some relief. Apparently, Dr. Nogalski agreed when he admitted that the arthroscopy would not provide long-lasting relief from the Petitioner's symptoms. It would be pointless to perform a surgery that would not provide relief to the Petitioner.

For those reasons, the Petitioner gives little weight to Dr. Nogalski's opinions and more weight to the opinions of Drs. Sucher, Woiteshek and Nester. The Arbitrator finds that the totality of evidence showed the work accident accelerated the need for a knee replacement.

Regarding treatment for the Petitioner's neck and back complaints, there was no evidence to contradict the reasonableness and necessity of Dr. Barnett and his staff's recommendations for physical therapy for the Petitioner's neck and back.

Based on the findings above, the Arbitrator finds that the medical treatment rendered, including the knee replacement surgery, was reasonable and necessary, and the Respondent has not paid the bills for this treatment. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibits 13-16 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit, including any lien by the Petitioner's health insurance.

Issue K: What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of December 15, 2016, through May 19, 2017.

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. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

PA Colon and Dr. Miller placed work restrictions on the Petitioner. Drs. Woiteshek and Nester agreed. Dr. Nogaliski agreed with the work restrictions at his deposition in 2018. It was not until his evaluation on September 24, 2019, that Dr. Nogalski found that the Petitioner needed no work restrictions.

Based on this and the findings above, the Arbitrator finds that the Petitioner was entitled to TTD benefits from December 15, 2016, through May 19, 2017. The Respondent is claiming a credit for TTD, but that is for TTD that accrued prior to December 15, 2016, and does not bear on the period of TTD sought by the Petitioner.

Issue L: What is the nature and extent of the Petitioner's injury?

The Petitioner is seeking benefits for permanent total disability pursuant to Section 8(f) of the Act.

The Illinois Supreme Court has frequently held that an employee is totally and permanently disabled when he "is unable to make some contribution to the work force sufficient to justify the payment of wages." *Ceco Corp. v. Industrial Comm'n,* 447 N.E.2d 842, 845 (Ill. 1985) (citing e.g*, Gates Division, Harris-Intertype Corp. v. Industrial Comm'n,* 399 N.E.2d, 1308 (Ill. 1980); *Arcole Midwest Corp. vs. Industrial Comm'n*, 405 N.E.2d 1306 (Ill. 1980)). However, an employee need not be reduced to total physical incapacity to be entitled to PTD benefits. *Ceco Corp.* 447 N.E.2d at 845. Rather, a person is totally disabled when he or she is incapable of performing services except those for which there is no reasonably stable market. *Id*. If an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving that he or she fits within the "odd lot" category. *Id*. The odd lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that he will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n*, 419 N.E.2d 1159 (Ill. 1981).

An employee meets the burden of proving that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful job search; or (2) by demonstrating that the disability coupled with the employee's age, training, education, and experience does not permit the employee to find gainful employment. *ABB C-E Servs. v. Industrial Comm'n*, 737 N.E.2d 682 (5th Dist. 2000). Once the employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Ceco Corp*, 447 N.E.2d at 845-846. Absent evidence of available employment, the

Commission can rightfully award PTD benefits to the employee. *Waldorf Corp. v. Industrial Comm'n*, 708 N.E.2d 476 (3d Dist. 1994). To meet its burden, the employer must show more than a theoretical possibility of an available job and cannot rely on speculative testimony that the employee has the potential for employment. *See, e.g, Walliser v. Waste Management East*, 12 ILWC 2451, 2017 WL 4769231 (September 29, 2017).

Through the evaluation and testimony of Mr. Dolan and the testimony of the Petitioner, it is apparent that the Petitioner is physically unable to perform the labor required by the jobs that suit his skills. In addition, he is ill-suited for more sedentary employment due to his lack of education and academic abilities. The Petitioner has met his burden of proof of showing by a preponderance of the evidence that his disability, age, training, education and experience, do not permit him to find gainful employment. The Respondent has failed to show that some kind of suitable work is regularly and continuously available to the Petitioner.

Accordingly, Respondent shall pay Petitioner permanent and total disability benefits of $ of $725.84 per week from May 19, 2017, the date which TTD was ordered terminated, for Petitioner's lifetime as per Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020149
Case Name	POE, JERRY v. KNIGHT HAWK COAL, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0590
Number of Pages of Decision	21
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Julie Webb

DATE FILED: 12/3/2021

/s/Christopher Harris, 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

JERRY POE,

Petitioner,

vs. NO: 17 WC 20149

KNIGHT HAWK COAL, 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 exposure, accident, causal connection, 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 May 3, 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.

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.

December 3, 2021

CAH/tdm
O: 12/2/21
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	17WC020149
Case Name	POE,JERRY v. KNIGHT HAWK COAL, LLC
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Proceeding Type	Petition for Review
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 5/3/2021

/s/William Gallagher, Arbitrator
Signature

INTEREST RATE WEEK OF APRIL 27, 2021 0.03%

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

Jerry Poe
Employee/Petitioner

v.

Knight Hawk Coal, LLC
Employer/Respondent

Case # 17 WC 20149

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville (Herrin Docket), on April 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. ☐ 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) and 6 of the Occupational Diseases Act

FINDINGS

On January 31, 2014, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $61,022.00; the average weekly wage was $1,173.50.

On the date of accident, Petitioner was 62 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

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

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

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

William R. Gallagher, Arbitrator
ICArbDec p. 2

MAY 3, 2021

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to lungs and/or heart, pulmonary system, respiratory tracts. The Application alleged a date of last exposure of January 31, 2014, and that Petitioner sustained the 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 of 36 years (Arbitrator's Exhibit 2).

At the time of trial, Petitioner was 69 years of age. Petitioner did not graduate from high school but did obtain his GED. Petitioner worked in the coal mine between 35 and 36 years. The first five years (approximately) of that employment was underground. Petitioner testified that in addition to coal dust, he was regularly exposed to and breathed silica dust. He testified that he worked as a roof bolter. When he worked in the strip mine he loaded rock, stripped boulders and pushed rock. He was also exposed to diesel fumes and smoke from coal fires. Petitioner's last day in the coal mine was January 31, 2014. On that date he was working for Respondent at its Red Hawk Mine in Pinckneyville. Petitioner was 62 years old on that date with the classification of working supervisor. Petitioner testified that he was exposed to coal dust on that day. He testified that same was his last day because he had prostate cancer and wanted to get out as early as he could. He testified that as a boss he did a lot of walking and he had a bad knee plus shortness of breath. He did not have any employment after leaving the mine.

Petitioner started coal mining in 1971 with Consolidated. He was classified as a laborer, but right away he went to work at the face where they were actually cutting the coal from the wall. He next went to work as the third man on a roof bolter. In that position he would make up the 14 foot long roof bolts and take them to the bolters where they drilled into the ceiling and inserted the bolts. He was also a buggy runner at Consolidated. In that job he operated the buggy taking coal from the face to the belt. He testified that the whole time he worked at Consolidated he was at the face. He also ran the continuous miner machine which actually cut the coal from the face. Petitioner worked at Consolidated for just under a year.

About August of 1972 Petitioner went to work for Peabody at Marissa. He worked underground there for about five years and then went on top. He worked as a buggy runner and as a roof bolter. Petitioner testified that he drilled holes and put bolts in the ceiling. There was a lot of rock dust exposure at that time. He also was a miner operator for two to three years. He then moved above ground where he worked coal piles. He testified that there were huge stock piles of coal that they would have to move away from the area where it came off the belt and was dumped on the ground. They had to move it away so they could keep room for coal. He ran a dozer and end loader. They would load trucks with coal, which would kick up a lot of dust. Later when the belts were installed, they would take scoops of coal off the pile and move it to the belt. Petitioner testified that working above the ground was as dusty as working below ground. He testified that he would have to run the equipment with the doors open to keep the dust from choking him in the cab. He testified that sometimes the dust would cause him to lose his breath. He was an equipment operator working on the coal piles for around 17 years.

Petitioner testified that he worked at Peabody until 1995 when they shut down the mine. He testified that he sought mining employment after he left the mine in 1995, but he did not want to

move to another state. He had his own tractor business from 1995 until 2001. In March 2001, he went back to work in the coal mines for Respondent. He worked there until he left the mines in 2014. He testified that Respondent is a strip mine. Petitioner described the strip mining process as uncovering the coal with dozers and then shooting the rock. The coal would then be pushed out with dozers. When they had 20 feet of coal, they would haul it out with the end loader and the end dumps. His job was running dozers and end loaders. He also used a track hoe to load coal on the trucks. He worked at the prep plant. He ran everything that was there. He testified that his exposure to the coal dust was not as bad as at Peabody, but he was around it. The roads were dusty. He testified that there was a lot of dust from loading coal.

Petitioner testified that he first noticed breathing problems in the mine in the 1980s while working for Peabody. He noticed that he had kind of a nagging cough after several years in the mine. He testified that he went to the doctor about the cough. He also would lose his breath faster than he used to. Petitioner testified that from the first time that he noticed his breathing problems until he left the mine they got worse. Since leaving the mine his breathing has gotten a little worse.

Petitioner testified that he has an inhaler for his breathing. He testified that it was prescribed by Rea Clinic. He testified that he does not use the inhaler every day. There are times when his breathing seems worse than others and he uses it. Petitioner testified that he is not nearly as active in his daily life because of his breathing. He testified that he used to walk for exercise, but he does not really walk anymore. He just runs out of breath. He testified that within a block of walking on level ground at a normal pace he is breathing hard. Petitioner testified that he cannot climb many stairs. He has a knee that he hurt so he is not good on stairs. Petitioner testified that he used to deer hunt, but he does not do that anymore because he does not have the air to walk out to the woods.

Petitioner testified that his family doctor is at Rea Clinic. He goes to the clinic at DuQuoin, but he used to go to Christopher Rea Clinic. He testified that he does not have one family doctor per se. Petitioner testified that he has seen the physicians at Rea Clinic for breathing issues. They gave him the inhaler. He testified that the physicians at Rea Clinic were aware that he worked in the coal mine. Petitioner testified that he has never smoked.

After Petitioner left Peabody in 1994 he attended Rend Lake College in Ag Mechanics. After that he began a business called Poe's Tractor Repair. In that business he worked on old gas tractors. He did that until 2001 when he went to work for Respondent. When he left Respondent in 2014, he signed up for Social Security. He also received his 401(k) from Respondent and a pension from his work at Peabody.

After Petitioner left Peabody, he filed a state black lung claim against them. He testified that he was represented by the same law firm that represents him in the present case. Petitioner testified that in conjunction with that black lung claim against Peabody, he had a chest x-ray taken, but he could not recall when it was taken. Petitioner testified that he thought that the chest x-ray was taken at Deaconess Hospital in Indiana. He recalled seeing a doctor at Deaconess Hospital in conjunction with that claim, but he could not remember the name of the doctor. He testified that he thought he took breathing tests. He recalled that he was told the chest x-ray was positive. He

did not have reports from the chest x-ray or breathing tests performed at Deaconess Hospital with him at arbitration. Petitioner testified that the claim against Peabody was dismissed after he took employment with Respondent.

Petitioner testified that he receives his primary care from Rea Clinic which was also referred to as Christopher Rural Health. He testified that he has always been honest with those medical providers in sharing his complaints or his lack of complaints whenever he provided a history to them. Petitioner was treated by a cardiologist at Prairie Cardiovascular when he had a problem with palpitations. He testified that he would have a heart rate in the 30s when he would get up in the morning. He was taking eye drops for glaucoma which he learned could cause low heart rate. After he stopped the eye drops, he has not had a problem with his heart. Petitioner testified that he underwent chest x-ray screening by NIOSH for black lung on two occasions. He testified that after they took the chest x-ray, they would write to him and tell him what the chest x-ray revealed. He testified that he did not bring any of those letters with him to Arbitration.

Petitioner testified that his black lung claim against Peabody was filed after he left that mine. It was at that time that he was seen at Deaconess for the breathing test and chest x-ray, which would have been in the late 1990s. In this particular case, he saw Dr. Istanbouly at the direction of his attorney. Petitioner testified that he saw Dr. Istanbouly just once, but Dr. Istanbouly was the one who prescribed his CPAP machine. Petitioner testified that he suffers from sleep apnea and he uses the CPAP machine.

Petitioner testified that he does not do much during the day. He takes his grandson to school and picks him up after school. He goes outside with his grandson. He testified that he lives on two acres on the highway outside of town. He has a house and pole barn on the two acres of ground. He works on tractors once in awhile in the pole barn. He has some antique tractors that he fixes for himself. Petitioner testified that what he can sit and mow, he mows. His granddaughter's husband, who lives next door, takes care of the rest of it.

Dr. Suhail Istanbouly is a physician specializing in pulmonary medicine, critical care and sleep medicine. He is board certified in internal medicine, pulmonary medicine, critical care medicine and sleep medicine. From April, 2003, to March, 2019, Dr. Istanbouly practiced as a pulmonologist and critical care specialist in Southern Illinois. He had his own private practice from October, 2008, until March, 2019, where he provided both inpatient and outpatient care in his specialties of pulmonary, critical care and sleep medicine. At the request of attorneys, he conducts black lung examinations on coal miners and writes reports regarding his examination. In April, 2019, Dr. Istanbouly moved to Chicago and practices at Hines VA Hospital in pulmonary and sleep medicine. Dr. Istanbouly goes to Southern Illinois once a month for a satellite clinic at Marshall Browning Hospital in DuQuoin (Petitioner's Exhibit 1, pp 5-7). Dr. Istanbouly testified that he saw Petitioner one time for the purpose of his state black lung claim. He testified for many years he performed an average of five to seven such examinations per month, always at the request of the claimant attorney. Dr. Istanbouly testified that although he has relocated his practice to Maywood, Illinois, he is still performing examinations in Southern Illinois such as the type performed on Petitioner. He testified that he returns to Southern Illinois once a month for two days and he sets aside one of those days for doing such examinations. He

testified that he is doing three to five such examinations a month (Petitioner's Exhibit 1, pp 34-35).

Dr. Istanbouly examined Petitioner on October 9, 2017. Dr. Istanbouly testified that Petitioner was a coal miner for 36 years with 23 of those years being underground. In his last year of coal mine employment he worked on the surface as a mine supervisor. Dr. Istanbouly testified that according to Petitioner, during his coal mine shift he was mostly on his feet and walking. He helped out in any kind of work needed including shoveling and lifting. Petitioner never smoked. Petitioner reported to Dr. Istanbouly that he had been coughing on a daily basis for years and the cough was moderate in intensity and around the clock. It was more prominent in the morning and in the evening each day. Petitioner could not specify any triggering factor for cough. The cough was productive of mild brownish sputum, averaging two tablespoons full per day. Petitioner also reported exertional dyspnea. He reported that he would get short of breath by walking one to two blocks and his physical capacity had been slowly declining since he left the coal mines in 2014. Petitioner also mentioned runny nose and post nasal drip which was mild in intensity and seemed to be year round rather than seasonal (Petitioner's Exhibit 1, pp 8-10).

Dr. Istanbouly testified that the results of Petitioner's spirometry testing reflected mild non-specific ventilatory limitation. Dr. Istanbouly testified that he is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*. Dr. Istanbouly testified that the FEV of 70% and the FVC of 70% would be a Class 1 impairment under Table 5-4 of the *Guides* (Petitioner's Exhibit 1, pp 11).

Dr. Istanbouly testified that he reviewed Petitioner's chest x-ray which revealed mild interstitial changes bilaterally, more prominent in the mid to lower zones. Dr. Istanbouly testified that the profusion was 1/0 per the B-reader, Dr. Henry Smith (Petitioner's Exhibit 1, pp 11-12).

Physical examination of Petitioner's lungs revealed decreased breath sounds, meaning reduced air entry bilaterally. Dr. Istanbouly testified that based on his testing and examination of Petitioner, he diagnosed simple coal workers' pneumoconiosis related to long term coal dust inhalation in addition to chronic bronchitis. Dr. Istanbouly testified that since Petitioner never smoked, the main culprit for his chronic bronchitis would be long term coal dust inhalation. His chronic respiratory symptoms were chronic daily cough, sputum production and exertional dyspnea. Dr. Istanbouly testified that based on his diagnoses of coal workers' pneumoconiosis and chronic bronchitis, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health. Dr. Istanbouly testified that coal workers' pneumoconiosis requires a tissue reaction in addition to just the deposition of coal mine dust in the lungs. He testified that the tissue reaction is commonly called scarring or fibrosis (Petitioner's Exhibit 1, p 15). Dr. Istanbouly testified that the macular nodule of coal workers' pneumoconiosis cannot perform the same function as normal, healthy lung tissue. He testified that there would be impairment of the function of the lung at those sites (Petitioner's Exhibit 1, pp 13, 15, 16).

Dr. Istanbouly testified that the most accurate way for diagnosing coal workers' pneumoconiosis is pathologic review. Dr. Istanbouly testified that if he read a chest x-ray as being positive for coal workers' pneumoconiosis and he knew there had been sufficient exposure to coal mine dust

to cause that disease, those two things combined would suffice for him to make a diagnosis of coal workers' pneumoconiosis. He testified that reading a chest x-ray as negative would not necessarily rule out the existence of coal workers' pneumoconiosis. Dr. Istanbouly agreed that a recent study showed that 50% or more of long term coal miners are found to have coal workers' pneumoconiosis at autopsy, even though during their life it was not found radiographically (Petitioner's Exhibit 1, pp 32, 33).

Petitioner related to Dr. Istanbouly that he coughed around the clock, but he could not identify a trigger for that cough. Petitioner related exertional dyspnea. Dr. Istanbouly testified that there are causes for exertional dyspnea other than respiratory disease. Heart problems and deconditioning are two such causes. At the time of Dr. Istanbouly's exam, Petitioner weighed 282 pounds and had a BMI of 35.25 which was obese. Dr. Istanbouly was not aware what Petitioner had done since he left the mine to maintain his physical fitness. Petitioner did not relate to Dr. Istanbouly any problems in completing his last job duties in the mine which was a fairly physical job. Petitioner did not tell Dr. Istanbouly that he left his employment at the mine at the time he did due to the diagnosis of respiratory disease or because of respiratory problems. Petitioner was not taking any breathing medications when Dr. Istanbouly saw him and according to the history he obtained, Petitioner had not taken any in the past. Petitioner was taking medication for high blood pressure. Dr. Istanbouly did not review any treatment records regarding Petitioner other than the chest x-ray dated May 12, 2017, and the report of Dr. Smith for that film (Petitioner's Exhibit 1, pp 35-38).

Petitioner's oxygen saturation at the time of Dr. Istanbouly's examination was 97%, which is normal. Dr. Istanbouly testified that the spirometry he performed had an FEV1/FVC ratio of 75% which was normal (Petitioner's Exhibit 1, pp 38-39). Dr. Istanbouly testified that there was no indication of obstruction from that testing according to the American Thoracic Society (ATS) or the GOLD standard. Dr. Istanbouly testified that in his clinical practice for someone age 50 or above, he considers an FEV1/FVC ratio to be normal if it is greater than 70%. Dr. Istanbouly testified that spirometry is effort dependent and for spirometry to be valid, it must be reproducibl (Petitioner's Exhibit 1, p 39). The printout from spirometry performed at Dr. Istanbouly's examination stated that the ATS reproducibility guidelines were not met (Petitioner's Exhibit 1, Deposition Exhibit 2).

Dr. Istanbouly was presented the May 12, 2017, chest x-ray along with the report of Dr. Smith when he met with Petitioner. Dr. Istanbouly was not provided any other interpretations of chest imaging of Petitioner. Dr. Istanbouly is neither an A or a B-reader. When he interprets a film for black lung, he determines whether the film is positive or negative for same. If it is positive, he characterizes what he sees as mild, moderate or severe. He does not provide profusion ratings in the films he interprets. Dr. Istanbouly characterized what he saw on Petitioner's film as mild. He did not know how long that abnormality had been present. Dr. Istanbouly could not say whether the film he reviewed had a 1/0 or a 0/1 profusion. He testified that the non-specific ventilatory limitation that he saw in Petitioner's spirometry could have also dated back for decades (Petitioner's Exhibit 1, pp 39- 41).

Dr. Henry K. Smith, a board certified radiologist and B-reader, reviewed a chest x-ray of Petitioner dated May 12, 2017. Dr. Smith interpreted the chest x-ray as positive, profusion 1/0 with P/Q opacities in the middle and lower lung zones bilaterally (Petitioner's Exhibit 2).

Dr. Cristopher Meyer reviewed a PA chest x-ray of Petitioner dated May 12, 2017, from Harrisburg Medical Center. Dr. Meyer found the film to be quality 2 due to under inflation. He testified that because of the underinflation, the lung volumes were lower than typical and there was some mild atelectasis of the left lung base. Dr. Meyer testified that there were no small or large opacities on the film. Dr. Meyer's impression was no radiographic findings of coal workers' pneumoconiosis (Respondent's Exhibit 1, p 40).

Dr. Meyer has been board certified in radiology since 1992 (Respondent's Exhibit 1, p 7). Dr. Meyer has been a B-reader since 1999 (Respondent's Exhibit 1, p 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot who was part of the original committee that designed the training program which was called the B-reader program (Respondent's Exhibit 1, pp 19-21). Dr. Meyer testified that he has participated in the American College of Radiology (ACR) B-reading course previously in studying for the examination and was just recently asked to have a more active academic role in helping with the course of the future. He was a member of the ACR Pneumoconiosis Task Force which completed a new syllabus for the B-reading course as well as a test that was delivered to NIOSH in 2017 (Respondent's Exhibit 1, pp 31-32).

Dr. Meyer testified that the B-reading training course was a weekend course in which there were a series of lectures describing the B-reading classification system. The teachers of the course would go through some standard examples of the various components of the B-reading system. The course participants would then review a series of practice examples with mentors overseeing the practice examples. Dr. Meyer testified that the faculty for the B-reader program are typically experienced senior level B-readers. Dr. Meyer testified that typically after one takes the course, he would then take the B-reading exam. Dr. Meyer testified that the certifying exam is six hours long with 120 chest x-rays to be categorized. The pass rate for the examination runs roughly around 60%. Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reading training and examination is making the distinction between a 0/1 and 1/0 film (Respondent's Exhibit 1, pp 32-34).

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities or any linear opacities. Based on the size and appearance of those small opacities they are given a letter score (Respondent's Exhibit 1, p 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described as revealing small round opacities. Diseases that cause pulmonary fibrosis, such as asbestosis, are described as small linear or small irregular opacities (Respondent's Exhibit 1, p 28). Dr. Meyer testified that the distribution of the opacities is also described as different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper lung zone predominant process (Respondent's Exhibit 1, pp 22-23). Dr. Meyer testified that it is very rare for the opacities of coal workers' pneumoconiosis to be found in the mid and lower lung zones and not in the upper lung zones

(Respondent's Exhibit 1, pp 76-77). The last component of the interpretation is the extent of the lung involvement or the so-called profusion (Respondent's Exhibit 1, p 23). Dr. Meyer testified that the profusion is essentially an attempt to define the density of the small opacities in the lung (Respondent's Exhibit 1, p 30).

Dr. Meyer testified that to determine the existence of lung disease, the gold standard is pathologic review of the tissue itself (Respondent's Exhibit 1, p 46). Dr. Meyer testified that it is possible for a miner to have pneumoconiosis determined by pathology that was not appreciated on a radiographic study. Dr. Meyer testified that there are studies that show that at autopsy as much as 50% of coal miners are found to have abnormalities of coal workers' pneumoconiosis which might not have been apparent radiographically during their life. Dr. Meyer testified that if he read an x-ray as positive and a patient had a sufficient history to cause coal workers' pneumoconiosis that would warrant a finding of coal workers' pneumoconiosis. He testified that if he interprets a chest x-ray as negative that does not rule out that the miner may have pneumoconiosis pathologically. Dr. Meyer testified that simple pneumoconiosis typically will not progress once exposure ceases (Respondent's Exhibit 1, pp 85-90).

Dr. David Rosenberg conducted a review of medical records and a film regarding Petitioner at the request of Respondent's counsel. Dr. Rosenberg has been board certified in internal medicine since 1977. After graduating from medical school he did a pulmonary fellowship at the National Institute of Health in Bethesda, Maryland. Dr. Rosenberg received his board certification in pulmonary disease in 1980. In 1995, he received his board certification in occupational medicine. Dr. Rosenberg has been a B-reader since July, 2000. He is a member of the American Thoracic Society, the American College of Chest Physicians and the American College of Occupational and Environmental Medicine. Dr. Rosenberg has lectured by invitation on a number of subjects through the years. These topics included interstitial lung disease, chronic obstructive lung disease, pulmonary stress testing, pulmonary function testing, exercise testing and occupational lung disease. Dr. Rosenberg has patients in his clinical practice who have black lung (Respondent's Exhibit 2, pp 4-11).

Dr. Rosenberg reviewed a chest x-ray for Petitioner dated May 12, 2017. He testified that the film was quality 1. Dr. Rosenberg did not see any evidence of micronodularity on the film. He interpreted the film as 0/0 profusion. Dr. Rosenberg testified that for a proper reading of a chest x-ray for pneumoconiosis, the reader first assesses the film quality. Then the reader goes on to gauge the degree of opacities and the kinds of opacities in the lung parenchyma and in which zones they are present. He testified that then the reader gauges the profusion which is the degree of changes present. Dr. Rosenberg testified that profusion is important because one needs a profusion of at least a 1/0 or higher to be classifiable as being significant. He testified that a profusion of 0/1 is technically a negative film for pneumoconiosis (Respondent's Exhibit 2, pp 20-22).

Dr. Rosenberg testified that subradiographic pneumoconiosis would not cause any significant functional impairment even if present. He testified that chest imaging is a poor tool for determination of pulmonary impairment. The *AMA Guides* do not use chest imaging as a factor, let alone a key factor, in determining pulmonary impairment. Dr. Rosenberg testified that if he wanted to determine whether one of his patients has pulmonary impairment, he would order

pulmonary function tests, spirometry, lung volume, diffusing capacity measurement as well as blood gases. He would not determine impairment from chest imaging. Dr. Rosenberg testified that he did not see emphysema on Petitioner's chest x-ray. Dr. Rosenberg testified that if one wanted to know whether an A or B-reader found emphysema in the interpretation of Petitioner's chest x-ray, he would look at the B-reading form for that. The box in section 4B EM would be checked for emphysema (Respondent's Exhibit 2, pp 22-23).

Dr. Rosenberg testified that it is unlikely for simple pneumoconiosis to progress once exposure ceases. Dr. Rosenberg testified that he agrees with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working at currently permissible dust levels in the mine until he reaches retirement age (Respondent's Exhibit 2, p 23).

Dr. Rosenberg testified that in the pulmonary function test performed as part of Dr. Istanbouly's examination on October 9, 2017, the two best FVC values varied by 50cc and the two best FEV1 values varied by 30cc. He testified that the flow-volume curves outlined that greater efforts could have been provided. Dr. Rosenberg testified that the pulmonary function tests that were performed on February 26, 2018, at Methodist Hospital had flow volume curves which revealed inconsistent efforts. This study was not valid. The technician noted that the efforts were inconsistent despite repeated coaching. Dr. Rosenberg testified that questionable efforts on the diffusing capacity measurement were also noted. Dr. Rosenberg testified that on the pulmonary function tests performed at Stat Care on May 29, 2018, the efforts varied greatly and the test was not valid (Respondent's Exhibit 2, pp 13-15).

Dr. Rosenberg testified that cough is not considered an objective determinant of pulmonary impairment. He testified that rhinitis and sinusitis are diseases common to the general public. He testified that there was not any evidence in this case that those conditions were aggravated on a permanent basis for Petitioner. He testified that those conditions are associated with cough. Petitioner was taking Linsinopril which has a known side effect of cough. Dr. Rosenberg testified that asthma is a disease common to the general public. He testified that if an individual has chronic asthma, it would be possible that the dust exposure in a coal mine could irritate his lungs and cause exacerbation on a temporary basis. Dr. Rosenberg testified that at some point in time Petitioner was taking Singulair and Albuterol. He testified that these are efficacious for the treatment of asthma (Respondent's Exhibit 2, pp 15-17).

Dr. Rosenberg testified that Dr. Istanbouly's spirometry performed on Petitioner was not valid. He testified there was great variability from one effort to the next. He testified that it is essential when pulmonary function tests are performed that the efforts be consistent and to the greatest effort possible for the test to be valid. Dr. Rosenberg testified that reproducibility is one factor in determining validity in spirometry. He testified that it is also the completeness of the efforts as evidenced by the flow volume curves to show that the efforts have been maximal without interruption. Dr. Rosenberg testified that validity in spirometry is required not only for diagnostic purposes but also to determine if and to what extent impairment is present. He testified that you cannot gauge impairment in order to make an assessment of disability unless the tests are valid. Dr. Rosenberg testified that diagnoses should not be made based on invalid testing. Dr. Rosenberg testified that the pulmonary function testing performed at Methodist

Hospital and Stat Care were not valid. He testified that they were invalid for the same reason as the testing performed by Dr. Istanbouly (Respondent's Exhibit 2, pp 17-19).

Dr. Rosenberg testified that he was familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*. In order to apply Table 5-4 or 5-5 to the results obtained in pulmonary function testing, one needs to have valid testing. Dr. Rosenberg testified that the testing performed by Dr. Selby at Stat Care, should it be valid, would support the presence of asthma based on the improvement with bronchodilator. Dr. Rosenberg testified that if asthma is the correct diagnosis, one would look at Table 5-5 of the *Guides* to determine whether impairment is present. Dr. Rosenberg testified that if he applied Table 5-5 to the results in spirometry performed by Dr. Selby on May 29, 2018, Petitioner would fall in Class 0 impairment. Dr. Rosenberg testified that Petitioner was capable of heavy manual labor based upon the testing he had, all be it not valid (Respondent's Exhibit 2, pp 19-20).

Dr. Rosenberg concluded that Petitioner had untreated sleep apnea along with hypertension and history of prostate cancer. The treatment records outlined intermittent respiratory symptoms, without chronic complaints. Dr. Rosenberg testified that Petitioner's pulmonary function tests have been performed with incomplete efforts and were not valid. Dr. Rosenberg testified that if the values of Dr. Selby's testing were accepted at face value as being valid, Petitioner improved to normal after bronchodilators. He testified that if this is a valid finding, this supported the presence of asthma, which is unrelated to past coal mine dust exposure. Dr. Rosenberg testified that Petitioner does not have a chronic respiratory disorder caused or aggravated by past coal mine dust exposure. He testified that Petitioner is not disabled from a pulmonary perspective (Respondent's Exhibit 2, pp 23-25).

Dr. Rosenberg testified that the gold standard for diagnosing coal workers' pneumoconiosis would be pathologic review rather than radiographic review. Dr. Rosenberg testified that a tissue reaction to trapped coal mine dust is required to have coal workers' pneumoconiosis. That tissue reaction can be called scarring or fibrosis (Respondent's Exhibit 2, p 39).

Dr. Rosenberg testified that the B-reading methodology was designed to avoid descriptive terms for what is seen on the chest x-ray such as "mild" pneumoconiosis. He testified that the B-reading methodology was developed to remove subjectivity because what is mild to Dr. Rosenberg may not be what is mild to someone else. He testified that when someone says mild, he would not know whether that was a 1/0 profusion or a 0/1 profusion (Respondent's Exhibit 2, p 61).

Medical records of Rea Clinic/Christopher Rural Health were admitted into evidence. Petitioner was seen on March 30, 1999, with complaint of throat and chest congestion. He denied tobacco use. Physical examination of the chest revealed the lungs had good air entry, no rales or no wheezes. The assessment was upper respiratory infection and pharyngitis (Respondent's Exhibit 3, p 395). Petitioner was seen on May 9, 2001, with a two week history of post nasal drip, stuffy nose, clogging of both ears and bifrontal headache, aggravated by bending over. Physical examination of the chest revealed the lungs to be clear. Impression was acute sinusitis and allergic rhinitis (Respondent's Exhibit 3, p 389). Petitioner was seen on December 31, 2002, with complaint of nasal drainage and sinus pressure and pain for one week with a non-productive

cough. On that date Petitioner reported that he was usually very healthy and denied any medical problems and reported that he did not take any medications. The assessment was acute sinusitis (Respondent's Exhibit 3, p 384). Petitioner was seen on October 27, 2003, reporting that he woke up that morning with nasal congestion, post nasal drip, cough productive of clear yellow sputum and possibly a fever. Assessment was upper respiratory tract infection with seasonal allergic rhinitis (Respondent's Exhibit 3, p 381).

Petitioner was seen on March 23, 2006, for tooth pain. Chest was clear to auscultation on that date (Respondent's Exhibit 3, p 369). Petitioner was seen on April 12, 2007, with complaint of sinus nasal congestion and sore throat, present for four days. Petitioner denied shortness of breath. Physical examination of the chest was normal. Assessment was upper respiratory infection (Respondent's Exhibit 3, p 366). Petitioner was seen on June 11, 2008, relating that he could only sleep two to four hours at a time. He reported that he snored and woke up gasping for air if he slept on his back. He denied shortness of breath (Respondent's Exhibit 3, p 360). In a note from Dr. Gary Reagan, dated March 2, 2011, it was indicated that Petitioner was diagnosed with prostate cancer (Respondent's Exhibit 3, p 315).

Petitioner was seen on July 14, 2011, with complaint of acute sinus symptoms and back pain. Chronic problems were noted to be hypertension, hyperlipidemia, obesity and sleep apnea. Petitioner's review of systems respiratory was negative for cough or dyspnea. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 3, pp 307-309). Petitioner was seen on July 23, 2012, in follow up for his hypertension. He denied dyspnea. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 3, pp 264-266). Petitioner was seen on September 18, 2012, with some chest complaints. He denied cough or dyspnea. His O2 saturation was 97% (Respondent's Exhibit 3, pp 259-261).

Petitioner was seen on January 4, 2013, for a viral infection. He had a productive cough. His symptoms were aggravated by cold air. Physical examination of the chest revealed the lungs clear to auscultation. Petitioner was prescribed Claritin and Tessalon Perles (Respondent's Exhibit 3, pp 251-253). Petitioner was seen on November 12, 2013, complaining of dizziness. His pulse ox at rest was 97%. Physical examination of the chest revealed the lungs clear to auscultation. Assessment was dizziness and sleep apnea. It appeared that Petitioner was not using his CPAP (Respondent's Exhibit 3, pp 230-233).

Petitioner was seen on February 4, 2015, for medication follow up. His oxygen saturation was 98%. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 3, pp 196-197). Petitioner was seen on May 13, 2015, for medication refill and follow up. His review of systems respiratory revealed no cough. His oxygen saturation was 98% (Respondent's Exhibit 3, pp 194-195). Petitioner was seen on July 22, 2015, with complaint of flu-like symptoms. He denied cough and shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 3, pp 191-192).

Petitioner was seen on February 8, 2016, for medication refill. His review of systems respiratory revealed no cough. Physical examination of the chest revealed the lungs clear to auscultation bilaterally, good air movement, no wheezes, rales or rhonchi (Respondent's Exhibit 3, pp 183-

185). Petitioner was seen on July 18, 2016, for regular follow up. The only medication he was taking was Lisinopril. Physical examination of the chest revealed the lungs clear to auscultation bilaterally, good air movement, no wheezes, rales or rhonchi (Respondent's Exhibit 3, pp 172-175).
Petitioner was seen on February 6, 2017, for blood pressure check. He denied chest pain or shortness of breath. Review of systems respiratory was negative for cough. Physical examination of the chest was normal with no wheezes, rales, rhonchi, good air movement, clear to auscultation bilaterally (Respondent's Exhibit 3, pp 163-165). Petitioner was seen on March 24, 2017, by Dr. Makhdoom for colorectal cancer screening. For past medical history the doctor recorded chronic cough. Review of systems respiratory revealed no cough, dyspnea or shortness of breath with exercise. Physical examination of the chest revealed same to be normal to auscultation, normal breath sounds with no rubs, wheezes or rhonchi (Respondent's Exhibit 3, pp 156-158). Petitioner was seen on June 19, 2017, with complaints of cough and sinus drainage. His review of systems respiratory was positive for seasonal allergies with intermittent difficulties swallowing and breathing. Physical examination of the chest revealed the lungs clear to auscultation bilaterally, no wheezes, rales, rhonchi and good air movement. Assessment was chronic seasonal rhinitis. Petitioner was started on Singulair once a day and Albuterol inhaler as needed (Respondent's Exhibit 3, pp 142-143). Petitioner was seen on August 4, 2017. He was taking Lisinopril, Singulair and Albuterol. Physical examination of the chest revealed the lungs clear to auscultation bilaterally, no wheezes, rales, rhonchi and good air movement. Review of systems respiratory revealed that Petitioner denied breathing problems. Assessment included seasonal rhinitis with unspecified trigger (Respondent's Exhibit 2, pp 133-136). Petitioner was seen on October 16, 2017, for coughing with congestion for about a month. He reported that he had taken Singulair in the past but it made him really dry and then he coughed more. Petitioner reported that he had a chest x-ray done about three months prior for black lung. He reported that the x-ray showed he had black lung with PFTs at 70%. Review of systems respiratory was positive for cough but negative for shortness of breath, sputum or wheezing. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement. The assessment was respiratory tract congestion with cough (Respondent's Exhibit 3, pp 124-126). Petitioner was seen on November 6, 2017, for high blood pressure. Review of systems respiratory was positive for cough and negative for shortness of breath, sputum or wheezing. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement (Respondent's Exhibit 2, pp 121-123).

Petitioner was seen on January 12, 2018. He denied any increase in shortness of breath. He was taking Singulair for his allergies. He inquired about a sleep study. He reported that he felt fatigued. He related having cough and wanted a refill on his cough syrup. Review of systems respiratory was positive for cough but negative for shortness of breath, sputum or wheezing. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement. Assessment included cough, allergic rhinitis and obstructive sleep apnea as well as fatigue (Respondent's Exhibit 3, pp 117-120). Petitioner was seen on February 21, 2018, with complaint of cough and congestion with clear sputum. Review of systems respiratory was negative with Petitioner denying problems. Physical examination of the chest revealed lungs clear to auscultation (Respondent's Exhibit 3, pp 113-116). Petitioner underwent a sleep study on March 9, 2018. Dr. Istanbouly interpreted the study and concluded that Petitioner suffered from obstructive sleep apnea (Respondent's Exhibit 3, p 104). On March 21, 2018, Petitioner's

wife made a request for a refill on cough syrup due to Petitioner's cough (Respondent's Exhibit 3, p 103). Petitioner underwent a chest x-ray for irregular heartbeat on April 27, 2018. Impression was blunting of the left costophrenic angle which could be due to scarring, small pleural effusion or minimal infiltrate (Respondent's Exhibit 3, p 88). Petitioner was seen in the emergency department at St. Joseph Memorial Hospital on April 28, 2018, for complaint of irregular heartbeat. Review of systems respiratory was negative. Physical examination of the chest revealed normal breath sounds without distress or wheezes, rales and he exhibits no tenderness (Respondent's Exhibit 3, pp 81-85). Petitioner was seen on May 7, 2018. His review of systems respiratory revealed cough but no shortness of breath, sputum or wheeze. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement (Respondent's Exhibit 3, pp 77-79). Petitioner was seen on July 3, 2018, for follow up after delivery of his CPAP machine. He reported he was doing well and felt better, more rested and less fatigued. Review of systems respiratory revealed no cough or shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement (Respondent's Exhibit 3, pp 70-72). Petitioner was seen on July 9, 2018, for heart rate issues. Review of systems respiratory was negative for cough or shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation bilaterally with good air movement. EKG was performed and interpreted as being within normal limits (Respondent's Exhibit 3, pp 63-68).

Petitioner was seen by Dr. Makhdoom for follow up on January 21, 2019, his medications included Lisinopril, Proctosol HC and Timolol Meleate. Review of systems respiratory revealed that Petitioner denied cough, dyspnea or shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with normal breath sounds, no rubs, wheezes or rhonchi (Respondent's Exhibit 3, pp 51-53). Petitioner was seen on April 12, 2019, with complaint of sudden onset of dizziness that morning. He related that he had chronic ear issues that he would get every season. He had chronic sinus and allergies also. He was supposed to be taking Singulair but he did not do that. Medications included Albuterol, Timolol, eye drops and Lisinopril. Review of systems respiratory revealed Petitioner denied cough or shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with good air movement, no weezes, rales or rhonchi (Respondent's Exhibit 3, pp 33-35). Petitioner was seen on April 15, 2019. He had been wearing an event monitor per Dr. Khan for intermittent episodes of "passing out." Review of systems respiratory revealed Petitioner denied breathing problems or cough. Physical examination of the chest revealed the lungs clear to auscultation bilaterally. Assessment was acute serous otitis media left ear and irregular heartbeat (Respondent's Exhibit 3, pp 29-31). Petitioner was seen on July 8, 2019, to discuss changing his blood pressure medication. He reported feeling well and his heart rate was staying in the 50s to 70s most days. Review of systems respiratory revealed Petitioner denied cough or shortness of breath. On examination lungs were clear to auscultation with good air movement (Respondent's Exhibit 3, pp 22-25).

Petitioner was seen on January 27, 2020, with complaint of flu-like symptoms with onset about a week prior. He complained of sore throat and cough. He reported severe head congestion. Review of systems respiratory revealed Petitioner denied breathing problems but did relate cough. He denied shortness of breath and wheeze. Physical examination of the chest revealed

the lungs clear to auscultation bilaterally. Assessment was flu-like symptoms with sinusitis (Respondent's Exhibit 3, pp 5-8).

Medical records of Prairie Cardiovascular Consultants were admitted into evidence. Petitioner was seen on August 28, 2018, by Dr. Khan. Petitioner was noted to be a "never smoker". He did not exercise. Review of systems constitutional was positive for weight gain. Review of systems respiratory was positive for snoring but negative for cough or significant shortness of breath. Physical examination of chest revealed normal effort and breath sounds with no respiratory distress (Respondent's Exhibit 4, pp 34-37). Petitioner was seen by Dr. Khan on March 5, 2019, for follow up. Review of systems respiratory was negative for cough, new or significant shortness of breath and snoring. Physical examination of the chest revealed normal effort and breath sounds (Respondent's Exhibit 4, pp 15-18). Petitioner was seen on September 24, 2019, for follow up. He was doing well clinically. It was noted that when he discontinued an eye drop which had a beta blocker in same it seemed like his symptoms of bradycardia significantly improved. Review of systems respiratory was negative for no more significant shortness of breath or snoring. Physical examination of the chest revealed normal effort and breath sounds (Respondent's Exhibit 4, pp 8-10). Petitioner was seen on October 20, 2020. He was doing well and lost 40 pounds since his last evaluation. He denied worsening dyspnea on exertion. His medications were Atorvastatin and Lisinopril. He was noted to be a "never smoker". Review of systems respiratory was negative for cough and new or significant shortness of breath. Physical examination of the chest revealed normal effort and breath sounds (Respondent's Exhibit 4, pp 3-6).

Records of NIOSH were admitted into evidence. Chest x-ray of May 16, 1979, was interpreted by two B-readers as being completely negative (Respondent's Exhibit 7, pp 5-6). Petitioner's chest x-ray of January 23, 1984, was interpreted by two B-readers as being completely negative (Respondent's Exhibit 7, pp 3-4).

Conclusions of Law

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

The Arbitrator concludes that Petitioner did not sustain an occupational disease arising out of and in the course of his employment with Respondent.

In support of this conclusion the Arbitrator notes the following:

Petitioner was last exposed to the hazards of an occupational disease in the course of his employment on January 31, 2014. Petitioner's Application for Adjustment of Claim was filed on July 12, 2017. Section 6(c) of the Occupational Diseases Act provides a claim should be filed within three years in respect to a condition other than coal workers' pneumoconiosis (where no compensation has been paid) or five years in respect to coal workers' pneumoconiosis (where no compensation has been paid). This case is analogous to *Carter v. Illinois Workers' Compensation Commission*, 2014 IL App (5th) 130151WC ¶20. The only occupational disease at issue in the *Carter* case was coal workers' pneumoconiosis. The same is true in the instant case

as any other claim for an alleged occupational disease is barred by Section 6(c) of the Occupational Diseases Act.

Dr. Rosenberg, Dr. Istanbouly and Dr. Meyer testified that the most accurate way for diagnosing coal workers' pneumoconiosis is pathologic review. There was no evidence in the record of pathologic review so the presence of coal workers' pneumoconiosis must be based on chest x-ray interpretation. All three of these physicians interpreted the chest x-ray of Petitioner dated May 12, 2017. Dr. Rosenberg testified that for a chest x-ray to be positive for pneumoconiosis the profusion must be 1/ 0 or greater. He testified that a profusion of 0/1 is technically a negative film for pneumoconiosis. Dr. Rosenberg testified the Petitioner's film revealed a 0/0 profusion. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making the distinction between a 0/1 and 1/0 film. Dr. Istanbouly did not know the profusion of the film that he reviewed. Dr. Istanbouly is not an A-reader or B-reader of films. He could not say whether the film he reviewed had a profusion of 1/0 or 0/1. Although one does not have to be a B-reader to interpret films for the presence of coal workers' pneumoconiosis, such certification lends credibility to a physician's interpretation.

Dr. Istanbouly testified that when he interprets a film for black lung he determines whether it is positive or negative and if it is positive he characterizes what he sees as mild, moderate or severe. In Petitioner's case, he characterized what he saw on the chest x-ray as mild. Dr. Rosenberg testified that the B-reading methodology was designed to avoid descriptive terms for what is seen on the chest x-ray such as "mild" pneumoconiosis. He testified that the B-reading methodology was developed to remove subjectivity because what is mild to Dr. Rosenberg may not be what is mild to someone else. When someone says mild, he would not know whether that was a 1/0 profusion or a 0/1 profusion. Based on the above, the Arbitrator gives no weight to Dr. Istanbouly's interpretation of Petitioner's May 12, 2017, chest x-ray.

Dr. Smith interpreted the chest x-ray of May 12, 2017, as positive for pneumoconiosis, profusion 1/0 with P/Q opacities in the mid and lower lung zones bilaterally. Dr. Smith on his B-reading form, did not note any opacities in the upper lung zones. Dr. Meyer testified that coal workers' pneumoconiosis is typically an upper lung zone predominant process. He testified that it is very rare for the opacities of coal workers' pneumoconiosis to be found in the middle and lower lung zones and not in the upper lung zones. Dr. Smith's interpretation was not consistent with the general presentation and progression of coal workers' pneumoconiosis. Dr. Meyer and Dr. Rosenberg testified that there were not any findings of coal workers' pneumoconiosis on the May 12, 2017, chest x-ray.

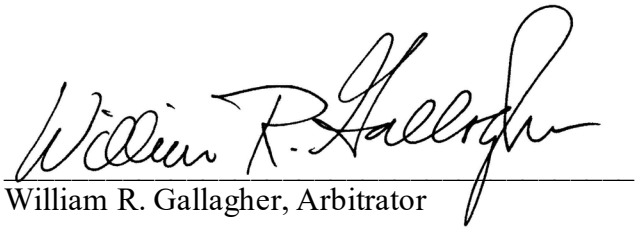
The Arbitrator notes the testimony of Dr. Istanbouly and Dr. Meyer that up to 50% of long term coal miners have coal workers' pneumoconiosis that was determined at autopsy which was not appreciated radiographically during their lives. The Commission has rejected reliance on such statistical evidence in the absence of other persuasive, medically accepted evidence establishing a causal connection. *Quinn v. The American Coal Co.*, 20 IWCC 0326, pp 16-17. The Arbitrator finds that the testimony of the experts that a negative chest x-ray would not rule out pneumoconiosis, is not the same as saying that Petitioner in fact suffers from the disease. *Woolard v. The American Coal Co.*, 20 IWCC 0154, p 17. It is not Respondent's duty to

produce evidence that Petitioner did not have coal workers' pneumoconiosis. Rather the issue is whether Petitioner has proven that he does. *Quinn*, 20 IWCC 0326, p 16.

Dr. Smith recently testified that the panel which authored the B-reading syllabus are the peers he aspires to be and acknowledged that Dr. Meyer was one of the authors of the syllabus. *Quinn v. The American Coal Co.*, 20 IWCC 0326, p 15. (citing *Ferrell v. The American Coal*, 20 IWCC 0067, pp 6-7). The Arbitrator finds the opinions of Dr. Meyer and Dr. Rosenberg as they pertain to whether or not Petitioner has evidence of coal workers' pneumoconiosis, to be more persuasive than the opinion of Dr. Smith. The Arbitrator finds Dr. Meyer to be the most persuasive of the B-readers given that he is not only a certified B-reader, but he is also on the ACR Pneumoconiosis Task Force which is engaged in redesigning the B-reading course and exam as well as submitting cases for the training module and exam.

The Arbitrator finds that Petitioner failed to prove that he suffered coal workers' pneumoconiosis and also failed to prove that his current condition of ill-being is causally related to his coal mine employment with Respondent.

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



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	08WC027157
Case Name	ERONDU, NWARARA v. PROVIDENT HOSPITAL
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0591
Number of Pages of Decision	23
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Charles Webster
Respondent Attorney	G. Steven Murdock

DATE FILED: 12/3/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NWAMARA ERONDU,

Petitioner,

vs. NO: 08 WC 27157

COOK COUNTY HOSPITAL SYSTEM
(PROVIDENT HOSPITAL),

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability (TTD) benefits, 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 is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission modifies the Arbitrator's Decision with respect to the issue of causal connection, and finds instead that Petitioner's current condition of ill-being is causally related to the March 13, 2008 work accident. Workers' compensation benefits are awarded accordingly.

The Arbitrator found that Petitioner failed to prove that her current condition of ill-being was causally related to the March 13, 2008 work accident. The Arbitrator explained: "Although Drs. Hattori and Razma took histories from Petitioner of the event she described at work on March 13, 2008, none of the three treating physicians documented an opinion that Petitioner developed asthma as a result of exposure to noxious or toxic fumes while at work." (Arbitrator's Decision, pg. 11).

Respondent's Section 12 examiner, Dr. Khanna, evaluated Petitioner on June 2, 2008. Dr. Khanna noted no pertinent prior medical history, and further noted the same history of injury, symptoms and complaints that Petitioner testified to at arbitration. Although Dr. Khanna indicated that there was no active clinical diagnosis because Petitioner's examination was normal on June 2, 2008, he testified as to what he believed Petitioner's diagnosis was immediately after the incident at work: "Based on the information she provided me and the medical records, my opinion was that she had been exposed to chemicals and had been treated for that chemical exposure." (RX2, pg. 16). Dr. Khanna stated that Petitioner had fully recovered as of April 1, 2008 when Dr. Hattori released her back to work. He believed Petitioner was at maximum medical improvement (MMI) and did not require any further treatment. The Commission notes that although Dr. Khanna did not opine that the chemical exposure at work caused an asthmatic condition in Petitioner, he did concede that a chemical exposure could create some type of temporary exacerbation or reaction.

Respondent's second Section 12 examiner, Dr. Diamond, examined Petitioner on August 10, 2016. Similar to Dr. Khanna, Dr. Diamond noted that Petitioner did not have any known allergies, no history of asthma and she did not smoke. Dr. Diamond's testimony with respect to Petitioner's history of injury and complaints was also consistent with Petitioner's testimony at arbitration. Dr. Diamond reviewed the methacholine challenge test from October 2, 2008 and testified that it had been interpreted incorrectly and that Petitioner did not have asthma. Dr. Diamond explained that the methacholine challenge test was the gold standard for diagnosing asthma and it was unlikely that a patient with asthma would have a negative methacholine challenge test. Dr. Diamond also explained that the methacholine test was done in people whose baseline breathing test was normal. He further added that someone that has a negative methacholine may have very mild reactive airway disease that could be treated with asthma medications – but that a patient does not necessarily have asthma. Dr. Diamond's physical examination of Petitioner was unremarkable. He also performed a complete pulmonary function test which demonstrated normal airflow but also mild restriction. Dr. Diamond noted that a CAT scan of the chest found no evidence of interstitial lung disease.

Dr. Diamond, like Dr. Khanna, did not form an opinion that Petitioner had asthma, but instead diagnosed Petitioner with hyper-irritable cough syndrome or having a hyper-irritable/hyper-sensitive upper airway throat. He testified that this diagnosis did not have a clear definition. "But there are people that chronically cough, and they don't have any chest issue, so it comes from their throat, their upper airway." Dr. Diamond explained that possible causes included post-nasal drip, GERD or reflux from the stomach, or a hypersensitive nervous system. (RX1, pg. 18). Dr. Diamond opined that Petitioner's current breathing condition was not related to the March 13, 2008 exposure at work. He testified that hyper-irritable cough syndrome typically developed after a very significant exposure to fumes "in a situation where something burns or explodes or

something. But it's never been reported or I have ever seen that someone was just walking through a room where they were using something appropriately without any extra spillage or exposure and then they are coughing for the rest of their life." (RX1, pgs. 19-20).

The Commission agrees that Petitioner did not prove that the chemical exposure at work on March 13, 2008 caused her alleged asthma condition. The arbitration record indicated that only Petitioner and her primary treating physician, Dr. Razma, believed she had asthma. Other than one single notation in the record suggesting Petitioner had asthma in 2007, there are no additional notes or details in the medical records and no evidence of any complaints or treatment related to asthma or breathing issues prior to March 13, 2008. In fact, Dr. Razma reviewed the March 13, 2008 chest x-ray and stated: "[I]t is clear to my exam, she's never had any asthma history and there is no family history of lung disease." (PX3; PX5).

The medical evidence, however, does support a finding that the chemical exposure resulted in some type of breathing or airway condition. The parties do not dispute that Petitioner sustained an injury at work on March 13, 2008. There is also no dispute that on March 13, 2008, custodians were using a chemical cleaner or agent that caused Petitioner to become ill and for which she required immediate treatment.

In line with Dr. Khanna's and Dr. Diamond's testimonies, Dr. Razma noted Petitioner's complaints after the March 13, 2008 exposure, which included shortness of breath, wheezing, coughing, tightness in her chest and sensitivity to strong smells. Also in line with the examination findings of Respondent's physicians, Dr. Razma's findings were unremarkable. Examination revealed a respiratory rate of 16 and 99% sat room air oximetry at rest. Petitioner was able to talk in full sentences and was not in any distress. Lungs were entirely clear to auscultation and percussion with no increased AP diameter or chest wall tenderness. The rest of the examination was unremarkable. Dr. Razma nonetheless ordered some pulmonary function tests (PFTs) and a chest x-ray to evaluate Petitioner's symptoms.

Petitioner underwent the PFTs at Advocate Christ Medical Center on July 3, 2008. The report stated that Petitioner had mild chest restriction, no bronchodilator response and air trapping may be present. Diffusion capacity was moderately reduced. There was a possibility anemia was a contributing factor. The impression also stated that there was possibility of interstitial lung disease or pulmonary vascular disease. The report further stated that Petitioner did not meet the criteria for a methacholine challenge. The chest x-ray was also completed on July 3, 2008 and revealed mild central interstitial prominence, no focal infiltrate, and mediastinum and heart contours were normal. The impression was mild central pneumonitis. A chest CT scan taken on July 30, 2008 found no evidence of interstitial lung disease or other abnormality.

Petitioner completed additional PFTs at Advocate Christ Medical Center on October 2, 2008. The impression stated: "Normal spirometry but positive methacholine challenge indicating hyperactive airways possibly asthma." (PX3; PX5; PX7). While Dr. Diamond clarified that this test was interpreted incorrectly, he did believe that Petitioner had some type of hyper-irritable cough syndrome or hyper-irritable/hyper-sensitive upper airway throat as explained above.

Petitioner again completed PFTs on April 30, 2012 which were normal and there was no change with bronchodilator. The impression stated on the report indicated normal spirometry, no significant response to bronchodilators, normal lung volume, and mild decrease in diffusion capacity "indicating a defect in air exchange surface that may be secondary to anemia, interstitial lung disease or pulmonary vascular disease. Clinical correlation is suggested." (PX3; PX5). Again, a previous chest CT scan had ruled out interstitial lung disease or other abnormality.

The last medical record in evidence was the office visit to Dr. Usmani, Dr. Razma's replacement, on April 4, 2019. Petitioner presented with complaints of chest tightness for the past three weeks that was triggered by perfumes and cleaning products.

The Commission finds that as of the first medical record from Respondent's emergency department, dated March 13, 2008, Petitioner had reported complaints of shortness of breath, coughing, dizziness and light-headedness. The evidence demonstrated that Petitioner's complaints, which not only included coughing, but tightness in her throat and chest, and shortness of breath, were consistent and continuously linked to the March 13, 2008 work exposure. The emergency department record also documented an exposure to fumes from cleaning/stripping/waxing floors in the emergency department and identified the alleged offending product as Shineline Emulsifier Plus. The Commission additionally finds Dr. Diamond's testimony with respect to Petitioner's diagnosis and the Shineline product not persuasive. Dr. Diamond did not have the information or evidence as to the levels of Shineline Emulsifier Plus being used on March 13, 2008, or how it was used, or for how long, to conclude that Petitioner's condition of ill-being was unrelated.

The Commission further notes that despite the various unremarkable examinations or tests indicating minimal findings, the impressions also described mild chest restriction, air trapping and moderately reduced diffusion capacity. Dr. Diamond noted this mild restriction finding in his own tests that he performed on Petitioner. He diagnosed Petitioner with hyper-irritable cough syndrome or with a hyper-irritable upper airway. Dr. Diamond testified that exposure to airway irritants could cause or aggravate this condition.

There is sufficient evidence in the record to reasonably infer that Petitioner suffered a reaction that affected her breathing following a chemical exposure at work on March 13, 2008, and that such condition was not temporary in nature. Petitioner has managed and continues to manage the majority of her treatment by way of medication, inhalers and other breathing treatments. The Commission therefore finds that Petitioner's current condition of ill-being, as it relates to her hyper-irritable cough syndrome or having a hyper-irritable/hyper-sensitive upper airway throat, is causally related to the March 13, 2008 exposure to the cleaning agent at work. As such, the Commission finds Petitioner is entitled to an award for medical bills, TTD and PPD benefits.

The Arbitrator noted that Dr. Diamond had conceded on cross-examination that Dr. Hattori's work restrictions through April 1, 2008 were reasonable. Thus, the Arbitrator found that the medical care provided from the date of accident through April 1, 2008 was also reasonable. The Arbitrator only awarded Dr. Hattori's bill of $935.00; Respondent does not dispute this award. Having determined that Petitioner's current condition of ill-being is causally related, the Commission awards the medical bills as detailed below. By his Brief, Petitioner requests an award

of $7,064.40 for unpaid medical bills. However, some of the amounts listed by Petitioner are incorrect, unrelated or duplicate charges. Having reviewed the medical bills submitted into evidence, the Commission finds the following bills reasonable, necessary and related:

1) Dr. Hattori (PX4)	$935.00
2) Pulmonology & Critical Care (PX6 and PX7)	$2,130.00
3) Advocate Christ Medical Center (PX8)	$3,725.00
4) Provident Hospital (PX10 and PX11)	$715.20
	$7,505.20

With respect to TTD benefits, the Commission seeks to clarify and modify the Arbitrator's Order. The Arbitrator awarded TTD benefits from March 14, 2008 through April 1, 2008, or 2 5/7 weeks. The evidence demonstrated that Petitioner was taken off work by her treating physicians during this time period and that Petitioner returned to work on April 2, 2008. Petitioner is entitled to TTD benefits for this time period in the amount of $2,487.78 ($918.00 x 2.71). Respondent is also entitled to a credit of $2,726.69 for TTD previously paid and as stipulated to by the parties on the Request for Hearing form.

The Commission next awards Petitioner PPD benefits of three-percent (3%) loss of use of the person as a whole. As Petitioner's injury occurred before September 1, 2011, the criteria for determining PPD benefits under Section 8.1b of the Act does not apply.

Petitioner testified that when she would be exposed to strong odors such as cleaning products, perfumes or strong lotions, she would feel tightness in her throat and chest. "I start coughing, and I'm short of breath." (T.31-32). Petitioner continues to work in her capacity as a nurse, but testified that she took measures to minimize her exposure to triggers at work. "The charge nurse works with me. When housekeeping is about to clean the floor, she will move me to a different area if she can help it. Or when they are waxing the floor, they move me to a different unit." (T.54-56). Petitioner also confirmed that she continues to be exposed to triggers in social, family and recreational environments. She carried a little mask with her in case she encountered strong odors while in public.

Petitioner further testified that she continued to manage her breathing issues with medications and inhalers. "So I'm now on BREO, INCRUSE, ProAir, which is albuterol, Flonase, Singulair, and a breathing treatment with albuterol if I need it. I take over-the-counter Zyrtec once a day." (T.31; PX5). Petitioner's emergency inhaler was the albuterol which she used about two to three times a week depending if she was exposed to strong odors. She also noticed that if she was walking fast or was active, "I easily get short of breath, which I did not have before." (T.32-33). Petitioner also had difficulty climbing stairs due to shortness of breath. Petitioner additionally took prednisone if she was short of breath.

Petitioner continues to rely on a chart that Dr. Usmani provided her in 2016 called the Asthma Action Plan Adult. The chart depicted a "green zone." Petitioner explained, "The green zone is I'm not coughing, no wheezing, I can do my usual activities." (T.35-36). The chart indicated the medication Petitioner was required to take when she was in the green zone. The chart also provided instructions if Petitioner was in the "yellow zone" or "red zone." (T.36-37). Finally,

Petitioner had a breathing machine that she obtained in 2016. "I put albuterol solution into it and inhale it if I think the pump is not helping me. I'll use that in place." (T.37-38).

In light of the foregoing, the Commission finds that Petitioner is entitled to PPD benefits for her ongoing complaints and symptoms for which she continued to manage through the date of arbitration. An award of three-percent (3%) loss of use of the person as a whole is reasonable and supported by the evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 8, 2020 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary, and related medical bills totaling $7,505.20, as detailed in this Decision and as provided under Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit pursuant to Section 8(j) of the Act for those bills paid by its group medical plan. Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $918.00 per week for 2 5/7 weeks, or $2,487.78, which covers March 14, 2008 through April 1, 2008, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $2,726.69 for TTD previously paid and as stipulated to by the parties on the Request for Hearing form.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $636.15 per week for 15 weeks because the injuries sustained caused three-percent (3%) loss of use of the person as a whole.

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

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

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

December 3, 2021

CAH/pm
O: 11/18/2021
052

Christopher A. Harris
Christopher A. Harris

Carolyn M. Doherty
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Marc Parker
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ERONDU, NWAMARA
Employee/Petitioner

Case# **08WC027157**

COOK COUNTY HOSPITAL SYSTEM (PROVIDENT HOSPITAL)
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:

0786 BRUSTIN & LUNDBLAD
CHARLES E WEBSTER
10 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
G STEVE MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nwamara Erondu,
Employee/Petitioner

v.

Cook County Hospital System (Provident Hospital),
Employer/Respondent

Case # **08 WC 27157**

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 **April 22, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ 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 13, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,604.00**; the average weekly wage was $**1,377.00**.

On the date of accident, Petitioner was **40** 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 $**2,726.69** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,726.69**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**918.00**/week for **2 & 5/7** weeks as provided in §8(b) of the Act. Respondent shall be given a credit of $**2,726.69** for TTD benefits previously paid.

Respondent shall pay to Petitioner those medical expenses incurred by Petitioner for treatment provided by Dr. Steven Hattori in the amount of $935.00, to be adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

As otherwise stated, the Arbitrator finds that Petitioner failed to prove that she sustained any permanent partial disability.

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 5, 2020
Date

JUN 8 - 2020

Nwamara Erondu v. Provident Hospital
08 WC 27157

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:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?

Petitioner claims $5,889.00 in unpaid medical bills. Petitioner also claims that she is entitled to total temporary disability benefits from March 14 through April 2, 2008, representing 2 & 6/7 weeks.

FINDINGS OF FACTS

Petitioner Nwamara Erondu was employed by Respondent Provident Hospital as a Registered Nurse in the Emergency Department since October 12, 1999. Her regular shift was 7:00 PM to 7:00 AM. She denied any history of asthma or breathing problems.

Petitioner was working her regular shift on March 13, 2008. There were employees of the hospital cleaning the floors in a are of the Emergency Department. Staff had cleared patients out of that area so this could be completed. Petitioner went to the nurses' station to retrieve medications from the Pyxis. Pyxis is a locked cabinet in which they store medications used in the ER and that requires a special authorization to open it.

The cleaning workers had started cleaning the floors approximately 20 feet away from the nurses' station. While she was retrieving the medications Petitioner began coughing, choking, and with difficulty breathing. Petitioner identified the workstation as shown in Petitioner's Exhibit #13, drawing a circle in the area where the workers were cleaning. Petitioner testified she immediately ran outside to get some air. While outside, she continued having difficulty breathing, so she ran to the resuscitation room where she called from a telephone in the room to the nurses' station reporting to a physician there that she was having difficulty breathing. Dr. Bridgette Smith arrived with some of the other nurses to assist Petitioner, providing her with IV medication and a "breathing treatment."

Petitioner noticed three other employees brought into the resuscitation room for treatment while she was in there. Petitioner continued to have shortness of breath and

coughing while in this room. Prior to this event, she had not been treated for asthma or had any issues with breathing. Petitioner was to be admitted, but because there were no rooms available, she was kept in the emergency room the rest of the evening. She was diagnosed with acute bronchospasms following exposure to noxious fumes and discharged to home.

Petitioner testified that Dr. Smith found that the cleaning workers were using Shineline Emulsifier Plus, for which the MSDS (Material Safety Data Sheet) was admitted into evidence as Petitioner Exhibit #2. The MSDS described the product is a clear liquid with a "fresh fragrance" odor and that breathing fumes or mist may cause irritation and damage to the respiratory tract, including nasal discharge and cough. It is also noted that use of the product may "aggravate preexisting skin; eye and respiratory disorders including asthma and dermatitis." The MSDS does not warn that it may initiate or cause asthma and also refers to "overexposure" to the product causing these symptoms. It is recommended the product be used with good ventilation, and Petitioner testified to there being no windows in the emergency department.

Petitioner first consulted Dr. Steven Hattori on March 14, 2008 complaining of continued shortness of breath following her exposure to cleaning product at work the day before (PX #3). Dr. Hattori diagnosed bronchial spasms and took her off work.

When Dr. Hattori next saw Petitioner on March 18, 2008 for follow up, he noted "? Allergies." Petitioner continued to complain of shortness of breath along with sneezing and congestion. His assessment on this date was "residual airway inflammation." He prescribed Advair along with Allegra and advised Petitioner to return in two weeks. He continued keeping Petitioner off work for that time.

Dr. Hattori issued a note on March 26, 2008 stating the claimant had "asthmatic bronchitis 2nd to inhalant irritant." She was on Prednisone and Advair and scheduled to return in one week to evaluate her work status.

Petitioner returned to Dr. Hattori on April 1, 2008, reporting that she was feeling better. Dr. Hattori's assessment was "improved." He instructed Petitioner to continue with the Advair and to return to the clinic if she had any further issues. He released her to return to work effective April 2, 2008.

Petitioner saw Dr. Hattori again on May 5, 2008, with continued complaints of shortness of breath. She started Prednisone when she returned to work, adding that her symptoms then returned. She was again diagnosed with bronchospasms, and the doctor

recommended she continue with Advair. He also referred her for a pulmonary evaluation with Dr. Razma while also completing FMLA paperwork for her.

FMLA paperwork completed and signed by Dr. Hattori on November 26, 2008, noted Petitioner was not then incapacitated from work, but would require periodic days off for treatment of asthma flare-ups (PX #3). He noted her current medication regimen included steroids and bronchodilators. Petitioner testified that her current medications include Breo, Incruse, ProAir (albuterol), Flonase, Singulair, and Zyrtec.

On June 2, 2008, Dr. Rajeev Khanna examined Petitioner at the request of Respondent pursuant to §12 of the Act. Dr. Khanna testified by evidence deposition on February 28, 2019. Dr. Khanna is board-certified in Sports Medicine and Family Practice. Petitioner gave a history that she suffered a work-related reaction to a chemical used to strip floors of Provident Hospital on March 13, 2008. She identified "Shineline Emulsifier Plus" as the chemical use to strip floors. She began to experience trouble breathing and felt lightheaded. She reported she was working as a registered nurse in the emergency department and was treated with Decadron, Solu-Medrol, Alupent, and 3 to 4 liters of fluid.

Petitioner told Dr. Khanna that prior to this work incident she had not had any breathing issues, but had been diagnosed with diabetes. She was using Advair inhaler and taking metformin and glipizide at that time. Petitioner did not have any ongoing symptoms relative to breathing at the time of the IME, but gave a consistent description of her symptoms following the exposure to fumes at work. In addition to the clinical exam Dr. Khanna reviewed Petitioner's treatment records from March 13, 2008 through April 1, 2008. On examination, Dr. Khanna noted all pertinent findings were normal.

Based upon his review of records, the history provided by Petitioner, and his clinical examination, Dr. Khanna opined that Petitioner's normal clinical examination and lack of subjective symptoms that Petitioner had no clinical diagnosis. He believed she had fully recovered from her exposure to fumes on March 13, 2008 and required no further treatment by the time he examined her. Dr. Khanna further opined that she had reached MMI as of April 2, 2008 when Dr. Hattori believed she was capable of returning to work. He also saw no evidence to suggest that Petitioner's exposure to fumes at work on March 13, 2008 resulted in any permanent condition of ill-being.

On cross-examination Dr. Khanna conceded that exposure to a chemical can aggravate underlying asthma, but he opined that it can cause a temporary aggravation. Dr. Khanna did not believe, based upon Petitioner's lack of symptoms and is clinical examination, that Petitioner had asthma at the time he examined her.

Petitioner was examined by Dr. Antanas Razma at Pulmonary and Critical Care Consultants on June 16, 2008, on referral from Dr. Hattori (PX #3 & PX #5). Petitioner reported no prior history of lung disease or breathing issues, including asthma and that she was a non-smoker. She gave a history of exposure to fumes at work on March 13, 2008 when floors were being waxed or stripped. She had an acute onset of shortness of breath and coughing. Dr. Razma reviewed the March 13, 2008 chest x-ray, which looked clear. The doctor considered whether Petitioner had developed asthma or whether she may have some underlying interstitial lung disease. He ordered pulmonary functional testing to include a Methacholine Challenge Test (MCT), as well as a chest X-ray. She was to return once those studies were completed. Dr. Razma subsequently ordered a chest CT scan on July 23, 2008 as well.

Petitioner underwent a pulmonary function test at Advocate Christ Medical Center with Dr. Francis Jamilla on July 3, 2008 (PX #5). The test showed mild chest restriction with no bronchodilator response and moderately reduced diffusion capacity. Interstitial lung disease was suspected. A chest X-ray that day showed findings consistent with mild central pneumonitis. A subsequent CT scan of Petitioner's chest on July 30, 2008 was unremarkable, with no evidence of interstitial lung disease or other abnormality.

Petitioner underwent another pulmonary function test on October 2, 2008 at Advocate Christ Medical Center with Dr. Muhammad Hamadeh, which showed normal spirometry, but a positive methacholine challenge indicated hyperreactive airways possibly asthma (PX #5). Interstitial lung disease was suspected.

Petitioner did not return to Dr. Razma until April 18, 2012 (PX #5). Dr. Razma noted the results of her July 2008 tests, adding that by telephone they then put her on Advair 250/50, for which she did not do well, so they changed this to Advair 500/50. Petitioner reported by telephone on October 27, 2008 that she was doing better and had not been heard from by Dr. Razma's office since then. Since that time, Singulair and Poventil HFA had been added as she continued to experience symptoms when exposed to noxious odors. Petitioner presented on this date to see if they could get better control of her asthma. Dr. Razma diagnosed extrinsic asthma without exacerbation. He switched petitioner to Symbicort and Dulera in place of the Advair. She was to continue with the Singulair and Proventil.

Petitioner continued to follow up with the physicians and assistants at Pulmonary and Critical Care Consultants through 2015 for shortness of breath, cough, seasonal allergic rhinitis, and asthma.

An April 30, 2012 pulmonary function test showed normal spirometry, normal lung volume, and no significant response to bronchodilators. A mild decrease in diffusion capacity indicating a defect in air exchange possibly secondary to anemia, interstitial lung disease or pulmonary vascular disease. As of April 10, 2014, Petitioner reported that her medications kept her asthma under control and that she would experience coughing and shortness of breath when exposed to noxious odors and did her best to avoid them.

Petitioner continued to follow up with Dr. Hattori throughout 2008 and 2015 for unrelated general health conditions and routine physical examinations, throughout much of which he noted asthma among her current conditions. These records are handwritten and difficult to read.

On August 10, 2016, Dr. Edward Diamond, a board-certified internist and pulmonologist with Suburban Lung Associates, examined Petitioner on behalf of Respondent pursuant to §12 of the Act. Dr. Diamond testified at his evidence deposition June 27, 2018 (RX #1). Dr. Diamond testified from his narrative report dated August 10, 2016, marked Deposition Exhibit #2, and test results, marked Deposition Exhibit #3. Deposition Exhibit #2 and Exhibit #3 were not admitted in evidence based on a hearsay objection.

Petitioner gave a history of her exposure to a cleaning product at her work on March 13, 2008. There was no spillage or unusual intensity of the exposure. At that time, she had chest tightness and shortness of breath and felt that she may pass out. She reported that since that time she experiences shortness of breath and coughing whenever exposed to any environmental irritant, but continued to work full-time. Dr. Diamond reviewed Petitioner's records from Drs. Hattori and Razma, including the Methacholine Challenge Test (MCT) report from October 2, 2008.

Dr. Diamond testified that the October 2, 2008 MCT was misinterpreted as positive. He explained that when the MCT is administered, the methacholine is designed to make underlying asthma worse so that when the patient is then provided with bronchodilator, there is noted improvement confirming the asthma diagnosis. To start the test, however, there has to be a baseline breathing test done before administering the methacholine so it can be determined what that baseline is as the goal for the use of the bronchodilator. During the test, increasing concentrations of methacholine are administered that continue until breathing becomes unstable, as exhibited by about a 20% fall in the lungs expiratory volume in one second (FEV 1). In reviewing the MCT from 2008, Dr. Diamond noted that Petitioner did not show a 20% drop in her FEV 1 and that even at the highest level of methacholine she barely hit a 20% FEV 1 drop. In his opinion, the reported findings showed a normal response to the exposure to methacholine

during testing and a negative test for asthma. In the end, he concluded that Petitioner does not have asthma.

Dr. Diamond's examination included a complete pulmonary function test, which showed normal airflow even with exposure to methacholine. There was some mild restriction that was difficult to explain and may not correlate with any particular underlying issue. However, he did not believe this correlated with an inhalation injury unless there was a resulting interstitial lung disease, which in the case of Petitioner was ruled out by a CT scan of her lungs back in July 2008. In conclusion, he found no remarkable findings on clinical and diagnostic examination of Petitioner on August 10, 2016.

Dr. Diamond diagnosed hyperirritable upper airway syndrome or hyperirritable "cough syndrome," which he stated is not a clearly defined medical diagnosis and may be associated with a myriad of conditions including chronic post-nasal drip, GERD, or nervous system issues. He continued, if a patient does not have one of the first two conditions, then it is likely a nervous system issue where the throat becomes hypersensitive to certain inhalants, resulting in coughing spells. Dr. Diamond does not believe that condition is related to the described work exposure on March 13, 2008 because it is not something that would be expected without an extreme exposure from a chemical spill, explosion, or burns. He did not believe that Petitioner's exposure to the chemical in question reached that level. Dr. Diamond did not believe she required any treatment or functional limitations due to the work exposure.

On cross-examination, Dr. Diamond explained that a patient may not have asthma, but a very mild reactive airway disease, and find some relief with the use of asthmatic medications, but again not have asthma. Dr. Diamond reiterated that a negative MCT indicates a patient does not have asthma, which he believed to be the case with Petitioner. He considers it unlikely that a patient would have asthma with a negative MCT. He also believes it is unlikely petitioner had a reactive airway. Dr. Diamond noted that a patient with a negative MCT and who is taking asthma medications which do not work does not have asthma. He acknowledged that someone with an asymptomatic hyperirritable upper airway syndrome could have an aggravation of the syndrome from an extreme exposure to an irritant.

On further cross-examination Dr. Diamond acknowledged that he did not know what cleaning product Petitioner was exposed to. He could not remember which specific part of Petitioner's medical records he relied on when he came to his conclusions.

Dr. Sarah Usmani of Pulmonary and Critical Care Consultants took over petitioner's care from Dr. Razma (PX #5). On April 4, 2019 Dr. was money noted that petitioner returned due to recent increase in symptoms. Petitioner reported she has chest tightness which is easily triggered by perfumes and cleaning products in the past three weeks. Petitioner reported her current medications of Singulair and Dulera, but had run out of Dulera three days before. Petitioner had also been taking Advair and Symbicort.

Dr. Usmani reviewed Petitioner's course with Pulmonary and Critical Care Consultants from January 12, 2015 through December 1, 2016. Petitioner's history of diabetes and exposure to tuberculosis as a nurse were noted. No environmental exposures were noted. The only noted occupational exposure was to TB. There was no note that Petitioner reported exposure to noxious or toxic cleaning products at work at any time. The only significant respiratory findings on examination were shortness of breath and asthma. The remainder of the examination was unremarkable. Dr. Usmani's assessment included shortness of breath, cough, allergic rhinitis, and asthma. Dr. Usmani noted that the clinical summary was provided to Petitioner verbally.

Petitioner's Exhibit #17 was Supervisor's Investigation Report dated March 13, 2008 and signed by Melinda Stone RN/HA. The report noted that 1:00 AM that petitioner developed coughing, shortness of breath, lightheadedness and dizziness "after inhaling the cleaning wax in the ED." The substance or object was closely connected to the accident was "chemical floor stripping agent." Petitioner's Exhibit #18 was Employees Accident Report, which was not signed but recited the same content as the Supervisor's Investigation Report. Petitioner's Exhibit #16 was a witness statement report from nurse Uche, which noted Petitioner's complaint of severe shortness of breath, dyspnea, dizziness, and lightheadedness.

Petitioner testified that she continues to have episodes of symptoms including shortness of breath and coughing when exposed to fumes such as cleaning materials or even strong cologne. She summarized her current regimen as follows: two inhalers, Breo and Incruse, plus Proair or Albuterol and Flonase and Singulair and over the counter Zytrec. She takes an Albuterol inhaler as an emergency medicine depending on exposure to strong orders about 2 or 3 times per week. Her physical reaction to these triggers is tightness in her throat, and chest and shortness of breath and coughing. She never had these problems before March 13, 2008 but has had them continuously since then.

Petitioner testified that if she walks fast she gets short of breath which never happened before March 13, 2008. Before the accident she could climb 8 floors of stairs without a problem but since the accident she can only climb to the third floor, so now she parks on the second floor of the hospital garage. She never had this problem before March 13, 2008. While sitting or standing, she doesn't have a problem unless she's exposed to a

strong odor and then she becomes short of breath. Petitioner identified the Asthma Action Plan given her by Dr. Usmani in 2016. She explained that the green zone sets forth the medicines she takes daily when she is not wheezing. The yellow zone on the Action Plan is medicines to take if she starts to cough or if she has trouble breathing and cannot do her regular activities, she should take her regular medicines plus the Albuterol inhaler or the nebulizer. Petitioner further explained that the red zone on the action plan is when she feels really bad and cannot breathe, she should go the emergency department which she has not recently had to do. Petitioner also identified an order for a breathing machine dated June 29, 2016, which she is to use at home if the Albuterol pump is not helping right away. She can put Albuterol into the breathing machine.

CONCLUSIONS OF LAW

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

The Arbitrator finds the Petitioner failed to prove that her claimed current condition of ill being is causally related to the claimed work accident on March 13, 2008.

Petitioner testified that she was working at her normal job, Respondent's emergency department, when workers began stripping the floors in another part of the emergency department. Petitioner's testimony that she developed coughing and shortness of breath after exposure to the fumes of the floor stripping chemicals, identified as Shineline Emulsifier Plus.

Petitioner came under the care of her primary physician, Dr. Steven Hattori and then under the care of pulmonologists Drs. Antanas Razma and Sarah Usmani. Doctors Hattori, Razma, and Usmani all diagnosed Petitioner with asthma, for which they treated her. Although Drs. Hattori and Razma took histories from Petitioner of the event she described at work on March 13, 2008, none of the three treating physicians documented an opinion that Petitioner developed asthma as a result of exposure to noxious or toxic fumes while at work. In fact, Dr. Usmani noted on April 4, 2019 that Petitioner did not report exposure to noxious or toxic fumes while at work.

It is noteworthy that Dr. Usmani's retrospective review on April 4, 2019 did not contain a reference to Petitioner's claimed exposure to noxious or toxic fumes while at work on March 13, 2008. The Arbitrator notes that as a healthcare professional Petitioner should understand the value and necessity of a reliable and accurate medical history. It is particularly noteworthy that in the heart of this litigation Petitioner's claim of exposure to noxious or toxic fumes while at work on March 13, 2008 was not noted in Petitioner's history Petitioner and Dr. Usmani reviewed on April 4, 2019. That critical omission

undermines the credibility of Petitioner's claim that she was injured in an accidental exposure to noxious or toxic fumes while at work.

The Material Safety Data Sheet for Shineline Emulsifier Plus, PX #2, listed only some of the components of Shineline Emulsifier Plus. There is no evidence that any of the three of Petitioner's treating physicians had knowledge or awareness of the product or its components that Petitioner claims she was exposed to. None of Petitioner's treating physicians opined that any component of Shineline Emulsifier Plus was the triggering irritant cause of Petitioner's diagnosed asthma.

Respondent's examining pulmonologist, Dr. Edward Diamond, opined that petitioner in fact did not have asthma, but rather she suffered from hyperirritable upper airway syndrome. Dr. Diamond noted that Petitioner was subjected to several pulmonary function tests which included Methacholine Challenge Tests (MCT). Dr. Diamond persuasively explained that Petitioner's MCT results were misinterpreted and in fact did not support a diagnosis of asthma. Dr. Diamond explained that Petitioner's MCTs were actually negative and when coupled with use of ineffective asthma control medication establish that Petitioner did not have asthma.

Petitioner tends to rely on an argument that the circumstantial evidence of a chain of events from exposure to noxious or toxic fumes while at work was sufficient to prove by the preponderance of evidence that petitioner developed asthma by exposure to the use of Shineline Emulsifier Plus while at work. This premise falls and Petitioner's claim fails for want of proving that she has asthma and for want of an opinion that causally connected her claim condition of ill-being to an irritant at work.

The Arbitrator finds the opinions of Dr. Diamond reasonable and persuasive and adopts the same. As stated above, petitioner failed to prove by a preponderance of the evidence that her claim condition of ill-being was causally related to claimed exposure of noxious or toxic fumes while at work.

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 on unpaid medical bills totaling $5,889.00: Dr. Hattori, $935; Dr. Razma, $1,219; and Advocate Christ Medical Center, $3,735. Respondent's examining physician, Dr. Diamond, conceded on cross-examination that Dr. Hattori's work restrictions through April 1, 2008, the period of his initial medical care, was reasonable. It would stand to reason that the medical care provided during that period of restricted work was also reasonable.

Therefore, the Arbitrator finds that Petitioner's proved that Dr. Hattori's bill of $935 was reasonable and necessary, and that Respondent shall pay that outstanding bill of $935, to be adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

However, as stated above the Arbitrator found the opinions of Dr. Diamond to be reasonable and persuasive, which included his opinion that Petitioner was at MMI on April 1, 2008 when Dr. Hattori released Petitioner to return to work without restrictions. The Arbitrator also notes that Dr. Khanna opined that Petitioner was at MMI also. Therefore, the Arbitrator finds that Petitioner failed to prove that the medical care and charges for the medical care provided by Dr. Razma and Advocate Christ Medical Center were reasonable and necessary.

K: What temporary benefits are in dispute? TTD

Petitioner claims she was temporarily totally disabled from March 14 through April 1, 2008, a period of 2 & 5/7 weeks. Petitioner was ordered off work by her physicians for this period, but denied liability for TTD on the issue of medical causal connection between the exposure and the condition for which Petitioner was restricted from work during that time. The Arbitrator found that Petitioner's condition of ill-being during that period and her medical off work restrictions were related to the chemical exposure on March 13, 2008 and finds that Respondent is liable for those benefits. Specifically, the Arbitrator looks to the testimony of Dr. Diamond on cross-examination that he believed the period of time for which Petitioner was restricted from work immediately after the exposure on March 13, 2008 was reasonable to assist in the recovery of her temporary aggravation to her upper respiratory system.

Based on the evidence presented and the stipulations at trial, the Arbitrator finds that the Respondent owes to Petitioner 2 & 5/7 weeks of TTD benefits at $918.00 per week, or a total of $2,491.71.

The parties stipulated that Respondent paid a total of $2,726.69 in TTD benefits to Petitioner. The evidence established that Respondent overpaid TTD benefits by $234.98, for which Respondent is entitled to a credit.

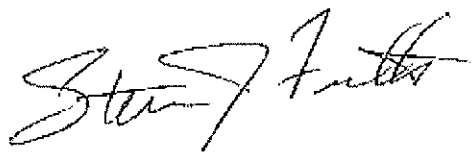
L: What is the nature and extent of the injury?

For the reasons stated above, the Arbitrator found the testimony of Dr. Diamond to be reasonable and persuasive. As such, the Arbitrator finds that the evidence showed that Petitioner suffered a temporary irritation to her upper airway system as the result of

her exposure to fumes from the Shineline Emulsifier Plus used in Respondent's Emergency Department on March 13, 2008, but that this exposure did not cause any long-term or permanent effects on her respiratory system, including but not limited to her diagnosed asthma.

Also, for the reasons stated previously, the Arbitrator finds that Petitioner failed to prove that she even has asthma, much less asthma triggered by exposure to the fumes of cleaning products while at work.

Based on the evidence presented, the Arbitrator finds no evidence of any diagnosed condition of ill-being for which Petitioner has sustained any permanent partial disability or other permanent effect to her person. Petitioner continues to work in her pre-injury capacity on a full-time basis as a Registered Nurse without any evidence of loss of income or inability to perform her duties in that capacity. For these reasons, the Arbitrator finds that Petitioner failed to prove that she sustained any permanent partial disability.



Steven J. Fruth, Arbitrator

June 5, 2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008752
Case Name	MCREYNOLDS, TRAVIS v. SHAWNEE CORRECTIONAL CTR
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0592
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 12/3/2021

/s/Christopher Harris, 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

TRAVIS McREYNOLDS,

Petitioner,

vs. NO: 20 WC 8752

STATE OF ILLINOIS/
SHAWNEE CORRECTIONAL 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 issues of accident, causal connection, medical expenses, temporary total disability (TTD) benefits, 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 is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972). The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties.

The Commission modifies the Arbitrator's Decision with respect to the TTD period and finds instead that Petitioner is entitled to TTD benefits from March 19, 2020 through August 11, 2020. The evidence demonstrated that Petitioner was either given work restrictions or taken off work beginning on March 19, 2020. There was no evidence that Respondent accommodated

Petitioner's light duty work restrictions during this time. By August 3, 2020, Petitioner's treating physician, Dr. Paletta, determined that Petitioner had reached maximum medical improvement (MMI) and released Petitioner to work without restriction. The Commission notes, however, that the actual work status form from August 3, 2020 stated that Petitioner could start full duty on August 12, 2020. The Commission therefore modifies the TTD period to conform with the proofs and awards benefits from March 19, 2020 through August 11, 2020.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary, and related medical bills as evidenced in Petitioner's Exhibit 1 and as provided under Sections 8(a) and 8.2 of the Act. The parties stipulated that all medical bills awarded shall be paid directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit pursuant to Section 8(j) of the Act for those bills paid by its group medical plan, if any. Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,106.56 per week, for 20 6/7 weeks, for the period of March 19, 2020 through August 11, 2020, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $836.69 per week for 26.875 weeks because the injuries sustained caused five-percent (5%) loss of use of the left leg and seven-and-a-half-percent (7.5%) loss of use of the right leg, as provided in Section 8(e)(12) of the Act.

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

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

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.

December 3, 2021

Christopher A. Harris
Christopher A. Harris

CAH/pm
O: 12/2/2021

052

Carolyn M. Doherty
Carolyn M. Doherty

Marc Parker
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McREYNOLDS, TRAVIS Case# **20WC008752**
Employee/Petitioner

SOI/SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

DEC 28 2020

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

TRAVIS MCREYNOLDS
Employee/Petitioner

v.

STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

Case # **20** WC **08752**

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 **September 29, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 11, 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 $**86,311.87**; the average weekly wage was $**1,659.84**.

On the date of accident, Petitioner was **31** 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 $**0.00** 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 amount paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 1, as provided in § 8(a) and §8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**1,106.56**/week for the period **3/19/20 through 8/3/20**, representing **19-5/7**ths weeks, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**836.69**/week for **26.875** weeks, because the injuries sustained caused the **5% loss of Petitioner's left leg** and **7.5% loss of Petitioner's right leg**, as provided in §8(e)12 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **8/3/20** through **9/29/20**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

12/12/20
Date

DEC 28 2020

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRAVIS MCREYNOLDS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-8752
	)	
STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on September 29, 2020. The issues in dispute are accident, causal connection, medical bills, temporary total disability benefits, and nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 31 years old, single, with no dependent children at the time of accident. Petitioner is employed as a Correctional Sergeant at Respondent's Shawnee Correctional Center and has worked there since 2011. Petitioner testified that he worked the 3:00 p.m. to 11:00 p.m. shift and part of his job duties included assisting the nursing staff in passing out prescription medications to inmates. On March 11, 2020, while passing out medication, Petitioner was walking up a flight of stairs when an inmate yelled out to him. Petitioner testified he was distracted and turned his head to look over his right shoulder at the inmate when his right toe hit the edge of a step. Petitioner fell forward and struck his left knee against the next step and he continued forward and struck his right knee. Petitioner testified he felt immediate pain in his left knee.

Petitioner testified he finished passing out medication, returned to assist the inmate that called out to him, and notified the shift commander of the accident. He observed swelling in his left knee and reported to the on-site healthcare department for examination. Petitioner also completed a Notice of Injury and Incident Report which contained an accident history consistent with Petitioner's testimony. Incident Reports were also completed by Officer Ashmore and Officer Irwin, containing consistent histories of Petitioner's accident. Petitioner testified he reviewed Officer Ashmore and Officer Irwin's reports and he found them to be consistent with his report of injury.

Petitioner testified he was examined by the on-site healthcare nurse who noted swelling in his left knee. She provided him with a workers' compensation packet and the option to go home. Petitioner testified he elected to finish his shift and returned the workers' compensation packet the next day. He reported to Workcare on 3/19/20 where x-rays were taken. He was examined by Dr. Paletta on 3/25/20 who ordered an MRI and performed tests on both knees. Petitioner testified he had extreme pain and weakness in his left knee and it felt hyperextended. Dr. Paletta ordered physical therapy for an ACL rehab protocol and took Petitioner off work. Petitioner testified that therapy helped strengthen his knee.

Petitioner had an appointment with Dr. Paletta scheduled the first week of July 2020 but missed the appointment on accident and immediately rescheduled. During that period of time he remained off work and continued physical therapy. Petitioner testified he remained off work because his restrictions had not changed and he would not have been allowed to return to work without medical clearance. He was reexamined by Dr. Paletta on 8/3/20 at which his left knee was improved, but he continued to have pain with kneeling.

Petitioner testified he discussed an ACL reconstructive surgery with Dr. Paletta. Petitioner elected to allow the partial ACL tear to heal and would follow up with Dr. Paletta if he wanted to proceed with surgery. Dr. Paletta released Petitioner to full duty work which he testified he is doing well. He has minor pain in his left knee and discomfort with running, standing for long periods of time, twisting, bending, and kneeling. As a correctional officer, it is important for Petitioner to stay in shape. However, since the accident he does not lift weights but he continues to jog and walk as tolerated. Petitioner currently takes Ibuprofen daily to manage his current levels of pain. Petitioner never had knee pain or treated for knee symptoms prior to the accident.

On cross-examination, Petitioner testified he did not state in the incident report that he filled out the day of the accident that he turned his head when an inmate called his name. Petitioner testified he added that detail when filling out the workers' compensation packet the next day. Petitioner used his own benefit time to remain off work after the accident. He has not returned to Dr. Paletta since being released on 8/3/20. He does not take prescription medication or wear any assistive devices for his knee.

Petitioner called Officer Joshua Ashmore to testify. Officer Ashmore is employed by Respondent as a correctional officer and has worked with Petitioner for eight years. He was working in the control room on 3/11/20 and witnessed Petitioner's accident. Officer Ashmore filled out a witness report stating Petitioner tripped and fell up the stairs and landed on his left knee. Officer Ashmore reported that Petitioner completed the medication rounds with a slight limp and he encouraged Petitioner to report the accident. Officer Ashmore was present throughout Petitioner's testimony and found Petitioner's testimony to be accurate and truthful.

MEDICAL HISTORY

On 3/19/20, Petitioner was examined at SIH Workcare where he reported that on 3/11/20 he was walking up stairs with a nurse when an offender yelled his name, causing him to miss a step with his right foot and fall onto his left knee. He continued to have pain located along the

anterior medial knee, which he rated as a 5 out of 10. Petitioner denied any previous problems with either knee. X-rays were taken and he was diagnosed with a knee contusion. He was instructed to ice and stretch his knee, take NSAIDs, and follow up with a physician. Petitioner was given work restrictions of no inmate contact, no climbing stairs, and no prolonged walking or standing.

On 3/25/20, Petitioner was evaluated by board certified orthopedic surgeon, Dr. George Paletta. Petitioner testified he knew Dr. Paletta from treating with his partner for another injury. Dr. Paletta noted a history consistent of accident. Petitioner reported ongoing complaints of pain in both knees with ambulation and when getting up from a seated position. He further had difficulty ascending and descending stairs. Dr. Paletta's exam noted pain at the end range of extension and flexion, flexion limited to 90 degrees due to pain, medial joint line tenderness, and positive meniscal rotary signs for the medial compartment. Dr. Paletta recommended bilateral knee MRIs, a Medrol dose pack to reduce left knee swelling, and Naprosyn. Dr. Paletta noted that he believed Petitioner's ongoing knee complaints were causally related to his work accident. Dr. Paletta also noted a "twisting component" to the injury when Petitioner turned to address the inmate who called out to him. Petitioner was kept off work.

On 4/28/20, Petitioner underwent MRIs of his left and right knees. Dr. Paletta noted Petitioner had a right partial thickness tear of the anterior cruciate ligament and a left mild ACL sprain and reactive effusion. Dr. Paletta scheduled a follow up visit to perform a KT 1000 and reexamination. Petitioner returned to Dr. Paletta on 6/3/20 at which time his condition had improved, but he continued to have trouble bending his left knee. He still had some discomfort superiorly at the superior pole of the patella and had some episodes of functional instability. Dr. Paletta diagnosed Petitioner with a partial ACL tear and noted it was difficult to quantify the laxity of Petitioner's knee due to guarding. Dr. Paletta noted that a partial tear of the ACL could go on to develop instability, where the knee gives way repeatedly and ultimately requires an ACL reconstruction. However, some low-grade tears have good stability and require only physical therapy to restore motion and function. Dr. Paletta recommended holding off on surgery and recommended physical therapy per the ACL rehab protocol. Petitioner was released to light duty work with no inmate contact, no squatting, kneeling, ladders, stairs, or climbing. Petitioner participated in physical therapy from 6/11/20 through 7/20/20 at Athletico Physical Therapy.

Dr. Paletta testified by way of evidence deposition on 7/17/20. Dr. Paletta is a board certified, fellowship trained orthopedic surgeon. He testified that Petitioner presented to him with complaints related to both knees. Petitioner informed him he was walking up stairs when an inmate called behind him and he turned as he was continuing to go up the stairs. Petitioner told him he caught his right toe on a step and then fell forward and struck his left knee on the edge of the step and had immediate pain in both knees. Dr. Paletta testified that Petitioner demonstrated mild limitation of flexion and tenderness along the medial joint line of the right knee and swelling, marked limited range of motion, tenderness along the medial joint line, and positive meniscal rotatory sign in the left knee. Dr. Paletta testified that these findings were consistent with Petitioner's complaints and the mechanism of injury. Dr. Paletta was concerned that Petitioner may have a tear of the meniscus versus pain coming from the patellofemoral joint, so he recommended MRIs of the bilateral knees. He also kept Petitioner off work.

Based on the MRI results, Dr. Paletta diagnosed Petitioner with an ACL sprain of the left knee, but he wanted to reexamine Petitioner again to come up with a firm impression and diagnosis for his right knee. Dr. Paletta stated that he next saw Petitioner on 6/3/20 and his condition was improving; however, he complained of pain at the top of the kneecap and he could not bend his knees fully and did not have full flexion. Dr. Paletta performed another physical examination to test the ACL, which suggested there was a partially injured or stretched ACL, but it was still intact. He also performed a KT 1000 to test the looseness of the knee, but because Petitioner was protecting his knee due to pain, his examination was limited. Dr. Paletta diagnosed a right partial thickness tear of the ACL with possible instability. He recommended a course of physical therapy and continued restrictions.

Dr. Paletta explained that "some patients with a partial tear do not require surgery and some do, depending on whether or not they have instability. He felt it was important to try and get Petitioner's pain down to restore full range of motion and then re-examine him to assess instability. Dr. Paletta further explained that if Petitioner's condition did not improve with physical therapy, an ACL reconstruction would be required. Dr. Paletta testified that he performs approximately 100 ACL reconstructions a year. If, however, Petitioner improved with physical therapy, regained full range of motion, and had no instability, then surgery would not be required and he could return to full duty.

Dr. Paletta testified that Petitioner's condition of ill-being, with respect to his bilateral knees, was causally related to his work accident on 3/11/20. He opined that Petitioner had a twist and fall on the stairs which is a mechanism by which one can suffer an ACL tear or partial tear. He noted Petitioner had no other history of problems. Dr. Paletta opined that Petitioner's accident would at least be a contributing factor as it was sufficient to cause an injury, although it is not the most typical way people tear their ACL. At the time of the deposition, Dr. Paletta restricted Petitioner's work duties. It was his understanding that Petitioner was off work and that his need for restrictions was related to the work accident.

On 8/3/20, Petitioner returned to Dr. Paletta at which time he was doing much better and his mobility returned. His only complaint was discomfort in kneeling. Dr. Paletta allowed Petitioner to increase activities as tolerated and released him to return to work full duty. Petitioner was to follow up as needed.

On 8/5/20, Petitioner was examined by Dr. Michael Nogalski pursuant to Section 12 of the Act. Dr. Nogalski's reported was admitted into evidence. Dr. Nogalski recorded an accident history consistent with Petitioner's testimony and the history he conveyed to his other medical providers. Dr. Nogalski reviewed Petitioner's medical records subsequent to the accident and performed a physical examination. Petitioner stated that overall he was doing well. He noted improvement in his motion and strength and was recently released by Dr. Paletta. He still had some mild soreness in the front of his left knee but believed that therapy helped. Petitioner had some mild pressure on the side of the left knee and some difficulty squatting. After therapy, Petitioner's knee felt more stable than it was before. Dr. Nogalski believed that Petitioner's treatment was reasonable and necessary but he did not appreciate any ACL injury and diagnosed Petitioner with a resolved left knee contusion. He believed that Petitioner could return to work without restrictions and was at maximum medical improvement.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent.

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). Specifically, the Court has acknowledged the existence of three categories of risk: (1) risks distinctly associated with her employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013).

The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill.Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill.Dec. 359, 67 N.E.3d 571. As noted above, 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. *Caterpillar Tractor*, 129 Ill. 2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill.Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204, 278 Ill.Dec. 70, 797 N.E.2d 665.

The Arbitrator finds that Petitioner's injuries arose out of an employment related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated his employment as a correctional officer. The evidence established that the acts that caused Petitioner's bilateral knee injuries (being distracted by an inmate calling out to him while he ascended stairs to pass out medications with a nurse) were risks incident to his employment because these were acts his employer might reasonably expect him to perform in fulfilling his assigned job duties.

Petitioner testified that he has a daily duty to assist the nurse and a fellow correctional officer in passing out prescription medication. Moreover, he also has the duty to respond to the needs of inmates, such as those who request their laundry which the inmate did in the instant case. Here, Petitioner was engaged in his ordinary job duty of passing out medications when, while walking up steps to continue passing out medications, an inmate called out to him. Petitioner testified that he turned to address the inmate who called out to him when he miss-stepped and fell forward, striking his knees on the steps above. Petitioner testified that the inmate who called out to him wanted him to retrieve his laundry, which is also one of Petitioner's job

duties. Petitioner's description of the accident was further corroborated by his medical records, the testimony of Dr. Paletta, the incident reports, and the testimony of Officer Ashmore. The record clearly establishes that Petitioner suffered injuries to his bilateral knees by falling up the stairs. Consequently, the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental injuries that arose out of and in the course of his 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 is causally related to his injury. The Arbitrator is not persuaded by Dr. Nogalski's opinion that Petitioner sustained a left knee contusion. The Arbitrator finds the opinions of Dr. Paletta more persuasive. Dr. Paletta's clinical examinations and diagnoses of a right-sided partial ACL tear and left-sided ACL sprain were supported by Petitioner's physical examination findings and objective studies. Moreover, Petitioner's condition of ill-being markedly improved following ACL rehab protocol.

According to the testimony of Dr. Paletta, the imaging studies demonstrated objective evidence of injury that correlated with Petitioner's symptoms. Dr. Paletta opined that Petitioner's symptoms were related to the accident of 3/11/20, and the record contains no evidence to rebut Petitioner's testimony that he had no prior injuries or treatment related to his knees before the accident. While Dr. Nogalski opined that Petitioner only suffered a left knee contusion, he examined Petitioner after he had already been released from Dr. Paletta's care and completed the ACL rehab protocol that strengthened his knees and improved his instability.

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 the medical services provided to Petitioner were reasonable and necessary. Petitioner has established by a preponderance of the evidence that his condition of ill-being is causally related to his injury. Upon establishing such connection, employers are to provide all care reasonably required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner required diagnostic studies to determine the cause of his complaints, which Dr. Paletta identified as ACL injuries. A rehab protocol was ordered to strengthen the ACL in Petitioner's bilateral knees as well as improve his stability. Petitioner testified that this conservative treatment improved his condition of ill-being and allowed him to return to unrestricted work.

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits. Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 1 as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner reported to the on-site healthcare department following the accident and finished working his shift on 3/11/20. Petitioner did not testify he remained off work and there are no medical records taking Petitioner off work from 3/12/20 through 3/18/20. Petitioner reported to Workcare on 3/19/20 resulting in light duty work restrictions. Petitioner was taken off work by Dr. Paletta on 3/25/20. On 4/28/20, Dr. Paletta allowed Petitioner to return to light duty work. There is no evidence that Respondent accommodated either period of Petitioner's light duty work restrictions. On 8/3/20, Dr. Paletta released Petitioner at MMI with no restrictions.

Based on the medical evidence, Respondent shall pay Petitioner temporary total disability benefits of $1,106.56/week for the period 3/19/20 through 8/3/20, representing 19-5/7ths weeks, as provided in Section 8(a) of the Act.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner returned to work for Respondent in the same position he held prior to his accident. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 31 years old at the time of his injury. Petitioner has a significant amount of years to work and live with his condition. The Arbitrator places some weight to this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. The Arbitrator places greater weight on this factor.

(v) **Disability**: Petitioner sustained a right partial ACL tear and a left ACL sprain that required a rehab protocol specifically targeted at strengthening the ACL and improving stability. While the objective tests suggest that the severity of the right knee injury was worse, Petitioner's symptoms were worse in his left knee. Dr. Paletta testified that a partial tear is at risk of continuing to worsen over time and can result in further instability and the need for surgery. The Arbitrator further notes that Petitioner regularly comes into contact with violent inmates and is at an increased risk for future injuries to his bilateral knees. The physical demands of

his job require him to stay in shape; however, he is unable to continue lifting weights and instead alternates between jogging and walking. He takes over-the-counter NSAIDs to manage his lingering symptoms and continues to have difficulty squatting and kneeling. The Arbitrator gives greater weight to this factor.

Based upon the foregoing evidence and factors, Respondent shall pay Petitioner permanent partial disability benefits of **$836.69**/week for **26.875** weeks, because the injuries sustained caused **5% loss of Petitioner's left leg** and **7.5% loss of Petitioner's right leg,** as provided in §8(e)12 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **8/3/20** through **9/29/20**, and shall pay the remainder of the award, if any, in weekly payments.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

12/12/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017234
Case Name	ROBERSON, SETH v. WALGREENS 5100 LAKE TERRACE NE
Consolidated Cases	20wc023506
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0593
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Michael Karr

DATE FILED: 12/6/2021

/s/Marc Parker, 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

Seth Roberson,

Petitioner,

vs.

No. 20 WC 17234,
Consolidated with 20 WC 23506

Walgreen's,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner, a 35-year-old utility worker, injured his right wrist while lifting boxes at work on June 4, 2020 (claim # 20 WC 17234), and September 20, 2020 (claim # 20 WC 23506). The Arbitrator found Petitioner proved that his current condition of ill-being was causally related to his June 4, 2020 accident, and ordered Respondent to pay Petitioner, in claim # 20 WC 17234, his past reasonable and necessary medical expenses and authorize and pay for his reasonable and necessary future medical care, including but not limited to surgery recommended by Dr. Matthew Bradley. The Arbitrator also ordered Respondent pay Petitioner, in claim # 20 WC 17234, TTD benefits of $357.67/week for 30-5/7 weeks, for the period 6/5/20 through 9/14/20 and 9/21/20 through 1/11/21.

The Arbitrator did not award Petitioner benefits in claim # 20 WC 23506, finding that his current condition of ill-being was not causally related to his September 20, 2020 accident, but remained related to his initial accident on June 4, 2020.

Regarding the issue of TTD, Respondent has argued that Petitioner only claimed 27-2/7 weeks of lost time on the Request for Hearing sheet (Arb. Ex. 1), and therefore, it was error for the Arbitrator to award 30-5/7 weeks of TTD. The Request for Hearing sheet, in fact, shows Petitioner claimed TTD for the periods of 6/5/20 through 9/14/20, and from 10/15/20[1] through 1/11/21, periods which total 27-2/7 weeks.

Under *Walker v. Indus. Comm'n*, 345 Ill. App. 3d 1084 (4th Dist., 2004) the Appellate Court held that the language of Commission Rule 7030.40[2] indicates that the Request for Hearing is binding on the parties as to their claims made therein. This has been interpreted as holding the parties to the claims (stipulations) they have made on the Request for Hearing sheet, even when such claims are not agreed to by their opponent. Accordingly, the Commission modifies the Arbitrator's award of TTD benefits in claim # 20 WC 17234 from 30-5/7 weeks to 27-2/7 weeks, for the periods claimed by Petitioner on the Request for Hearing sheet: 6/5/20 through 9/14/20, and 10/15/20 through 1/11/21. The Commission affirms and adopts all other parts of the Arbitrator's decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 9, 2021, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified. Respondent shall pay Petitioner temporary total disability benefits of $357.67 per week for 27-2/7 weeks, for the periods 6/5/20 through 9/14/20, and 10/15/20 through 1/11/21, as provided in Section 8(b) of the Act.

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

---

[1] Arguably, the handwritten date on the Request for Hearing sheet for one of Petitioner's claimed TTD periods could be interpreted as, "10/**13**/20 - 1/11/21," rather than, "10/**15**/20 – 1/11/21." However, on the record, the Arbitrator read that period as being, "10/15/21 to 1/11/21," and counsel for both parties verbally agreed that was accurate (Transcript, pp. 6-7).

[2] Commission Rule 7030.40 is now codified, unchanged, as Commission Rule 9030.40.

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 $18,000.00. 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.

December 6, 2021

MP/mcp
o-12/2/21
068

/s/ *Marc Parker*
Marc Parker

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

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

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

ROBERSON, SETH
Employee/Petitioner

Case# **20WC017234**
20WC023506

WALGREEN'S
Employer/Respondent

On 3/9/2021, 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 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Seth Roberson
Employee/Petitioner

v.

Walgreen's
Employer/Respondent

Case # **20** WC **17234**

Consolidated cases: **20-WC-23506**

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 **1/11/2021**. 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, **6/4/20**, 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 $**15,225.00 (29 weeks)**; the average weekly wage was $**525.00**.

On the date of accident, Petitioner was **35** 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 $**6,990.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**6,990.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act. Respondent has paid $**5,518.45** in medical bills for which credit shall be given.

ORDER

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the reasonable and necessary medical care, including but not limited to, surgery recommended by Dr. Matthew Bradley.

Respondent shall pay Petitioner temporary total disability benefits of $**357.67 (Min. Rate)**/week for **30-5/7** weeks, for the period **6/5/20 through 9/14/20 and 9/21/20 through 1/11/21**, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

3/1/21
Date

MAR 9 - 2021

ICArbDec19(b)

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SETH ROBERSON,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-17234
	)	
WALGREEN'S,	)	Consolidated Case No. 20-WC-23506
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 11, 2021 pursuant to Section 19(b) of the Act. On July 22, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right wrist, thumb, and arm as a result of grabbing a box weighing 20 pounds on June 4, 2020 (Case No. 20-WC-17234). On October 6, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right wrist and thumb as a result of lifting boxes to stock on September 20, 2020 (Case No. 20-WC-23506). The cases were consolidated at arbitration by oral motion of Petitioner. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 4, 2020 and September 20, 2020. The issues in dispute in Case No. 20-WC-17234 are causal connection, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act with respect to Case No. 20-WC-23506.

TESTIMONY

Petitioner was 35 years old, single, with three dependent children at the time of the accident. Petitioner was hired by Respondent on 11/15/19 as a third shift utilities worker. Petitioner testified that on June 4, 2020 he grabbed a box of cleaning supplies that weighed 20-25 pounds when he felt a sharp pain in his right wrist and thumb area. He denies striking his hand or wrist on anything. He immediately went to management and reported the incident. Petitioner testified he has had no prior injuries or treatment with respect to his right hand or arm. Petitioner is left-handed but uses his left hand for writing and his right hand for most activities.

Petitioner testified he was taken off work following the accident and received temporary total disability benefits. He received treatment and returned to full duty work on 9/15/20 at the direction of Respondent's physician, Dr. Crandall. Petitioner testified his condition was not better when he returned to work. On September 20, 2020, Petitioner lifted a big box of Tums and he felt the same but worse pain in his right wrist. He denies striking his hand or wrist on anything. He immediately reported his injury to management and received medical treatment. Petitioner is currently treating with Dr. Bradley who has recommended surgery. Petitioner has been off work since the second date of accident and has not received TTD benefits since 11/23/20.

Petitioner testified he has been diagnosed with De Quervain's tenosynovitis that is very painful and he feels sharp pain in his wrist. He is not able to lift anything or drive without a brace provided by Dr. Paletta. He takes over-the-counter medication. He does not have any similar symptoms in his left hand/wrist. Prior to 6/4/20, Petitioner performed a cardio workout, including running and sit-ups, four times per week. He did not perform any hand gripping exercises. Petitioner testified that physical therapy and Ibuprofen have not improved his symptoms.

MEDICAL HISTORY

Petitioner initially treated with the company physician where he was provided medication and taken off work. On 6/24/20, Petitioner was seen by Dr. George Paletta who took the history of injury, noting Petitioner was grabbing a box and pulling it from his right side to his left side when he felt a pop and pain in the radial side of his right wrist and the face of his thumb. He noted that after being seen at the plant he was evaluated by telemedicine because of COVID. Dr. Paletta noted that Petitioner had access to a thumb spica splint. Petitioner's symptoms were localized to the right volar side of the wrist at the base of the thenar eminence. He had difficulty with ranges of motion along with mild swelling. Dr. Paletta noted Petitioner had never sustained any type of injury to his right hand or wrist prior to the date of accident. Examination showed minimal soft tissue swelling at the base of the hypothenar eminence over the volar side of the radius. Tenderness to palpation was noted directly over and distally to the radial styloid. He had limited range of motion with pain and limitation of extension and flexion. He was nontender at the ulnar styloid and at the TFCC with minimal tenderness at the scaphoid. Carpal tunnel examination was normal. Dr. Paletta recommended an MRI and no lifting with his right hand and primarily one-handed work. Dr. Paletta believed Petitioner's right wrist condition was causally related to the work incident that occurred on 6/4/20. The MRI was performed on 6/27/20 that revealed an extensor carpi radialis strain pattern and a dorsal contusion of the capitate bones. Dr. Paletta recommended a cockup wrist splint, twelve-day Prednisone taper followed by two weeks of Naprosyn, and a follow up with Dr. Wendell Becton.

Petitioner presented to Dr. Becton on 8/4/20 with continued right wrist pain. Dr. Becton noted Petitioner's history of lifting a box while working that put an awkward force on his right wrist causing immediate pain. Petitioner reported worsening pain since the accident and continuing wrist pain at the conclusion of two weeks of occupational therapy. Petitioner had been released back to work with restrictions of primarily left-handed work. Dr. Becton noted no swelling or bruising and an improved range of motion. However, Petitioner had a positive

Finkelstein's test and limited right wrist range of motion at end range due to pain. Dr. Becton assessed right wrist pain consistent with De Quervain's tenosynovitis which was related to his work injury on 6/4/20. He prescribed a right wrist thumb spica splint, occupational therapy with work conditioning, and Diclofenac gel. He advised Petitioner to apply ice and perform home exercises. Dr. Becton continued Petitioner's work restrictions and opined a right wrist De Quervain's tenosynovitis cortisone injection may be appropriate if Petitioner's symptoms did not improve.

Petitioner followed up with Dr. Becton and reported continued severe right wrist pain despite completing occupational therapy. Petitioner continued to wear the thumb spica splint and use the Diclofenac gel. Dr. Becton administered a right wrist De Quervain's tenosynovitis cortisone injection and Petitioner reported immediate relief. Dr. Becton recommended continued use of the thumb spica splint, light duty work, and home exercises. Petitioner was ordered to follow up in six weeks.

Respondent had Petitioner examined by Dr. Evan Crandall on 9/15/20 pursuant to Section 12 of the Act. Dr. Crandall noted a consistent history of injury and that Petitioner was still having pain in the dorsal radial aspect of his forearm and along the dorsal aspect of his thumb. Dr. Crandall believed that the medical records of Dr. Becton indicated Petitioner had no improvement from the cortisone injection which is contrary to the records. Dr. Crandall noted Petitioner had no prior problems with his right arm or wrist. Dr. Crandall's examination showed no swelling, no point tenderness, negative Finkelstein's test, and an otherwise completely normal examination with giveaway weakness on grip testing indicating a submaximal effort. Petitioner's grip strength was less in his right hand.

Dr. Crandall reviewed the medical records to date and the MRI scan. He believed that Petitioner had a condition of De Quervain's tendonitis, a dorsal wrist contusion, and a ganglion volar to the radial styloid base. He did not believe Petitioner's condition of De Quervain's syndrome was caused by the accident of 6/4/20. Dr. Crandall believed that Petitioner should perform daily stretching exercises and take Ibuprofen 600mg three times a day along with Tylenol for any discomfort and returned him to work without restrictions. Petitioner returned to full duty work the same day, 9/15/20. Petitioner continued physical therapy treatment at Novacare Rehabilitation which did not improve his symptoms.

Following Petitioner's second accident on 9/20/20 he was examined by Dr. Matthew Bradley and provided a history of both accidents. Dr. Bradley's examination showed pain to palpation to the radial styloid along the ECR abductor and extensor poleis, normal sensation, and positive Finkelstein's test. Dr. Bradley noted Petitioner's diagnosis of De Quervain's tenosynovitis and believed that his treatment with a thumb spica brace and injection gave him some pain relief. Dr. Bradley recommended repeating the injection in a slightly different spot along with a home exercise program and light duty. Dr. Bradley stated that the same two separate injuries to his right wrist both resulted in pain along the radial aspect of his wrist and the mechanism of injuries were consistent with the physical finding examination of De Quervain's tenosynovitis. The second injection was administered that day and Dr. Bradley released him to return to work with no repetitive lifting and wearing a brace at work. Respondent would not allow Petitioner to return to restricted work.

Petitioner returned to Dr. Bradley on 10/13/20 and reported excellent pain relief from the injection but the improvement was only temporary. Dr. Bradley recommended a repeat MRI to note any changes. The MRI was performed on 10/20/20 and showed fluid about the extensor carpi radialis brevis longus. Dr. Bradley had a telemed visit with Petitioner on 10/26/20 and he continued to recommend conservative treatment in the form of splinting, medication, and physical therapy. Petitioner last saw Dr. Bradley on 11/16/20 at which Petitioner's examination was still positive and Dr. Bradley recommended surgery.

On 10/7/20, Dr. Crandall reviewed additional medical records and noted Dr. Bradley reported a positive Finkelstein's test on his 9/29/20 examination. Dr. Crandall stated in his report that the presence of a positive Finkelstein's test within two weeks while a patient was off work indicates idiopathic pathology unrelated to work activities. Dr. Crandall does not mention the 9/20/20 injury or that Petitioner returned to work.

Dr. Matthew Bradley testified by way of evidence deposition on 12/7/20. Dr. Bradley testified that Petitioner reported both injuries where he suffered pain in his right thumb and wrist area while lifting boxes between 20 and 30 pounds. Petitioner reported no symptoms prior to the injuries and Dr. Bradley's diagnosis was that of De Quervain's tenosynovitis. He opined that the mechanism of injury was consistent with both MRI findings and the diagnosis was consistent with examination findings. He testified that Dr. Paletta's and Dr. Becton's physical examinations were consistent with his findings and that Petitioner was in a significant amount of pain and wanted to proceed with surgery. He described the surgery as releasing the first compartment sheath along with debridement of any inflammation of scar tissue surrounding the two tendons of Petitioner's right thumb. He believed Petitioner to be honest and detected no malingering.

Dr. Bradley commented on Dr. Crandall's report stating that he, Dr. Paletta, and Dr. Becton had physical examinations which were almost identical and Dr. Crandall's was different showing no pain and negative Finkelstein's with which he strongly disagreed. He testified that Petitioner's swelling and fluid around his tendons were consistent with De Quervain's tenosynovitis. He testified that he ordered the second MRI because Petitioner had not responded to treatment and to ensure a small tear had not become a big tear. The only diagnostic change was that some of the acute inflammation seen on the first MRI was no longer present four months later. He testified that Petitioner's condition was acute and Dr. Becton and Dr. Paletta appropriately treated his symptoms conservatively immediately following the accidents. Dr. Bradley testified he treated Petitioner months later in more of a chronic period, where Petitioner had no changes in symptoms over a six-month period, which now warranted surgery. This was due to the failure of non-operative treatment including injections, positive physical examinations including a positive Finkelstein's test, and symptoms that were inhibiting his ability to do more than light duty work.

Dr. R. Evan Crandall testified by way of evidence deposition on 11/24/20. Dr. Crandall testified consistent with his reports in that Petitioner had a negative Finkelstein's test and giveaway weakness on grip testing which was an indication of submaximal effort. He reviewed the 6/27/20 MRI report and his interpretation was consistent with De Quervain's tenosynovitis and dorsal wrist contusion along with a ganglion volar to the radial styloid base. He believed that

lifting a single box would not cause a condition of De Quervain's syndrome, but a person could lift a box and feel the pain because they already have De Quervain's syndrome. Dr. Crandall acknowledged that prior to 6/4/20 Petitioner had no symptoms in his right hand or wrist. He described De Quervain's tenosynovitis as a pain syndrome because the tendon extending the thumb and pulling the thumb outwards from the wrist does not fit in the canal causing it to rub the canal resulting in pain and popping. He acknowledged that Respondent did not provide him with Dr. Bradley's 10/13/20 report, the 10/26/20 telemed visit, or the 11/16/20 office note. Dr. Crandall believed that the two accidents were "not enough" to determine if Petitioner required surgery. He opined that Petitioner's symptoms were caused by underlying De Quervain's tenosynovitis.

CONCLUSIONS OF LAW

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

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. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 442 N.E.2d 908 (1982). A chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident is sufficient to satisfy the claimant's burden. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The record is clear that Petitioner was working full duty without incident prior to June 4, 2020. Petitioner credibly testified that prior to 6/4/20 he suffered no symptoms and received no treatment or diagnostic studies for his right wrist or arm. Subsequent to his accident on 6/4/20, Petitioner remained symptomatic and has yet to return to his pre-accident baseline. Dr. Paletta, Dr. Becton, and Dr. Bradley all document similar right wrist symptoms and agree those symptoms were caused by the work injuries of 6/4/20. Further, Dr. Becton and Dr. Bradley both document positive Finkelstein's test supporting their diagnoses of De Quervain's tenosynovitis.

The Arbitrator finds Dr. Bradley's opinions more persuasive than Dr. Crandall's opinions. Dr. Crandall would suggest that Petitioner already had De Quervain's syndrome prior to the accident, but said condition was dormant and asymptomatic. Dr. Crandall's opinion suggests that Petitioner aggravated an underlying condition in Petitioner's right wrist that became symptomatic on 6/4/20.

The Arbitrator finds Petitioner has met his burden of proof in establishing causal connection between his accidental injuries on 6/4/20 and his current condition of ill-being.

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

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that all of the care and treatment rendered with regard to Petitioner's right hand/wrist was reasonable and necessary. The records reflect that Petitioner has not reached maximum medical improvement with respect to his right hand/wrist. Petitioner has attempted to resolve his condition conservatively with medication, braces, injections, physical therapy, occupational therapy, and home exercises for over six months with minimal and temporary relief. Despite this treatment Petitioner's condition of ill-being continues to persist and additional treatment is recommended. Dr. Bradley testified that surgery is necessary to cure or relieve Petitioner of his symptoms. Respondent shall therefore authorize and pay for the treatment recommended by Dr. Bradley, including but not limited to surgery.

The Arbitrator awards the reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The law in Illinois holds that "[a]n 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." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984).

The parties stipulated that all temporary total disability benefits have been paid from 6/5/20 through 11/23/20. Based upon the above findings regarding causal connection, the Arbitrator finds Petitioner is entitled to temporary total disability benefits for his period of incapacity from 6/5/20 through 9/14/20 and 9/21/20 through 1/11/21, for a period of 30-5/7th weeks.

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

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/1/21

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023506
Case Name	ROBERSON, SETH v. WALGREEN'S
Consolidated Cases	20WC017234
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0594
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Michael Karr

DATE FILED: 12/6/2021

/s/Marc Parker, 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

Seth Roberson,

Petitioner,

vs.

No. 20 WC 23506,
Consolidated with 20 WC 17234

Walgreen's,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective care and temporary total disability (TTD), 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 compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 35-year-old utility worker, injured his right wrist while lifting boxes at work on June 4, 2020 (claim # 20 WC 17234), and September 20, 2020 (claim # 20 WC 23506). The Arbitrator found Petitioner proved that his current condition of ill-being was causally related to his June 4, 2020 accident, and ordered Respondent to pay Petitioner, in claim # 20 WC 17234, his past reasonable and necessary medical expenses and authorize and pay for his reasonable and necessary future medical care, including but not limited to surgery recommended by Dr. Matthew Bradley. The Arbitrator also ordered Respondent pay Petitioner, in claim # 20 WC 17234, TTD benefits of $357.67/week for 30-5/7 weeks, for the period 6/5/20 through 9/14/20 and 9/21/20 through 1/11/21.

The Arbitrator did not award Petitioner benefits in claim # 20 WC 23506, finding that his current condition of ill-being was not causally related to his September 20, 2020 accident, but remained related to his initial accident on June 4, 2020. The Commission affirms and adopts that finding and the Arbitrator's decision, and does not award Petitioner any benefits in this claim, # 20 WC 23506.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 9, 2021, is hereby affirmed and adopted, and no benefits are awarded Petitioner in this claim.

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

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

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

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

December 6, 2021

/s/ *Marc Parker*
Marc Parker

MP/mcp
o-12/2/21
068

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

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

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

21IWCC0594

ROBERSON, SETH
Employee/Petitioner

Case# **20WC023506**

20WC017234

WALGREEN'S
Employer/Respondent

On 3/9/2021, 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 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

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)

Seth Roberson
Employee/Petitioner

v.

Walgreen's
Employer/Respondent

Case # **20** WC **23506**

Consolidated cases: **20-WC-17234**

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 **1/11/2021**. 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, **9/20/20**, 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 **$15,225.00 (29 weeks)**; the average weekly wage was **$525.00**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of **$0.00** 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. Respondent has paid **$0.00** in medical bills for which credit shall be given.

ORDER

Based on the Arbitrator's decision that Petitioner's current condition of ill-being is not causally related to his subsequent accident that occurred on 9/20/20 but remains related to his initial accident on 6/4/20, and the Arbitrator having awarded Petitioner medical expenses, prospective medical care, and temporary total disability benefits in Case No. 20-WC-17234, the Arbitrator does not award further benefits herein.

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

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

Signature of Arbitrator

3/1/21
Date

ICArbDec19(b)

MAR 9 - 2021

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SETH ROBERSON,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-23506
	)	
WALGREEN'S,	)	Consolidated Case No. 20-WC-17234
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 11, 2021 pursuant to Section 19(b) of the Act. On July 22, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right wrist, thumb, and arm as a result of grabbing a box weighing 20 pounds on June 4, 2020 (Case No. 20-WC-17234). On October 6, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right wrist and thumb as a result of lifting boxes to stock on September 20, 2020 (Case No. 20-WC-23506). The cases were consolidated at arbitration by oral motion of Petitioner. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 4, 2020 and September 20, 2020. The issues in dispute in Case No. 20-WC-23506 are causal connection, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act with respect to Case No. 20-WC-17234.

TESTIMONY

Petitioner was 35 years old, single, with three dependent children at the time of the accident. Petitioner was hired by Respondent on 11/15/19 as a third shift utilities worker. Petitioner testified that on June 4, 2020 he grabbed a box of cleaning supplies that weighed 20-25 pounds when he felt a sharp pain in his right wrist and thumb area. He denies striking his hand or wrist on anything. He immediately went to management and reported the incident. Petitioner testified he has had no prior injuries or treatment with respect to his right hand or arm. Petitioner is left-handed but uses his left hand for writing and his right hand for most activities.

Petitioner testified he was taken off work following the accident and received temporary total disability benefits. He received treatment and returned to full duty work on 9/15/20 at the direction of Respondent's physician, Dr. Crandall. Petitioner testified his condition was not better when he returned to work. On September 20, 2020, Petitioner lifted a big box of Tums and he felt the same but worse pain in his right wrist. He denies striking his hand or wrist on anything. He immediately reported his injury to management and received medical treatment. Petitioner is currently treating with Dr. Bradley who has recommended surgery. Petitioner has been off work since the second date of accident and has not received TTD benefits since 11/23/20.

Petitioner testified he has been diagnosed with De Quervain's tenosynovitis that is very painful and he feels sharp pain in his wrist. He is not able to lift anything or drive without a brace provided by Dr. Paletta. He takes over-the-counter medication. He does not have any similar symptoms in his left hand/wrist. Prior to 6/4/20, Petitioner performed a cardio workout, including running and sit-ups, four times per week. He did not perform any hand gripping exercises. Petitioner testified that physical therapy and Ibuprofen have not improved his symptoms.

MEDICAL HISTORY

Petitioner initially treated with the company physician where he was provided medication and taken off work. On 6/24/20, Petitioner was seen by Dr. George Paletta who took the history of injury, noting Petitioner was grabbing a box and pulling it from his right side to his left side when he felt a pop and pain in the radial side of his right wrist and the face of his thumb. He noted that after being seen at the plant he was evaluated by telemedicine because of COVID. Dr. Paletta noted that Petitioner had access to a thumb spica splint. Petitioner's symptoms were localized to the right volar side of the wrist at the base of the thenar eminence. He had difficulty with ranges of motion along with mild swelling. Dr. Paletta noted Petitioner had never sustained any type of injury to his right hand or wrist prior to the date of accident. Examination showed minimal soft tissue swelling at the base of the hypothenar eminence over the volar side of the radius. Tenderness to palpation was noted directly over and distally to the radial styloid. He had limited range of motion with pain and limitation of extension and flexion. He was nontender at the ulnar styloid and at the TFCC with minimal tenderness at the scaphoid. Carpal tunnel examination was normal. Dr. Paletta recommended an MRI and no lifting with his right hand and primarily one-handed work. Dr. Paletta believed Petitioner's right wrist condition was causally related to the work incident that occurred on 6/4/20. The MRI was performed on 6/27/20 that revealed an extensor carpi radialis strain pattern and a dorsal contusion of the capitate bones. Dr. Paletta recommended a cockup wrist splint, twelve-day Prednisone taper followed by two weeks of Naprosyn, and a follow up with Dr. Wendell Becton.

Petitioner presented to Dr. Becton on 8/4/20 with continued right wrist pain. Dr. Becton noted Petitioner's history of lifting a box while working that put an awkward force on his right wrist causing immediate pain. Petitioner reported worsening pain since the accident and continuing wrist pain at the conclusion of two weeks of occupational therapy. Petitioner had been released back to work with restrictions of primarily left-handed work. Dr. Becton noted no swelling or bruising and an improved range of motion. However, Petitioner had a positive

Finkelstein's test and limited right wrist range of motion at end range due to pain. Dr. Becton assessed right wrist pain consistent with De Quervain's tenosynovitis which was related to his work injury on 6/4/20. He prescribed a right wrist thumb spica splint, occupational therapy with work conditioning, and Diclofenac gel. He advised Petitioner to apply ice and perform home exercises. Dr. Becton continued Petitioner's work restrictions and opined a right wrist De Quervain's tenosynovitis cortisone injection may be appropriate if Petitioner's symptoms did not improve.

Petitioner followed up with Dr. Becton and reported continued severe right wrist pain despite completing occupational therapy. Petitioner continued to wear the thumb spica splint and use the Diclofenac gel. Dr. Becton administered a right wrist De Quervain's tenosynovitis cortisone injection and Petitioner reported immediate relief. Dr. Becton recommended continued use of the thumb spica splint, light duty work, and home exercises. Petitioner was ordered to follow up in six weeks.

Respondent had Petitioner examined by Dr. Evan Crandall on 9/15/20 pursuant to Section 12 of the Act. Dr. Crandall noted a consistent history of injury and that Petitioner was still having pain in the dorsal radial aspect of his forearm and along the dorsal aspect of his thumb. Dr. Crandall believed that the medical records of Dr. Becton indicated Petitioner had no improvement from the cortisone injection which is contrary to the records. Dr. Crandall noted Petitioner had no prior problems with his right arm or wrist. Dr. Crandall's examination showed no swelling, no point tenderness, negative Finkelstein's test, and an otherwise completely normal examination with giveaway weakness on grip testing indicating a submaximal effort. Petitioner's grip strength was less in his right hand.

Dr. Crandall reviewed the medical records to date and the MRI scan. He believed that Petitioner had a condition of De Quervain's tendonitis, a dorsal wrist contusion, and a ganglion volar to the radial styloid base. He did not believe Petitioner's condition of De Quervain's syndrome was caused by the accident of 6/4/20. Dr. Crandall believed that Petitioner should perform daily stretching exercises and take Ibuprofen 600mg three times a day along with Tylenol for any discomfort and returned him to work without restrictions. Petitioner returned to full duty work the same day, 9/15/20. Petitioner continued physical therapy treatment at Novacare Rehabilitation which did not improve his symptoms.

Following Petitioner's second accident on 9/20/20 he was examined by Dr. Matthew Bradley and provided a history of both accidents. Dr. Bradley's examination showed pain to palpation to the radial styloid along the ECR abductor and extensor poleis, normal sensation, and positive Finkelstein's test. Dr. Bradley noted Petitioner's diagnosis of De Quervain's tenosynovitis and believed that his treatment with a thumb spica brace and injection gave him some pain relief. Dr. Bradley recommended repeating the injection in a slightly different spot along with a home exercise program and light duty. Dr. Bradley stated that the same two separate injuries to his right wrist both resulted in pain along the radial aspect of his wrist and the mechanism of injuries were consistent with the physical finding examination of De Quervain's tenosynovitis. The second injection was administered that day and Dr. Bradley released him to return to work with no repetitive lifting and wearing a brace at work. Respondent would not allow Petitioner to return to restricted work.

Petitioner returned to Dr. Bradley on 10/13/20 and reported excellent pain relief from the injection but the improvement was only temporary. Dr. Bradley recommended a repeat MRI to note any changes. The MRI was performed on 10/20/20 and showed fluid about the extensor carpi radialis brevis longus. Dr. Bradley had a telemed visit with Petitioner on 10/26/20 and he continued to recommend conservative treatment in the form of splinting, medication, and physical therapy. Petitioner last saw Dr. Bradley on 11/16/20 at which Petitioner's examination was still positive and Dr. Bradley recommended surgery.

On 10/7/20, Dr. Crandall reviewed additional medical records and noted Dr. Bradley reported a positive Finkelstein's test on his 9/29/20 examination. Dr. Crandall stated in his report that the presence of a positive Finkelstein's test within two weeks while a patient was off work indicates idiopathic pathology unrelated to work activities. Dr. Crandall does not mention the 9/20/20 injury or that Petitioner returned to work.

Dr. Matthew Bradley testified by way of evidence deposition on 12/7/20. Dr. Bradley testified that Petitioner reported both injuries where he suffered pain in his right thumb and wrist area while lifting boxes between 20 and 30 pounds. Petitioner reported no symptoms prior to the injuries and Dr. Bradley's diagnosis was that of De Quervain's tenosynovitis. He opined that the mechanism of injury was consistent with both MRI findings and the diagnosis was consistent with examination findings. He testified that Dr. Paletta's and Dr. Becton's physical examinations were consistent with his findings and that Petitioner was in a significant amount of pain and wanted to proceed with surgery. He described the surgery as releasing the first compartment sheath along with debridement of any inflammation of scar tissue surrounding the two tendons of Petitioner's right thumb. He believed Petitioner to be honest and detected no malingering.

Dr. Bradley commented on Dr. Crandall's report stating that he, Dr. Paletta, and Dr. Becton had physical examinations which were almost identical and Dr. Crandall's was different showing no pain and negative Finkelstein's with which he strongly disagreed. He testified that Petitioner's swelling and fluid around his tendons were consistent with De Quervain's tenosynovitis. He testified that he ordered the second MRI because Petitioner had not responded to treatment and to ensure a small tear had not become a big tear. The only diagnostic change was that some of the acute inflammation seen on the first MRI was no longer present four months later. He testified that Petitioner's condition was acute and Dr. Becton and Dr. Paletta appropriately treated his symptoms conservatively immediately following the accidents. Dr. Bradley testified he treated Petitioner months later in more of a chronic period, where Petitioner had no changes in symptoms over a six-month period, which now warranted surgery. This was due to the failure of non-operative treatment including injections, positive physical examinations including a positive Finkelstein's test, and symptoms that were inhibiting his ability to do more than light duty work.

Dr. R. Evan Crandall testified by way of evidence deposition on 11/24/20. Dr. Crandall testified consistent with his reports in that Petitioner had a negative Finkelstein's test and giveaway weakness on grip testing which was an indication of submaximal effort. He reviewed the 6/27/20 MRI report and his interpretation was consistent with De Quervain's tenosynovitis and dorsal wrist contusion along with a ganglion volar to the radial styloid base. He believed that

lifting a single box would not cause a condition of De Quervain's syndrome, but a person could lift a box and feel the pain because they already have De Quervain's syndrome. Dr. Crandall acknowledged that prior to 6/4/20 Petitioner had no symptoms in his right hand or wrist. He described De Quervain's tenosynovitis as a pain syndrome because the tendon extending the thumb and pulling the thumb outwards from the wrist does not fit in the canal causing it to rub the canal resulting in pain and popping. He acknowledged that Respondent did not provide him with Dr. Bradley's 10/13/20 report, the 10/26/20 telemed visit, or the 11/16/20 office note. Dr. Crandall believed that the two accidents were "not enough" to determine if Petitioner required surgery. He opined that Petitioner's symptoms were caused by underlying De Quervain's tenosynovitis.

CONCLUSIONS OF LAW

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

Based on the evidence and Petitioner's medical records, the Arbitrator finds that Petitioner's current condition of ill-being in his right hand/wrist is not causally related to his subsequent accident that occurred on 9/20/20 but remains related to his initial accident on 6/4/20 (Case No. 20-WC-17234).

Petitioner was taken off work consistently from the date of his first accident on 6/4/20 through 9/15/20 when Section 12 examiner, Dr. Crandall, released him to return to full duty work. Petitioner testified his condition had not improved when he returned to work on 9/15/20. In fact, Petitioner was still actively treating for his condition and on work restrictions ordered by his treating phyisicans when Dr. Crandall returned him to work.

Petitioner was diagnosed with De Quervain's tenosynovitis prior to his second work-related accident of 9/20/20 based on an MRI performed on 6/27/20. Following the MRI and diagnosis, Dr. Paletta recommended a cockup wrist splint, twelve-day Prednisone taper followed by two weeks of Naprosyn, and a follow up with Dr. Wendell Becton. Prior to 9/20/20, Petitioner underwent extensive conservative treatment without improvement, including medication, physical therapy, occupational therapy, splinting, a cortisone injection, icing, and home exercises. Despite conservative treatment, Petitioner continued to complain of severe pain in his right wrist.

Petitioner's symptoms in his right hand/wrist/thumb remained constant up through the date of his second accident on 9/20/20. Petitioner sought treatment with Dr. Matthew Bradley following his second accident. Dr. Bradley's physical examination findings, diagnosis, and initial treatment recommendations were the same as Petitioner's treating physicians prior to 9/20/20. Dr. Bradley ordered a repeat MRI and stated the findings on the second MRI performed on 10/20/20 were unchanged, with the exception of improved inflammation. Dr. Bradley recommended a second cortisone injection and splinting.

None of Petitioner's treating physicians returned Petitioner to full duty work prior to 9/20/20. Despite Dr. Crandall's orders, Petitioner was still under Dr. Becton's work restrictions of left-handed work at the time of his second accident. Following Petitioner's second accident,

Dr. Bradley continued to restrict Petitioner's activities to no repetitive lifting and wearing a brace while working.

On 10/13/20, Petitioner again reported only temporary relief from the second injection. On 11/16/20, Dr. Bradley recommended surgery only after significant conservative treatment failed to alleviate Petitioner's symptoms.

The record does not suggest the 9/20/20 accident aggravated Petitioner's symptoms and neither the character of his symptoms nor his recommended course of treatment was altered as a result thereof. It is clear the second incident did not sever the chain of causal connection from the first incident. *Lasley Construction Co. v. Industrial Comm'n,* 274 Ill.App.3d 890, 893, 655 N.E.2d 5 (1995) (holding that "other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant").

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

Issue (K): Is Petitioner entitled to any prospective medical care?

Based on the Arbitrator's decision that Petitioner's current condition of ill-being is not causally related to his subsequent accident that occurred on 9/20/20 but remains related to his initial accident on 6/4/20, and the Arbitrator having awarded Petitioner medical expenses and prospective medical care, including surgery, in Case No. 20-WC-17234, the Arbitrator does not award further benefits herein.

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

Based on the Arbitrator's decision that Petitioner's current condition of ill-being is not causally related to his subsequent accident that occurred on 9/20/20 but remains related to his initial accident on 6/4/20, and the Arbitrator having awarded Petitioner temporary total disability benefits in Case No. 20-WC-17234, the Arbitrator does not award further benefits herein.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/1/21

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC014316
Case Name	GUAMAN, LUIS v. WALSH CONSTRUCTION
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0595
Number of Pages of Decision	29
Decision Issued By	Kathryn Doerries, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Mitchell Peskin
Respondent Attorney	Lauren Kus

DATE FILED: 12/6/2021

/s/Kathryn Doerries, Commissioner

Signature

DISSENT

/s/Kathryn Doerries, Commissioner

Signature

21IWCC0595

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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS GUAMAN,

Petitioner,

vs. NO: 18 WC 014316

WALSH CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission adopts the Arbitrator's Statement of Facts in its entirety, however, modifies the Arbitrator's Conclusions of Law with respect to the award of 20% loss of use of the left arm, reducing the award to 10% loss of use of the left arm. The Commission further modifies the period for which Section 19(l) penalties are awarded to 458 days representing the period from June 12, 2018, through September 12, 2019, however, the dollar amount of the Section 19(l) penalties shall remain at the statutory maximum of $10,000.00. Finally, the Commission affirms and adopts the Arbitrator's award of Section 19(k) penalties (with mathematical corrections), however, modifies the Arbitrator's award of Section 16 attorney's fees, limiting the attorney's fees award solely to the amount of Section 19(k) penalties awarded. The Commission makes the referenced modifications based upon the following:

Temporary Total Disability

The Commission affirms the Arbitrator's award of temporary total disability (TTD) for the

period from January 15, 2019, to January 29, 2019. However, the Commission corrects the mathematical computations in the last paragraph in Section K, under the Conclusions of Law. The Commission strikes the last paragraph in Section K, under the Conclusions of Law and substitutes the following:

Accordingly, the Arbitrator finds the Petitioner is entitled to TTD for the periods of September *5,* 2017, through September 24, 2017, and January 6, 2018, through January 28, 2019, in the amount of $1,093.33 per week for 58 2/7 weeks ($63,725.83) subject to credit for payments already made by Respondent (62,814.07). This means the amount of $911.76 remains payable to Petitioner.

The Commission further corrects the same mathematical computation in the last line of the paragraph at the top of page 14. The line should read, "Respondent owes $911.76 in additional TTD benefits after consideration of amounts already paid."

Permanent Disability

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

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

The Commission affirms the Arbitrator's award of 25% loss of use of a left hand. However, regarding the left arm, the Commission views the evidence differently than the Arbitrator.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) Dr. Fernandez authored an impairment rating and opined that Petitioner had a 3% upper extremity rating for his tendon laceration with repair, a 3% upper extremity rating relating to his dorsal radial sensory nerve and a 3% rating for his left carpal tunnel syndrome. This factor is given some weight.

(ii) Petitioner was employed as a cement worker. He was released to full-duty by both his treating doctor and the Section 12 examiner. Petitioner is currently working in a steel factory, a job that could be considered heavy duty as he must lift bolts that weigh between thirty to sixty pounds. Petitioner testified that while he can perform his job, he does have some difficulty with pain in the area of his left hand when he must lift or push something. Thus, this factor is assigned greater weight.

(iii) Petitioner was 41 years old at the time of the accident and has approximately 25 years

of work life remaining until retirement. This factor is assigned some weight.

(iv) There is no evidence of reduced future earning capacity in the record thus this factor is assigned no weight.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of August 3, 2017, Petitioner was diagnosed with tears of the extensor carpi radialis longus (ECRL) and extensor carpi radialis brevis (ECRB) tendons. The tendons were torn at the level of the proximal carpal row. The MRI of his left hand also showed low grade partial interstitial tearing of the extensor carpi ulnaris tendon and a perforation-like tear of the central articular disc of the triangular fibrocartilage. He underwent surgery consisting of neurolysis of the left radial sensory nerve; repair of the left radial sensory nerve with allograft conduit wrap; tenolysis of the ECRB tendon; repair of the ECRB with interposition tendon graft; tenolysis of the ECRL tendon; repair of the ECRL tendon with a tendon graft, and harvest tendon graft from a distant palmaris. Subsequently, Petitioner underwent a second surgery consisting of a tenolysis of the left ECRB, a tenolysis of the left ECRL tendon, neurolysis, left radial sensory nerve; excision neuroma-in-continuity of the left radial sensory nerve, a left de Quervain release, and a left carpal tunnel release. More than one years later, he had a left first extensor compartment injection for pain primarily along the dorsal wrist extending into the hand. He was off work 58-2/7 weeks, from September 5, 2017, through September 24, 2017 and January 6, 2018, through January 28, 2019 at which time he was released to full duty work.

Petitioner testified at Arbitration he is not able to lift a lot of weights when it comes to his left hand and he still notices numbness and pain in his left hand. (T. 66) He has pain on the area of his hand when he lifts at work. (T. 61) The Athletico physical therapy discharge note on January 21, 2019, confirms that Petitioner's subjective report was documented as follows: "He is ready to see what the arm can do. He is having a lot of pain as he tried to shovel today." (PX4, 1/21/19) All short term and long term physical therapy goals were met; some noted to be achieved in 2018. Under long term goals, "increase strength to 5/5 in the wrist and elbow for heavy category of lifting for work" is noted to be achieved as of 1/22/19. On November 11, 2019, Petitioner consulted Dr. Brian Evanson for pain localized near the first extensor compartment. It was noted that he was working but had discomfort in the wrist. He was given a left first extensor compartment injection. At his last medical consult with Dr. Evanson on December 24, 2019, it was noted that he had 40 to 50% improvement with the injection. Finally, Dr. Fernandez reviewed the video surveillance and testified Petitioner demonstrated using his left hand where he could use either the left or right hand on three or four separate occasions and he did not exhibit any signs of guarding with his left hand or favoritism. (RX2, 8-9, 10). Dr. Fernandez further testified if Petitioner were having ongoing significant difficulty in August 2020, he would have expected Petitioner's activity to be different than what was depicted on the video in terms of functionality of his left hand. (RX2, 11-12) This factor is assigned moderate weight.

Based on the foregoing factors, the Commission reduces the permanency award to 10% loss of use of the left arm, 25.3 weeks, from 20% loss of use of the left arm, in addition to the award of 25% loss of use of the left hand, 51.25 weeks, for injuries sustained as provided in Section 8(e) of the Act. Therefore, the Respondent shall pay Petitioner the sum of $790.64 per week for a period of 76.55 weeks for injuries sustained as provided in Section 8(e) of the Act.

Section 19(l) Penalties

The Commission modifies the Arbitrator's award of Section 19(l) penalties solely for the period commencing June 12, 2018, through September 12, 2019, a period of 458 days x $30.00 per day, however, still reaching the maximum dollar amount of $10,000.00 per the stricture of Section 19(l). The Commission does not agree that Section 19(l) penalties are warranted for the period between November 22, 2018, through February 27, 2019. The check issued on February 27, 2019, represented the TTD period between November 22, 2018, through January 14, 2019, and was paid based upon the Respondent's Section 12 expert's re-examination and opinion report dated January 15, 2019. (RX6) The Commission finds the Respondent reasonably relied upon Dr. Fernandez's previous report dated June 12, 2018, to terminate TTD benefits wherein Dr. Fernandez opined that recovery from the proposed surgery with carpal tunnel release, first compartment release and local tenolysis would be in order of about two months with a fairly rapid resolution. (RX5) (See *McMahan v. Industrial Comm'n*, 183 Ill.2d 499, 515, 234 Ill.Dec. 205, 702 N.E.2d 545, 552 (1998). The assessment of a penalty under Section 19(l) is only mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." See also *Mechanical Devices,* 344 Ill.App.3d at 73, 279 Ill.Dec. 531, 800 N.E.2d at 829. The standard for determining whether an employer has good and just cause for delay in payment is defined in terms of reasonableness.)

Section 19(k) Penalties

The Commission corrects a mathematical computation in Section M, under the Conclusions of Law on page 15, second full paragraph on the page, (last paragraph under Section M) in the first bullet point. This entire paragraph will be revisited below based on the combined analysis in Section 19(k), 19(l) and Section 16, however, bears a separate note that there is a mathematical error, wherein the PPD advance made in June was meant to be subtracted, however, was overlooked. Therefore, the Commission finds that the penalty under Section 19(k) should be calculated by taking 50% of the combined late TTD payments, $20,672.40 plus $8,641.30 ($29,313.70) less the payment of a PPD advance in June of $2,371.92, or $26,941.78 x 50% = $13, 470.89.

Section 16 Attorney's Fees

The Commission modifies the Arbitrator's award of penalties finding that the Arbitrator's award of attorney's fees on the Section 19(l) penalty is not warranted. The relevant provisions of the Workmen's Compensation Act, pursuant to which the penalties and fees were imposed, are:

Penalties under Section 19(k)

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." *820 ILCS 305/19(k)(2013)*.

Penalties under Section 19(l)

If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l)(2013).*

Attorneys' Fees under Section 16

Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his insurance carrier. *820 ILCS 305/16(2013).*

As held by the *Boker* court in upholding the Commission's denial of attorney fees under section 16 of the Act, "[n]o provision is made in section 16 for an award based upon conduct proscribed in section 19(l)." *Boker v. Illinois Industrial Comm'n.,* 141 Ill. App. 3d 51, 58-59, 489 N.E.2d 913, 919, 1986 Ill. App. LEXIS 1875, *15, 95 Ill. Dec. 351, 357. In this case, all but $911.76 TTD remained unpaid at the time of the Arbitration hearing. However, the Arbitrator awarded and the Commission agrees, to award Section 19(k) penalties for the delayed TTD payments made in lump sums of $20,672.40 and $8,641.30 ($29,313.70) less the Respondent's PPD advance in June of $2,371.92 ($29,313.70 - $2,371.92 = $26.941.78). Accordingly, the penalty amount under Section 19(k), 50% of $26,941.78 is $13,470.89. Therefore, the Commission modifies the award of attorney's fees to $2,694.18 or 20% of the penalties awarded

under Section 19(k).

In conjunction with the Commissions Conclusions of Law regarding the Sections 19(k) and 19(l) penalties and under Section 16, the Commission strikes the last paragraph and three bullet points on page 15 under Section M, and substitutes the following to comport with the above referenced analysis under Sections 19(k), 19(l), and Section 16:

The Commission finds as follows concerning the amount of penalties:

- Under Section 19(k) the Commission bases the penalty on 50% of the amount that was not paid on a timely basis (See *Jacobo v. IWCC,* cited above). In this case the amounts of $20,672.40 and $8,641.30 were not paid on a timely basis. Respondent's payment of a PPD advance in June of $2,371.92 will be subtracted. Accordingly, the penalty amount under Section 19(k) is 50% of $26,941.78 or $13,470.89.
- Under Section 19(1) the Commission issues a penalty of $30 per day from the date of June 12, 2018, through September 12, 2019 which brings calculations to the maximum penalty of $10,000.00.
- Under Section 16, the Commission awards attorney's fees of 20% of the Section 19(k) penalties issued. 20% of $26,941.78 is $2,694.18.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on January 6, 2021, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,093.33 per week for a period of 58-2/7 weeks, commencing September 5, 2017, through September 24, 2017, and January 6, 2018, through January 28, 2019, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $60,442.16 paid in TTD benefits and $2,271.91 PPD advance, for a total credit of $62,814.07.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 76.55 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 25% loss of use of the left hand and 10% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay penalties in the amount of $13,470.89, 50% of $26,941.78, representing the combined late TTD payments of $29,313.70 ($20,672.40 plus $8,641.30), less the PPD advance of $2,371.92, pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay penalties in the amount of $10,000.00 pursuant to Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner attorney's fees in the amount of $2,694.18, 20% of the $13,470.89 penalty awarded

under Section 19(k), pursuant to Section 16 of the Act.

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

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

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

December 6, 2021

KAD/bsd
O100521
42

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

DISSENT

I disagree with the award of Section 19(k) penalties and, in this case given that the Section 16 award is based solely upon the Section 19(k) penalty, also the award of attorney's fees under Section 16. The Arbitrator awarded Section 19(k) penalties based upon two periods of delayed TTD payments. The first period was when TTD benefits were terminated on April 28, 2018, and the second was when TTD benefits were terminated as of November 23, 2018. The Arbitrator noted that in both cases, that there was no medical basis for the TTD termination. (AD. 12) This is patently incorrect.

I agree with the majority that the second period of delayed TTD did not warrant Section 19(l) penalties and for the same reasons does not warrant imposition of Section 19(k) penalties. Nonetheless, the $8,641.30 payment made on February 27, 2019, was used to calculate the Section 19(k) penalties award which is inconsistent with the Arbitrator's statement in the second paragraph on page 15 which reads, "The Arbitrator is not awarding penalties for the period of TTD of January 15, 2019 through January 28, 2019 as the Respondent could have reasonably relied on the opinions of Dr. Fernandez releasing Petitioner to full duty work after the third and final Section 12 examination." (AD. 15)

To reiterate the majority opinion, the $8,641.30 check issued on February 27, 2019, represented the TTD period between November 22, 2018, through January 14, 2019, and was paid based upon the Respondent's Section 12 expert, Dr. Fernandez's re-examination and opinion report dated January 15, 2019. (RX6) The Commission majority finds, and I agree, the Respondent had reasonably relied upon Dr. Fernandez's previous report dated June 12, 2018, to terminate TTD

benefits when Dr. Fernandez opined that recovery from the proposed surgery with carpal tunnel release, first compartment release and local tenolysis would be in order of about two months with a fairly rapid resolution. (RX5) The Petitioner's second surgery was on September 27, 2018, thus the Respondent terminated TTD approximately two months later on November 23, 2018. Hence there was a medical opinion that Respondent relied upon to terminate benefits. Notable is the fact that this was not a medical opinion that the Arbitrator discounted or found not credible. Instead, the Arbitrator finds that both Dr. Fernandez and Dr. Dedhia to be knowledgeable and capable orthopedic surgeons. (AD. 9) The Arbitrator finds Dr. Dedhia and Dr. Fernandez's treatment plans were similar. *Id*. The Arbitrator finds Dr. Fernandez remains a "well-respected and credible physician." (AD. 10) The Arbitrator also noted that "Dr. Fernandez is well-respected, and his opinions are afforded substantial weight." (AD. 12) I agree with that assessment.

On January 15, 2019, after his third Section 12 evaluation, Dr. Fernandez opined that Petitioner was at MMI. I agree with the majority that the Petitioner's treating physician Dr. Dedhia had a greater basis of understanding when it comes to Petitioner's subjective complaints and is entitled to deference to his declaration of MMI two weeks later on January 29, 2019. However, Respondent's termination of TTD benefits on January 15, 2019, was done in reliance on Dr. Fernandez's third Section 12 evaluation on January 15, 2019, and his declaration that Petitioner was at MMI. Thus, the analysis and amount of award under Section 19(l) or Section 19(k) should not include the period between November 18, 2018 and February 27, 2019, or payment of the $8,641.30 check issued on February 27, 2019 (PX6).

If, arguendo, the award of Section 19(k) penalties was warranted, it should be calculated as 50% of the unpaid TTD, represented by the lump sum payment made in the amount of $20,672.40 issued on September 12, 2019 (PX7), or $10,336.20.

However, I disagree that any Section 19(k) penalty should be imposed. In *Jacobo v. Ill. Workers' Comp. Comm'n*, the Court reviewed Illinois precedent for assessing penalties and attorneys' fees, finding penalties under Section 19(k) and attorneys' fees under Section 16 to be reserved for situations where the delay is premised on bad faith. The *Jacobo* Court explained:

> An award of penalties and attorney fees pursuant to Sections 19(k) and 16 are "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *McMahan v. Industrial Comm'n*, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 463 (1997), *aff'd*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998).
>
> The standard for awarding penalties and attorney fees under Sections 19(k) and 16 of the Act is higher than the standard for awarding penalties under Section 19(*l*) because Sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552 (1998). It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Instead, Section 19(k) penalties and Section 16 fees are "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." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553. In addition, while Section 19(*l*) penalties are mandatory, the imposition of penalties and attorney fees under Sections 19(k) and Section 16 fees is discretionary. *Id*.

Jacobo v. Ill. Workers' Comp. Comm'n, 2011 Ill. App. LEXIS 1186, *11-12, 355 Ill. Dec. 358, 364, 959 N.E.2d 772, 778, 2011 IL App (3d) 100807WC.

The imposition of penalties under Section 19(k) and attorney's fees under Section 16 requires a higher threshold be overcome than under Section 19(l). Whereas penalties under Section 19(l) are to be awarded whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment without good and just cause, penalties under Section 19(k) and Section 16 require that not only is there a delay, but "the delay be 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.'" *Armour Swift-Eckrich v. Indus. Comm'n (Williams)*, 355 Ill. App. 3d 708, 712, 823 N.E.2d 1103, 1106 (2005).

With respect to the period of TTD not paid beginning April 28, 2018, to September 16, 2018, 20-2/7 weeks, the Respondent also had good faith defenses. After his first Section 12 evaluation on February 27, 2018, Dr. Fernandez reviewed the first injury report, treatment notes, MRI of August 18, 2017, the September 5, 2017 operative report and opined that Petitioner would be at MMI in approximately two months, approximately April 28, 2018. (RX4) The Arbitrator noted it was "not unreasonable or vexatious" for Respondent to rely upon that opinion to terminate TTD benefits on April 28, 2018, calling Dr. Fernandez "well-respected, and his opinions are afforded substantial weight." (AD. 12)

After his second Section 12 evaluation on June 12, 2018, Dr. Fernandez authored an opinion report after taking an updated history from Petitioner. (RX5) In his opinion report, Dr. Fernandez noted that Petitioner had worsened symptoms than he had three months prior, he was capable of light medium work and recommended that Petitioner undergo an EMG. *If* the EMG showed that Petitioner had carpal tunnel syndrome, Dr. Fernandez recommended that he proceed with surgery that would include a release of the first dorsal compartment and even possible tenolysis of the second compartment tendons noting Petitioner had pain emanating from that as well. Dr. Fernandez opined that Petitioner should recover from such a surgery "in order of about two months with a fairly rapid resolution. If at that time, he still has significant residual complaints, consideration would be given to an FCE and then discharging him accordingly, likely with full duty release." (RX5)

The Arbitrator then notes that he changed his opinion (that it was "not unreasonable or vexatious" for Respondent to rely upon Dr. Fernandez's opinion) after Dr. Fernandez issued his second June 12, 2018, Section 12 opinion report. The Arbitrator noted Respondent continued to withhold TTD benefits until the surgery on September 27, 2018, when Respondent commenced payment of ongoing weekly TTD benefits until November 22, 2018, however, that decision to terminate TTD was based upon Dr. Fernandez's June 12, 2018, opinion that Petitioner would be at MMI within two months after surgery with a fairly rapid resolution. (RX5) The majority ignores

the fact that Dr. Fernandez's report stated that Petitioner could not return to full-duty, not that he should be off-work and implying that he could work with restrictions. (RX5) At that time, Petitioner had not yet even had an EMG recommended by Dr. Fernandez. As noted by the Arbitrator, the EMG was approved and performed on July 11, 2018. (AD. 3) Dr. Gelman reviewed the EMG on July 24, 2018, and prescribed a left carpal tunnel release, left de Quervain's release, and repair of the left ECRB and ECRL tendons and left radial sensory nerve. Dr. Gelman also prescribed restrictions of no lifting greater than 20 pounds and no repetitive pushing, pulling or grasping. The condition was not confirmed until July 24, 2018.

Petitioner testified that he stopped working for Respondent beginning January 2018 because the supervisor told him that he did not have any type of work available for him. He was told to talk to a different supervisor who also mentioned that there was nothing for him. (T. 31) Petitioner testified that when Dr. Gelman gave him a letter stating he was able to go back to work in June 2018, Respondent was not able to accommodate the light-duty restrictions Dr. Gelman had prescribed. (T. 42, 43) Petitioner further testified that he did not look for any work between April 2018 until the beginning of September 2018. (T. 71) Again, Respondent commenced TTD payments when the Petitioner underwent surgery, as of September 27, 2018.

The Respondent also issued a PPD advance on June 5, 2018, in the amount of $2,371.92 and overpaid TTD by $26.88 for entire period of TTD paid between September 5, 2017, and the last TTD check issued on February 1, 2019. (PX8). More importantly, contrary to the Arbitrator's opinion, in his first evidence deposition taken on July 19, 2019, Dr. Fernandez testified that it was reasonable for Petitioner to work functionally between the period between April 28, 2018, and the September 27, 2018, surgery. (RX1, 25) Despite the defense, even after having made the PPD advance in June 2018, and ongoing TTD overpayment, Respondent paid the disputed period on September 12, 2019, over one year before the arbitration hearing that took place on October 21, 2020. (T. 59)

The Respondent ultimately had paid all medical benefits before the arbitration hearing and paid all but $911.76 in TTD benefits one year before the arbitration hearing. Had the majority relied upon Dr. Fernandez's opinion that Petitioner was at MMI on January 15, 2019, the Respondent would not owe any additional TTD. The Respondent's conduct was not vexatious, done in bad faith or for improper purpose. Instead, it is obvious that Respondent relied upon a medical opinion that the Arbitrator characterized as "well-respected" and "his opinions are afforded substantial weight." For all the foregoing reasons, I respectfully dissent and would reverse the award of Section 19(k) penalties and attorney's fees under Section 16.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0595

GUAMAN, LUIS
Employee/Petitioner

Case# **18WC014316**

WALSH CONSTRUCTION
Employer/Respondent

On 1/6/2021, 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 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4036 MILLON & PESKIN LTD
MITCHELL PESKIN
310 S COUNTY FRAM RD SUITE J
WHEATON, IL 60187

1682 HINSHAW & CULBERTSON
PETER H CARLSON
151 N FRANKLIN ST SUITE 2500
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Luis Guaman
Employee/Petitioner

v.

Walsh Contruction
Employer/Respondent

Case # **18** WC **14316**

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 **Chicago**, on **10/21/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/3/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**85,280.00**; the average weekly wage was $**1,640.00**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**60,442.16** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**2,371.91 (PPD Advance)** for other benefits, for a total credit of $**62,814.07**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,093.33/week for 58 and 2/7 weeks, commencing September 5, 2017, through September 24, 2017 and January 6, 2018, through January 28, 2019, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $790.64/week for a further period of 101 and 5/7 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 25% loss of use of the left hand/wrist and 20% loss of use of the left arm.

Petitioner's Petitions for Penalties pursuant to Sections 19(k), 19(l), and Attorney's fees under Section 16 are granted. Respondent shall pay penalties in the amount of $14,656.85 pursuant to Section 19(k), $10,000.00 pursuant to Section 19(l), and Attorneys' fees in the amount of $4,931.37 pursuant to Section 16 of the Act.

See attached Findings of Fact and Conclusions of Law

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

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

Signature of Arbitrator

12/31/20
Date

JAN 6 - 2021

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS GUAMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No: 18 WC 14316
	)	
	)	
WALSH CONSTRUCTION,	)	
	)	
Respondent.		

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Petitioner was a laborer with Respondent since July 2007. His job primarily involved cement work and his job duties included operating a machine to break cement, demolition work, and working with bags of cement weighing from 50 to 70 pounds. On August 3, 2017, Petitioner sustained an undisputed accident at the Athletic Center in Evanston when a large metal object fell onto Petitioner's left hand and wrist. The object was described as eight to ten feet in length and very heavy. Petitioner testified that his injury began gushing blood and he felt immediate, excruciating pain.

Petitioner's Treatment Begins

The accident was reported to his supervisor, Adam, who took Petitioner for treatment at Physicians Immediate Care in Chicago. Petitioner saw Dr. Daniel Blade there and gave a history of his accident. Dr. Blade diagnosed a 4cm laceration without foreign body of the left forearm and a contusion to the left forearm. Dr. Blade repaired Petitioner's wound ordered X-rays of the left wrist, and prescribed work restrictions of no strong gripping with the left hand, limited repetitive motion with the left hand and no lifting using the left arm.

Petitioner returned to Physicians Immediate Care on August 5, 2017 and treated with Dr. Brian Hughes. Dr. Hughes noted that Petitioner continued to have pain with range of motion, swelling in the left hand, and that Petitioner was experiencing pain from the elbow to the base of his hand. Dr. Hughes renewed the prior work restrictions of right-hand work only. On August 14, 2017, Petitioner returned to Physicians Immediate Care and treated with a physician's assistant, Audra Dust. PA Dust prescribed the same work restrictions and recommended an MRI of the left wrist. Petitioner underwent the MRI on August 18, 2017 which revealed complete tears of the extensor carpi radialis longus (ECRL) and extensor carpi radialis brevis (ECRB) tendons along with mild extensor pollicis longus tenosynovitis, low grade partial interstitial tearing of the extensor carpi ulnaris tendon, and a perforation-like tear of the central articular disc of the triangular fibrocartilage. Following the MRI, Petitioner returned to Physicians Immediate Care on August 21, 2017 when he saw a physician's assistant, Emma Frankel. PA Frankel noted that

Petitioner had mild pain over the back of the left wrist, left thumb and left index finger, continued Petitioner's work restrictions, and recommended that Petitioner see a hand surgeon.

Petitioner testified that Respondent was able to accommodate his light duty restrictions. He would work mainly as a flagger controlling traffic outside. He testified that although this was a light duty job, he still had to work beyond his work restrictions through his use of his left hand from time to time.

Petitioner saw Dr. Jack Gelman of Orthopedic Specialists of Northwest Indiana on August 29, 2017. Dr. Gelman reviewed the left wrist MRI, noted that the MRI showed completely tears of the ECRL and ECRB tendons. He further noted that the Petitioner suffered a laceration to his left forearm and that Petitioner was having numbness over the thumb and index finger. Dr. Gelman prescribed an MRI of the elbow to determine the nature of a mass by the Petitioner's left elbow. He also discussed surgical repair of his tendon and radial sensory nerve. An MRI of left elbow was performed on August 29, 2017. Dr. Gelman recommended surgery for the left wrist at that time

Surgery took place on September 5, 2017 with Dr. Gelman performing a neurolysis of the left radial sensory nerve; repair of the left radial sensory nerve with allograft conduit wrap; tenolysis of the ECRB tendon; repair of ECRB with interposition tendon graft; tenolysis of the ECRL tendon; repair of ECRL tendon with tendon graft, and harvest tendon graft from a distant palmaris longus. The Petitioner was taken off work completely at that time. TTD benefits began.

On September 12, 2017, Dr. Gelman prescribed occupational therapy three times a week for six weeks and indicated the Petitioner was able to return to work with strict right-hand duty only. The Petitioner began physical therapy at Athletico on September 18, 2017. Petitioner returned to restricted duty work for Respondent on September 25, 2017. TTD was paid through September 24, 2017.

On September 26, 2017 Petitioner followed up with Dr. Gelman who continued the work restrictions and advised Petitioner to continue with occupational therapy. Petitioner followed up with Dr. Gelman on October 17, 2017, November 14, 2017 and January 2, 2018. Dr. Gelman continuously ordered the work restrictions and the continuation of occupational therapy.

The Petitioner testified he stopped working for the Respondent on January 6, 2018 because the Respondent was no longer able to accommodate his work restrictions. At this time, the Respondent began paying TTD benefits again. The Petitioner completed his last physical therapy appointment on January 25, 2018 after completing forty-five sessions of therapy.

Petitioner returned to see Dr. Gelman on January 30, 2018. On that date Dr. Gelman discontinued therapy and recommended that Petitioner continue with his home exercise program. He also increased Petitioner's restrictions to no lifting greater than 30 pounds and limited repetitive pushing, pulling and grasping. Respondent was not able to accommodate these restrictions and continued to pay TTD benefits.

On February 27, 2018, the Petitioner attended a Section 12 examination with Dr. John Fernandez at the request of the Respondent. Dr. Fernandez noted that the Petitioner continued to

have complaints of dorsal radial sensory nerve numbness, burning with pain, particularly with cold sensitivity. Dr. Fernandez also noted the Petitioner had increasing numbness and tingling in the median nerve distribution of the thumb, index finger and middle finger which were all worse with activities and improved with rest. Dr. Fernandez opined that the Petitioner was not at MMI but that he "believed he will reach MMI in approximately two months." He agreed with Dr. Gelman's thirty-pound restriction and then stated "[a]pproximately two months from today's time, he can then attempt to return back to full duty without restriction or limitation."

Dr. Fernandez also suggested that if the Petitioner's numbness and tingling complaints persisted or worsened over the next two months, the Petitioner should consider an EMG to determine if he has carpal tunnel syndrome. If it was determined that the Petitioner had carpal tunnel syndrome, Dr. Fernandez opined that it should be treated and that such treatment may include surgical intervention with a carpal tunnel release. Dr. Fernandez stated this "would also be treated as work related as part of the overall injury as well as the surgery."

On March 6, 2018 Petitioner returned to see Dr. Gelman, and complained of symptoms consistent with carpal tunnel syndrome and de Quervain's. Dr. Gelman recommended that he have a left carpal tunnel release and a left de Quervain's release. Dr. Gelman opined that both conditions were related to his initial injury. Work restrictions of no lifting greater than thirty pounds and no repetitive pushing, pulling, or grasping were prescribed.

Petitioner returned to Dr. Gelman on March 15, 2018. Dr. Gelman agreed with Dr. Fernandez and recommended an EMG of the left hand/wrist and continued the same light duty restrictions. Dr. Gelman further opined and agreed that if Petitioner had the left carpal tunnel release and de Quervain's release soon he may be able to return to full duty in two months. Dr. Gelman continued Petitioner's work restrictions.

Petitioner attempted to obtain an EMG, but it was not initially approved by Respondent. Respondent terminated TTD benefits on April 28, 2018 – roughly two months or 60 days after the initial Section 12 examination with Dr. Fernandez.

On June 12, 2018, a second Section 12 examination with Dr. Fernandez was performed. Dr. Fernandez noted Petitioner complained of increasingly severe symptoms of numbness and tingling in the median nerve of the thumb, index, and middle fingers along with pain and burning in the radial sensory nerve distribution. Dr. Fernandez opined that Petitioner was not at MMI from his work injury and that Petitioner could not return to full duty due to ongoing active symptoms. Dr. Fernandez opined that Petitioner was capable of light-medium work in the twenty to thirty-pound range and restricted Petitioner from the use of tools, heavy machinery or materials, and climbing. An EMG was again suggested. Further, Dr. Fernandez stated that if the EMG showed carpal tunnel syndrome, he would recommend proceeding with a carpal tunnel release surgery and that strong consideration should be given to release of the first dorsal compartment and a possible tenolysis of the second compartment tendons. Petitioner testified that he had not yet received TTD benefits from Respondent as of June of 2018.

The EMG was eventually approved and performed on July 11, 2018. The EMG revealed acute, mild axon derivation affecting the median innervated muscles distal to the left wrist with

proximal sparing and without evidence of sensory or motor demyelination consistent with a mild, acute traumatic median neuropathy at the left wrist. The Petitioner returned to Dr. Gelman on July 24, 2018. Upon review of the EMG and his exam findings, Dr. Gelman prescribed a left carpal tunnel release, left de Quervain's release, and repair of the left ECRB and ECRL tendons and left radial sensory nerve. Dr. Gelman also prescribed restrictions of no lifting greater than 20 pounds and no repetitive pushing, pulling or grasping. Petitioner testified that he did not yet receive TTD benefits from Respondent in July of 2018.

The prescribed surgery was not immediately approved by Respondent. Surgery was eventually performed by Dr. Gelman on September 27, 2018 consisting of a tenolysis of the left ECRB, a tenolysis of the left ECRL tendon, a neurolysis of the left radial sensory nerve, an excision of a neuroma-in-continuity of the left radial sensory nerve, a left de Quervain's release, and a left carpal tunnel release. Dr. Gelman's post-operative diagnosis was tenosynovitis and tendon adhesions of the left ECRB, tenosynovitis and extensor tendons of the left ECRL tendon, neuroma-in-continuity of the left radial sensory nerve, left carpal tunnel syndrome and left de Quervain's stenosing tenosynovitis.

The Respondent reinstated TTD benefits on September 27, 2018 but did not at that time pay Petitioner for the period of April 28, 2018 through September 26, 2018 (21 and 5/7 weeks) with the exception of a $2,371.92 advance against PPD on June 5, 2018. The Arbitrator notes several emails demanding payment of benefits were sent to Respondent's counsel (as evidenced in Petitioner's Exhibit 5, and its sub exhibits A through K) on May 26, 2018. May 30, 2018, June 26, 2018, June 29, 2018, July 19, 2018, July 24, 2018, July 25, 2018, August 3, 2018 and September 14, 2018.

Following surgery, the Petitioner returned to Dr. Gelman on October 4, 2018. Dr. Gelman had prescribed off work restrictions and recommended occupational therapy three times a week for four weeks which the Petitioner began at Athletico on October 9, 2018. On October 11, 2018 Petitioner followed up with Dr. Gelman, who continued Petitioner's off work restrictions and prescribed the continuation of occupational therapy at that time. On November 8, 2018, Dr. Gelman noted that the Petitioner could return to work with right -hand work only. He also continued his occupational therapy. A copy of the light duty note was sent to the Respondent's counsel via email on November 8, 2018 (See Petitioner's Exhibit 5, sub exhibit N) but Petitioner testified that he did not speak directly with Respondent regarding a possible return to work within the prescribed restrictions.

TTD was suspended by Respondent on November 22, 2018. Petitioner was still restricted to right-handed work only by Dr. Gelman at that time. Dr. Gelman saw Petitioner again on December 4, 2018 and continued the work restrictions along with additional occupational therapy. A copy of the restricted work note was sent to Respondent's counsel via e-mail on December 6, 2018 along with a demand for payment of TTD benefits (See Petitioner's Exhibit 5, sub exhibit P). Additional emails were sent by the Petitioner on December 11, 2018, December 18, 2018, December 21, 2018, January 2, 2019 and January 10, 2019 to the Respondent's counsel asking for payment of TTD benefits in light of the Petitioner's work restriction. (See Petitioner's Exhibit 5, sub exhibits Q through T). TTD benefits were not paid at that time.

Dr. Gelman recommended that Petitioner begin treating with Dr. Sunil Dedhia of Orthopedic Specialists of Northwest Indiana on January 8, 2019. Dr. Dedhia's records note that Petitioner complained of pain and sensitivity around the distal aspect of the forearm, the area of the thumb, and the distal aspect of the dorsal incision. He also noted weakness in the hand, tenderness to palpation, weakness in the grip, but excellent range of motion. Dr. Dedhia opined that his pain appeared related to his neuroma and that a functional capacity evaluation may be in order. Petitioner's light duty restrictions continued. Respondent did not restart TTD benefits at that time since suspending them on November 22, 2018.

Petitioner saw Dr. Fernandez for a third Section 12 examination at Respondent's request on January 15, 2019. Dr. Fernandez noted that the Petitioner continued to have pain primarily along the dorsal wrist extending into the hand primarily neurologic in nature relating to burning and numbness, tingling and electrical shocks. Dr. Fernandez opined that the Petitioner's major complaints had to do with the dorsal sensory nerve. Dr. Fernandez opined that the Petitioner could return to full duty work without restrictions or limitations and was at maximum medical improvement. Dr. Fernandez, however, also noted that Petitioner may reasonably consider further treatment in the form of a diagnostic injection along the dorsal radial sensory nerve. Dr. Fernandez further stated that if the injection took away the Petitioner's pain and he was willing to live with the numbness than Petitioner should consider a resection of the dorsal radial sensory nerve.

Petitioner completed his therapy and was discharged from Athletico on January 21, 2019 after completing 44 sessions of therapy. The discharge note indicated that the Petitioner reported he was having a lot of pain on the day from shoveling in the cold weather.

On January 29, 2019, Petitioner Saw Dr. Dedhia and complained of pain and burning around the wrist and difficulty doing activities in the cold. It was his opinion that the Petitioner was suffering from a persistently symptomatic dorsal radial sensory nerve. He agreed with Dr. Fernandez's recommendation regarding a corticosteroid injection or local anesthetic and that further surgery may be contemplated. He noted that if the Petitioner was persistently symptomatic in the next 6 to 12 months that he should consider these options. Dr. Dedhia released Petitioner from care without work restrictions at that time.

Upon his release by Dr. Dedhia, Petitioner testified that he contacted his supervisor at Respondent to inquire about returning to work since he was released without restrictions. He was told that they did not have any work for him at that time. Petitioner stated that he did not look for work or advise Respondent of his release from Dr. Fernandez on January 15, 2019.

Petitioner sought a second opinion with Dr. Brian Evanson with the Community Neuroscience and Sports Medicine Center on November 11, 2019. Dr. Evanson noted that Petitioner was reporting pain and discomfort on a regular basis over the inner part of the left wrist. Petitioner testified he was having discomfort along the same area where he had the surgery. It was also noted that he had no improvement of numbness over the thumb and index finger. Dr. Evanson diagnosed Petitioner with left radial sided wrist pain and provided an injection into the left wrist. Dr. Evanson indicated that if the injection gave him relief than surgery may not be necessary but if the injection did not work a neurolysis and tenosynovectomy and exploratory surgery may be required.

After the injection, Petitioner returned to see Dr. Evanson on December 24, 2019. Dr. Evanson noted that Petitioner's symptoms improved 40 to 50 percent for two weeks but that pain had returned but was better than it was prior to the injection. Dr. Evanson's diagnosis was left wrist ECRL, ECRB, APL, EPB tendinitis. Possible future injections and surgical procedures were discussed, but Petitioner wanted to give it more time before considering surgery because the shot had helped. Petitioner testified he has not seen Dr. Evanson or any other doctor for the injury to his left wrist and forearm since December 24, 2019. Petitioner testified he is not interested in having the surgeries that Dr. Evanson discussed on December 24, 2019.

The Respondent obtained an impairment rating from Dr. Fernandez. Dr. Fernandez prepared a September 28, 2020 report summarizing his findings concerning the impairment rating. He determined that the Petitioner had a 3% upper extremity rating for his tendon laceration with repair, a 3% upper extremity rating relating to his dorsal radial sensory nerve and a 3% rating for his left carpal tunnel syndrome. The combined upper extremity impairment rating was 9% which converted to a 5% whole person rating. Dr. Fernandez determined that the Petitioner was a maximum medical improvement and was not in need of further treatment.

Petitioner's Current Condition

Petitioner testified that he has worked for three companies since January 2019. He is presently working as a laborer for a steel factory called Greif. His job duties consist of lifting bolts which weigh between 30 and 60 pounds and moving them from one side to the next. He can perform his job duties but testified to having difficulty with pain in his hand when he must lift or push something. Prior to his work with Grief, he testified that he worked for one day for a company called Trust Auto Repair in Whiting, Indiana where he was responsible for moving cars from the lot inside the shop, sweeping the floor, watering the plants, and doing oil changes. He testified that the owner was a friend of his and asked for his help on that day. Petitioner also worked for one day at a company called Concrete Construction. Petitioner testified that he wanted to see if he could still work in construction but stated that the pain in his left hand made it difficult. The Arbitrator was provided surveillance of his work at Trust Auto Repair and notes that Petitioner's testimony seemed consistent with the activities depicted on the video.

Petitioner testified that his left wrist and forearm are persistently painful. He has difficulty performing heavy work in cold weather. He testified that he has reduced strength in his hand and cannot do some of the activities he was able to before, such as performing push-ups and flexing his fingers. He must perform hand and finger exercises in the morning to get the feeling in his left hand back. He testified to pain and numbness in the area where the surgery was performed. Petitioner testified he is not taking any medication and is right hand dominant. He does lift objects weighing more than 60 pounds from time to time. The Arbitrator, having had the chance to observe Petitioner during his testimony, notes that Petitioner testified credibly.

Section 12 Testimony of Dr. John Fernandez

Dr. Fernandez from Midwest Ortho at Rush examined Petitioner for the first time on February 27, 2018. He reviewed the relevant records, prepared a report and testified via evidence

deposition on July 19, 2019. Dr. Fernandez, a native Spanish speaker, testified he communicated with Petitioner in Spanish. Petitioner provided a history that he was right hand dominant, sustained an injury on August 3, 2017 after an injury at work, sustained two transversally oriented lacerations at the injury site and had no prior difficulties or treatment for similar problems before that injury. Dr. Fernandez noted the August 2017 MRI findings were consistent with the injury.

Dr. Fernandez testified that when the Petitioner had his ECRB and ECRL tendons lacerated they retracted significantly - from the wrist toward the elbow. He testified that the surgery the Petitioner underwent started where he had his laceration which was near the watchband of the wrist and ended roughly halfway up his forearm. Dr. Fernandez testified as of his February examination, with Petitioner being four months out from surgery, he was still having some residual complaints of numbness and tingling as well as complaints of local burning, stiffness and weakness. Dr. Fernandez testified that these symptoms were reasonable given the nature of the injury, the surgery and the recovery and that he just needed more time. His prognosis was that Petitioner would be able to return eventually to full duty, but that he was not quite at maximum improvement.

At that time Dr. Fernandez's testified that he estimated that Petitioner would be able to return to full duty without restrictions in 60 days. Dr. Fernandez based this opinion on the description of the injury Petitioner had that he was progressing well given the nature of the injury combined with Dr. Fernandez's experience with similar injuries. Between April 27, 2018 and June 12, 2018, when Dr. Fernandez examined Petitioner a second time, Dr. Fernandez believed Petitioner could work full duty without restrictions. Dr. Fernandez later acknowledged that his estimate at that time was not accurate since the Petitioner's symptoms had not improved after Dr. Fernandez reexamined the Petitioner in June 2018 where he acknowledged that the Petitioner was not yet at MMI from his work injury. Further, he testified that it was reasonable to leave it up to Dr. Gelman to outline the Petitioner's work restrictions.

Dr. Fernandez testified that he examined Petitioner for a second time on June 12, 2018 where he took an updated history. Petitioner reported having increased symptoms of numbness with pain between four and eight out of 10. Based on Petitioner's subjective complaints Dr. Fernandez recommended an EMG to see if he had carpal tunnel syndrome and see if it would warrant treatment with surgery. Dr. Fernandez stated that Petitioner needed light-medium duty restrictions which he defined in the twenty-to-thirty-pound lifting range. Further, Dr. Fernandez opined that if the Petitioner's condition was too painful that it was not unreasonable for the Petitioner to have been on work restrictions during the summer of 2018 though it was also reasonable to see if he was capable of working full duty at that time. Dr. Fernandez noted in his testimony that his light-medium restrictions were not based on Petitioner's functionality but based on Petitioner's subjective complaints. Dr. Fernandez testified he generally bases work restrictions on a patient's subjective pain complaints. Dr. Fernandez reviewed the EMG and testified it showed that Petitioner did have evidence of carpal tunnel syndrome and that based on the EMG and subjective complaints Dr. Fernandez believed that surgery was a reasonable option.

Dr. Fernandez examined Petitioner for the third and final time on January 15, 2019. Dr. Fernandez reviewed the relevant interim medical records including the July 2018 MRI report and September 2018 operative report of Dr. Gelman. Dr. Fernandez understood that Dr. Gelman

released scar tissue around the tendons that he had previously repaired, performed a carpal tunnel release, performed a release of the first compartment tendon (de Quervain's), and resected a branch of the dorsoradial sensory nerve (cutting out the part of the nerve branch that was affected likely with the initial injury). Dr. Fernandez testified he related the carpal tunnel syndrome to the surgery to the initial accident. At that time, Dr. Fernandez opined that petitioner was at MMI. As of that date, though Petitioner still had residual complaints, Dr. Fernandez testified that Petitioner could return to work without restrictions

Dr. Fernandez testified via evidence deposition a second time on September 30, 2020 and reviewed updated medical records of Dr. Dedhia and Dr. Evanson. Dr. Fernandez also reviewed a surveillance video of the Petitioner taken on August 8, 2020 and August 15, 2020. Dr. Fernandez issued an updated report which contained opinions concerning Petitioner and included an AMA rating. Dr. Fernandez did not examine the Petitioner at the time of this rating and report.

Dr. Fernandez testified that Petitioner was self-reported right hand dominant. In the surveillance video Dr. Fernandez noted that Petitioner was not wearing any sort of bracing or medical device to protect his left hand. The Arbitrator, though, is unaware of any doctor having prescribed a brace for his hand. Dr. Fernandez stated he believes that the Petitioner did not exhibit any signs of guarding with his left hand or favoritism. Dr. Fernandez testified that the surveillance showed Petitioner using the left hand where he could use either the left or the right hand on three or four separate occasions including an instance where he was carrying a big grouping of keys with only the left hand, another instance where he was using a watering can with the left hand, and where he was using both hands such as getting into and out of cars. The video showed Petitioner pulling cars into a station and apparently doing an oil change. He was getting in and operating the lift, using the machinery to catch the oil and change the oil, and using the hands to use a shop broom. Dr. Fernandez testified that there were several times in the video where Petitioner used his left non-dominant when his right non-injured dominant hand was available for use for the same task.

Dr. Fernandez opined that if Petitioner were having ongoing significant difficulty in August 2020, he would have expected Petitioner's activity to be different than what was depicted on the video in terms of functionality of his left hand. Based on the materials he reviewed, Dr. Fernandez opined that Petitioner is not a candidate for further treatment or surgery. Dr. Fernandez opined that Petitioner reached MMI as of January 15, 2019 and could work full duty without restrictions. As of his second evidence deposition Dr. Fernandez testified Petitioner can still work full duty without restrictions.

Dr Fernandez testified to a 9% upper extremity AMA rating converted to 5% whole person rating. Regarding the impairment rating, though, Dr. Fernandez acknowledged that the relationship between impairment and disability is complex and difficult to predict. He also agreed that a person can have a significant disability without a demonstrable impairment. He further agreed that the Guides are not entirely evidenced based and that the Guides state that the impairment numbers are estimates. He testified that he did not know how the percentages for impairment ratings in the Guides were derived. Although Dr. Fernandez opined the Petitioner was at MMI, he did agree that under the Guides that such a finding does not preclude the allowance of ongoing follow-up for optimal maintenance of the medical condition in question.

Timeliness of TTD Payments

Petitioner and Respondent stipulated to the fact that Petitioner was entitled to TTD benefits for the periods of September 5, 2017 through September 24, 2017 (2 and 6/7 weeks) and January 6, 2018 through January 14, 2019 (53 and 3/7 weeks). The Petitioner claims an additional TTD period of January 15, 2019 through January 28, 2019 (2 weeks).

The evidence demonstrates that TTD payments were timely made for the following periods:

- September 5, 2017 through September 24, 2017 (2 and 6/7 weeks);
- January 6, 2018 through April 27, 2018 (16 weeks); and
- September 27, 2018 through November 21, 2018 (8 weeks).

The evidence demonstrates that Respondent made the following payments:

- The TTD period of April 28, 2018 to September 16, 2018 (20 and 2/7 weeks) was paid on September 12, 2019 in the amount of $20,672.40;
- The TTD period of November 22, 2018 through January 14, 2019 (7 and 5/7 weeks) was paid on February 27, 2019 in the amount of $8,641.30; and
- A PPD advance of $2371.92 (~3 weeks) was paid on June 5, 2018.

There is no direct evidence that payment for the period of September 17, 2018 through September 23, 2018 was made though the Arbitrator recognizes the PPD advance that was paid in June of 2018. The period of January 15, 2019 through January 28, 2019 is in dispute.

CONCLUSIONS OF LAW

K. What temporary benefits are in dispute? TTD

The only temporary total disability period in dispute is from January 15, 2019 to January 28, 2019 - a period of two weeks. All other TTD dates are agreed and stipulated.

Petitioner was released to full duty work by Dr. John Fernandez, Respondent's Section 12 examiner, on January 15, 2019. At that time, Petitioner was still reporting pain in his hand along with burning, numbness, and shocks in his left wrist. Petitioner completed his physical therapy sessions and was discharged on January 21, 2019. Petitioner was released to full duty work by his treating doctor, Dr. Dedhia, on January 29, 2019.

The Arbitrator finds that both Dr. Fernandez and Dr. Dedhia to be knowledgeable and capable Orthopedic surgeons. The Arbitrator finds the fact that Petitioner was still complaining of pain, had not yet finished physical therapy, and was only two weeks later released by Dr. Dedhia to be persuasive evidence in Petitioner's favor. Dr. Fernandez himself testified that he generally bases work restrictions on the patient's pain complaints. There is no evidence that Petitioner's complaints of pain were not credible. Additionally, the Arbitrator notes long-standing and substantial similarity in treatment plans between Petitioner's treating surgeons and Dr. Fernandez. This two-week difference in return to work dates is no different. It is reasonable to believe that the

Petitioner's treating physicians may have a greater basis of understanding when it comes to Petitioner's subjective complaints due to their repeat, consistent visits and communication with each other. While Dr. Fernandez remains a well-respected and credible physician the Arbitrator finds the release back to work from Petitioner's treating doctor, in conjunction with the timeliness of Petitioner finishing therapy, along with the Petitioner's credible complaints of ongoing pain, to hold more weight than the release from Dr. Fernandez.

Accordingly, the Arbitrator finds the Petitioner is entitled to TTD for the periods of September 5, 2017 through September 24, 2017 and January 6, 2018 through January 28, 2019 for the amount of $1,093.33 per week for 58 2/7 weeks ($63,719.27) subject to credit for payments already made by Respondent (62,814.07). This means the amount of $905.20 remains payable to Petitioner.

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

In considering permanent disability, this Arbitrator must consider five factors. The factors include a report prepared by a physician using the AMA Guides rating the level of impairment, the occupation of the injured employee, his or her age on the date of accident, the employee's future earning capacity, and evidence of disability corroborated by the medical records of the treating physicians. No single factor shall be the sole determinant of disability and the Arbitrator's decision should explain each factor and its weight.

Concerning factor one, the reported level of impairment under the Guides, Dr. Fernandez opined that the Petitioner had a 3% upper extremity rating for his tendon laceration with repair, a 3% upper extremity rating relating to his dorsal radial sensory nerve and a 3% rating for his left carpal tunnel syndrome. The combined upper extremity impairment rating was 9% which converted to a 5% whole person rating. The Arbitrator notes that in assessing impairment, Dr. Fernandez did not obtain an updated history from the Petitioner. He also did not perform a recent examination that coincided with his impairment assessment. Rather, he used a prior history and relied on examination findings from over one year and nine months prior. Dr. Fernandez also acknowledged that the Guides themselves were not entirely evidence based and that he lacked any knowledge as to the methods used in determining the derived percentages in the Guides. Accordingly, the Arbitrator places some weight on this factor.

Concerning the second factor, the occupation of the injured employee, the Arbitrator notes that Petitioner was released to full duty work by both his treating doctor and the Section 12 examiner. Petitioner stated that he attempted to return to concrete work but was unable, however, the Arbitrator notes that Petitioner has not sought additional medical treatment since his release and his full duty release remains intact. Petitioner is currently working a job that could be considered heavy duty as he must lift bolts that weight between thirty to sixty pounds. Petitioner testified that while he can perform his job, he does have some difficulty with pain in the area of his left hand when he must lift or push something. The labor-intensive aspect will likely have an effect on his disability. Accordingly, the Arbitrator places moderate weight on this factor.

Concerning the third factor, the age of the employee at the time of his injury, the Arbitrator notes that Petitioner was 41 years old. Given his age and the many years of work ahead of him in

which he will have to endure the effects of his injury, the Arbitrator places moderate weight on this factor.

Concerning the fourth factor, the employee's future earning capacity, the Arbitrator notes that Petitioner is no longer employed by Respondent. That said, no evidence was entered by either party that Petitioner's earning capacity was affected one way or the other. Accordingly, little weight will be placed on this factor.

Concerning the fifth factor, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained an injury to his left wrist and forearm that required two surgeries. The ECRB, ECRL, and radial sensory nerves were injured and repaired surgically along with a left carpal tunnel and de Quervain's release. Dr. Fernandez noted that the lacerated tendons retracted significantly up toward Petitioner's elbow. The surgery involved addressed issues that started at Petitioner's wrist and went half-way up his forearm. The surgical scarring on Petitioner's arm that was viewed by the Arbitrator corroborates this.

Petitioner's last medical treatment with Dr. Evanson in November of 2019 noted that Petitioner complained of ongoing pain which was previously addressed by injections. Dr. Evanson suggested the possibility of further injections or surgery. Dr. Fernandez did not believe Petitioner was a candidate for any further treatment. The Arbitrator views Petitioner's subjective complaints of pain to be credible and that his testimony was corroborated by the medical evidence. He testified that he is in persistent pain in his left wrist and forearm and has difficulty performing certain activities such as push-ups and lifting heavy weights.

The Arbitrator notes that Respondent's surveillance video and the corresponding testimony from Dr. Fernandez are persuasive evidence that Petitioner remains capable of full duty work and may not benefit from ongoing treatment. The Arbitrator notes that this video does not show Petitioner working in his current position. Similarly, the video does not show Petitioner engaging in the activities he testified to that cause him discomfort currently. The Arbitrator does not view the surveillance as evidence that refutes or impeaches Petitioner's testimony of his ongoing subjective complaints. There is sufficient evidence of ongoing disability that is corroborated by the treating medical records. The Arbitrator assigns significant weight to this factor.

Having considered the evidence, the Arbitrator finds that the Petitioner is entitled to an award of 25% loss of use of the hand and 20% loss of use of Petitioner's arm. The Respondent is ordered to pay the sum of $790.64 a week for a period of 101 and 5/7 weeks pursuant to Section 8(e).

M. Should penalties or fees be imposed upon Respondent?

Petitioner has filed a Petition for Penalties under Sections 19(k), 19(l), along with a Petition for Attorneys' fees under Section 16. A quick recitation of the evidence demonstrates to the Arbitrator that Respondent terminated the Petitioner's benefits on April 28, 2018 which is roughly two months after Dr. Fernandez estimated that Petitioner should be able to return to full duty work. Petitioner was still on light duty restrictions from his treating physician, Dr. Gelman, at that time.

Section 19(k) states "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." 820 ILCS 305/19(k).

It is the Arbitrator's opinion that Respondent's reliance on Dr. Fernandez's estimation that Petitioner be capable of full duty work in 60 days was not unreasonable or vexatious (though the proper channel for terminating benefits would have been through Respondent requesting a hearing pursuant to Section 19(b) – a "reverse 19b"). While this 60-day future release was speculative, the Arbitrator does not find Respondent's reliance on it unreasonable or vexatious. Dr. Fernandez is well-respected, and his opinions are afforded substantial weight.

The Arbitrator's opinion changes, though, when Dr. Fernandez issued his second Section 12 examination opinions. At this time, Dr. Fernandez noted that Petitioner's condition had not improved and that his symptoms were still severe. Dr. Fernandez acknowledged that Petitioner could not return to full duty work. Dr. Fernandez recommended light-medium work. Despite the opinions expressed by Dr. Fernandez regarding Petitioner's work status, Respondent still did not pay TTD benefits.

It was not until September 27, 2018- over 21 weeks later - when Petitioner had surgery with Dr. Gelman – that Respondent started paying weekly TTD benefits again. The Arbitrator notes that Respondent did not yet pay the accrued, back-owed TTD benefits at that time. Further, it was not until September 12, 2019 – over 72 weeks later from the start of the unpaid TTD period or over 52 weeks later from when weekly TTD benefits were reinstated - that that the Respondent finally made payment for TTD owed for the period of April 28, 2018 through September 16, 2018.

The Arbitrator finds Respondent's continued withholding of TTD benefits after Dr. Fernandez issued his second Section 12 opinion to be unreasonable. The Arbitrator finds it wholly unreasonable to rely on Dr. Fernandez's opinion that the Petitioner could return to full duty work within 60 days without a follow-up exam but then continue to delay the payment of TTD benefits even after Dr. Fernandez suggest light duty work. The Respondent has offered no medical opinion into evidence that would serve as a basis for continuing to delay TTD benefits after Dr. Fernandez suggested light duty work.

Following the Petitioner's second surgery on September 27, 2018, the Respondent paid ongoing weekly TTD benefits until November 22, 2018, when the Respondent again, without any medical basis, terminated the Petitioner's TTD benefits. November 22, 2018 was the last time TTD benefits were paid in a timely fashion. Petitioner was still on light duty restrictions at this time. Respondent offered no medical opinion from Dr. Fernandez or any other Section 12 examiner that placed Petitioner at full duty work. This persisted through January 14, 2019 when Petitioner was released to full duty by Dr. Fernandez. It is noteworthy that Dr. Fernandez did not dispute Petitioner's prior restrictions. TTD for that period of November 22, 2018 through January 14, 2019

was paid on February 27, 219 – 14 weeks from the start of the period at issue or over 6 weeks from the time when Petitioner was released to full duty by Dr. Fernandez.

Section 19(l) states that "if the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(1).

Penalties imposed under section 19(l) are "in the nature of a late fee." *McMahan v. Industrial Comm'n*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Moreover, the award of section 19(l) penalties is mandatory "if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *Id.* "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, 20, 959 N.E.2d 772. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865 (1982).

The Arbitrator finds that Petitioner made several explicit demands for payment. Further, Respondent offered no evidence of any attempt to explain why benefits were not being paid timely. Respondent, further, did not submit any evidence that Respondent was capable of offering work within Petitioner's restrictions after light duty work was no longer offered after January 6, 2018. Again, the opinions of Dr. Fernandez were known to Respondent since June of 2018. There is no medical opinion after June 2018 capable of serving as the basis for Respondent to have delayed payment of TTD.

Section 16 of the Act states, in pertinent part, that whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of … unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier. 820 ILCS 305/16.

Respondent's argument against penalties and attorneys' fees seems to be two-fold, that Respondent overpaid on its payment of uncontested TTD benefits and that the employer acted reasonably. Neither is persuasive here. First, the Arbitrator refers to his findings above regarding the stipulated TTD periods and amounts payable - and further notes the Arbitrator's awarding of

TTD for the two-week disputed period in January 2019. Even with a minor weekly overpayment when Respondent's TTD liability is calculated no overpayment exists currently. Respondent owes 905.00 in additional TTD benefits after consideration of amounts already paid.

The Arbitrator acknowledges that Respondent paid the lion's share of TTD payments prior to hearing and is not accused of delaying payment of any medical benefits under Section 8(a). This does not absolve Respondent of liability for penalties as a result of its unreasonable delay in paying TTD benefits under Section 8(b). "The Act provides an income stream to an injured worker, who is typically left without income while he is disabled." *Jacobo v. Ill. Workers' Comp. Comm'n*, 2011 IL App (3d) 100807WC, 27, 959 N.E.2d 772, 783. Respondent delayed the payment of more than 20 weeks of TTD for a period of 52 to 72 weeks depending on whether you start counting from the start of the owed TTD periods at issue or the end. Respondent also delayed the payment of over 7 weeks of TTD for a similar period of 6 to 14 weeks. No medical opinion is in evidence that releases Respondent of its responsibility to pay TTD to a Petitioner that had not yet reached maximum medical improvement.

Respondent's reliance on *Sarlo v. ABM Industries,* 2017 Ill. Wrk. Comp. LEXIS 140 – a commission decision from 2004 - is misplaced. The commission in *Sarlo* held that penalties were not appropriate where unpaid TTD was minimal, TTD overpayments were made, and that the Respondent had offered testimonial evidence of a long-standing offer of light-duty work within claimant's restrictions that was rejected by claimant. Again, there being no overpayment at issue in this matter, *Sarlo's* holding on that issue ais misplaced. This matter is further distinguishable from *Sarlo* as Respondent here has not offered any evidence that Respondent had work within Petitioner's restrictions for the TTD periods at issue. The matters at issue are distinguishable from *Sarlo.*

The Respondent appropriately argues that an employer's reasonable and good faith challenge to liability does not warrant the imposition of penalties citing *USF Holland v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805 (1st Dist. 2005) and that when an employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties are ordinarily not imposed. *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971-72 (3d Dist. 2009). See also *Global Products v. Illinois Workers Compensation Comm'n*, 392 Ill. App. 3d 408 (1st Dist. 2009)(setting aside penalties based upon employer's reasonable reliance on its Section 12 examination). The issue here is that Respondent cannot argue that it is relying on the medical opinion of its Section 12 physician when the evidence shows that the Section 12 physician had once against restricted Petitioner from work as of the date of the second Section 12 examination in June of 2018. Further, the Section 12 examiner did not – nor did any other physical - provide any further medical opinion that Petitioner could return to full duty work until January 15, 2019.

Weeks and months passed between the June 2018 Section 12 examination findings and the eventual payment of the back-owed TTD. TTD was reinstated on a weekly basis in late September of 2018 but the 20 plus week arrearage remained. A similar pattern was repeated again in November of 2018 though to a bit of a lesser degree as only slightly more than 8 weeks of TTD were at issue. Respondent has not offered any factual evidence to support its position that Respondent relied upon reasonable or conflicting medical opinions. It is the opinion of the

Arbitrator that Respondent had no basis to delay the payment of TTD after Dr. Fernandez provided his opinions in June of 2018 and thus acted unreasonably.

The Arbitrator, accordingly, finds that Petitioner has proven by a preponderance of the credible evidence that Respondent's actions were unreasonable or vexatious within the meaning of Sections 19(k) and 19(l) and Section 16 of the Act. The Arbitrator is not awarding penalties for the period of TTD of January 15, 2019 through January 28, 2019 as the Respondent could have reasonably relied on the opinions of Dr. Fernandez releasing Petitioner to full duty work after the third and final Section 12 examination. Further, the Arbitrator's calculation for Section 19(l) penalties begins on June 12, 2018 as Respondent could have reasonably relied on Dr. Fernandez's opinion regarding full duty release until that time.

The Arbitrator finds as follows concerning the amount of penalties:

- Under Section 19(k) the Arbitrator bases the penalty on 50% of the amount that was not paid on a timely basis (See *Jacobo v. IWCC*, cited above). In this case the amounts of $20,672.40 and $8,641.30 were not paid on a timely basis. Respondent's payment of a PPD advance in June of $2,371.92 will be subtracted. Accordingly, the penalty amount under Section 19(k) is 50% of $29,313.70 or $14,656.85.
- Under Section 19(l) the Arbitrator issues a penalty of $30 per day from the date of June 12, 2018 through September 12, 2019 and November 22, 2018 through February 27, 2019 which brings calculations to the maximum penalty of $10,000.00.
- Under Section 16, the Arbitrator awards Attorneys' fees of 20% of the combination of the penalties issued. 20% of 24,656.85 is $4,931.37.

N. Is Respondent due any credit?

The parties stipulated to the fact that Petitioner was paid $62,814.07 in TTD/PPD benefits as evidenced in the Request for Hearing Sheet (Arbitrator's Exhibit 1). Respondent is entitled to a credit for such payment against TTD payments due Petitioner in Section K above.

12/31/20

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC035264
Case Name	WHITE, SHARON v. STATE OF ILLINOIS MADDEN MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0596
Number of Pages of Decision	39
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jim Vainikos
Respondent Attorney	David Christensen

DATE FILED: 12/8/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHARON WHITE,

Petitioner,

vs. NO: 15 WC 35264

STATE OF ILLINOIS – MADDEN HEALTH CENTER,

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 the employer-employee relationship, accident, causal connection, medical expenses, temporary total disability, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

I. FINDINGS OF FACT

A. Background

Petitioner testified that she was hired by Respondent in April 1992. She stated that on August 31, 2015, she worked for Respondent as an Executive II. She described her duties as conducting policy meetings with hospital management and the leadership team, creating, changing, and rescinding policies as needed. She further stated that she would then distribute policies to the different hospital departments. On August 31, 2015, Petitioner was 57 years old.

Petitioner testified that in August 2015, she was also the vice president and a steward for the American Federation of State, County and Municipal Employees (AFSCME) Local 386, the union representing state employees. She explained that her local unit represented State of Illinois employee union members at Madden as well as an entity called OCAPS and the Office of Inspector General (OIG). She added some of these employees worked in an administration building, while others worked in an adjacent pavilion building. Petitioner described her union

duties as generally enforcing the union contract and speaking with State of Illinois Department management when issues arose. She testified that when State of Illinois Department management was contemplating pre-disciplinary proceedings against an employee, management often contacted her to reach an understanding or mediate disputes.

Petitioner stated that her meetings regarding union discipline and grievances were held on Respondent State of Illinois property. She later testified that she did not have set hours for her union duties, which would be undertaken as needed. She explained that she might spend two hours in a week on union duties and then might not have any for two weeks, depending on whether there were pre-disciplinary actions pending against a State of Illinois employee. She stated that she was not required to report these hours or activities to the union. She also stated that she did not have to sign out from Madden while performing union duties. She added that as a vice-president, she would always run decisions past union president Linda Hall. She explained that she did not have specific rules and regulations governing her union activities, but she did have training as both a steward and a member of the union's executive board, which also occurred during work hours but was funded by a per diem from the union. She further testified that Respondent could not remove her from her union position.

Petitioner also testified regarding the collective bargaining agreement (CBA) between AFSCME Council 31 and the State of Illinois, Department of Central Management Services. She described Article VI, Section 1, as providing that given appropriate notice with their supervisor, the employee is allowed reasonable time off with pay during work hours to attend the grievance meetings, labor management meetings, and negotiation of their own agency. She testified that under section 2A, the employer agreed that local representatives and officers and AFSCME shall have reasonable access to the premises of the employer, giving notice upon arrival to the appropriate employer representative. Petitioner further testified that Section 3 provided that "[l]ocal union representatives shall be allowed time off without pay for legitimate union business" and that such time off shall not be detrimental in any way to the employee's record.

Linda Hall, a cook and agent to the dietary manager for Respondent, as well as the president of AFSCME Local 386, testified on behalf of Petitioner. Ms. Hall testified that she was a negotiator and signatory of the CBA. She stated that the CBA provided that a union steward had the right to attend pre-disciplinary hearings and listen to an employee's complaint regarding any violation imposed by the employer. She also confirmed that the CBA gave union representatives the right to go to any department they represent to talk to a grievant or investigate a case. She further confirmed that some of the members of her bargaining unit worked for OCAPS and OIG, including an OIG employee with whom Petitioner met on August 31, 2015.

Ms. Hall also testified that she gave Petitioner specific tasks regarding union activities and Petitioner would report back to her. Ms. Hall stated that Petitioner normally needed to inform her supervisor when she was going to perform union duties. Ms. Hall clarified that with proper notice, Petitioner's supervisor could not stop her from performing union duties. She agreed that Respondent had not violated Article VI, Section 1 of the CBA in providing Petitioner time off to participate in a grievance hearing. She also opined that Article VI, Sections 2 and 3 of the CBA, which address permitting access to the premises for union activities and unpaid time

off for union activities, respectively, were not at issue in this matter insofar as Petitioner was provided access to the pavilion building to participate in the pre-grievance process.

Mike Ally, who served as Respondent's HR Director and Labor Relations Manager for the past 34 years and 7 months, testified on behalf of Respondent. He agreed that on August 31, 2015, Petitioner was representing a member of her local unit. He later testified that he was not aware of whether OIG employees were members of Local 386. He stated that the OIG office was located on a concourse for Respondent. He also stated that Madden Health Center employees did not go to that pavilion for Madden business. Mr. Ally testified that OIG was "the same agency as the Department of Human Services." He later stated that there was little relationship between Local 386 and OIG's employees and that the OIG was a separate entity responsible for investigating abuse and neglect. He further stated that Respondent did not tell Petitioner what time to go to or come from the OIG office, or what to do while she was there. Mr. Ally testified that Respondent had no control over Petitioner's performance of her union duties.

B. Prior Medical Treatment

Petitioner testified that in 2008, she injured her left shoulder which resulted in surgery. She stated that in 2010, she injured her left shoulder, which resulted in two surgeries in 2011 and 2012. She added that in 2010, she also injured her neck, but treatment recommended by her surgeon was not approved. She also sought chiropractic treatment from Dr. Steven Mather for back pain resulting from the 2010 injury. Petitioner testified that MRIs indicated that she had lumbar degenerative disc disease and lumbar herniation and that a spinal fusion had been recommended.

C. Accident

Petitioner testified that on August 28, 2015, an OIG bureau chief requested that she come over to the pavilion on August 31, 2015, to conduct a pre-disciplinary hearing for an OIG employee. She stated that the door to the pavilion had to be unlocked by OIG to gain admission. She later explained that the security was for "confidential reasons" and "some offices you can't just walk into." She added that this was the first time she had entered the pavilion. According to Petitioner, at approximately 9:30 a.m., on August 31, 2015, she and the employee used an office at the pavilion to meet privately about the pre-disciplinary hearing. Petitioner stated that she sat in a chair which broke. Petitioner testified that she flew backwards into a brick wall, striking her head, neck, back, and upper torso. The Arbitrator was shown a photograph which ostensibly depicted the chair, but it was not admitted into evidence as an exhibit. Respondent later had Petitioner identify a proposed exhibit as a photograph of the chair, but it was not introduced into evidence either. The Arbitrator and counsel appear to have agreed that this second photograph depicted a chair with legs broken on the right side, front and back.

Petitioner testified that she was knocked out for a few minutes. Petitioner added that the employee she had met asked whether she was okay and Petitioner replied that she was not. She further stated that the employee left the room and a nurse for OIG entered to administer treatment. Petitioner recounted that she was placed in a wheelchair. She indicated that she

wanted to be taken to Elmhurst, her hospital, rather than nearby Loyola Hospital. Petitioner testified that she was picked up for transportation by her husband.

Ms. Hall testified that on August 31, 2015, she was telephoned by the employee with whom Petitioner went to meet and was notified of Petitioner's fall. Ms. Hall stated that she went to the scene, where she observed Petitioner with a nurse and another person standing nearby. She described Petitioner as "shaking and like kind of out of it, like really bad."

D. Medical Treatment

On August 31, 2015, Petitioner presented at the Elmhurst Memorial Hospital emergency department, complaining of a headache, nausea, blurry vision, shoulder tenderness and neck pain, giving a consistent description of the incident. CT images of the head disclosed no evidence of calvarial fracture, coup/contrecoup intraparenchymal; contusion, or intercranial hemorrhage. A CT scan of the cervical spine disclosed no acute fracture or subluxation, but revealed mild degenerative changes, worst at C5-6 and C6-7, with moderate to severe asymmetric right-sided neuroforaminal stenosis at C5-6. Petitioner was diagnosed with a head contusion and cervical neck strain. Petitioner was taken off work for "2-3 days."

On September 1, 2015, Petitioner followed up with Dr. Laura Vetrone with no change in status.

On September 11, 2015, Petitioner saw Dr. Mather of M & M Orthopedics, whose impressions were of: (1) cervical strain with cervical degenerative disc disease; and (2) lumbar spondylolisthesis. Dr. Mather recommended physical therapy for Petitioner's neck and back, and possibly an MRI if her condition did not improve. Petitioner was taken off work until September 28, 2015.

On September 15, 2015, Petitioner visited Dr. Anthony DeLorenzo, D.O., with additional complaints of headache and vertigo, reporting that she was awakened with nausea and vomiting two nights earlier. The doctor recommended a neurological evaluation.

On September 28, 2015, Petitioner returned to Dr. Mather complaining of pain in her neck, low back, and right thigh. Following an examination and another review of the CT scans, Dr. Mather's impressions were of lumbar spinal stenosis and cervical degenerative disc disease. The doctor recommended continued therapy and took Petitioner off work pending its completion.

On October 6, 2015, Petitioner was seen by Dr. Kerry DiSanto of DuPage Medical Group, reporting that her vomiting and nausea had improved, but complaining of a constant dull headache which occasionally became severe and throbbing. Petitioner was assessed with post-concussive syndrome, chronic migraine without aura, and cervicalgia. Based on these symptoms, the doctor wanted to check a brain MRI.

On October 15, 2015, Petitioner followed up with Dr. DeLorenzo, who assessed Petitioner with headache and low back pain with no change in status.[1]

[1] The Decision and Respondent's Statement of Exceptions both refer to lumbar and spinal MRIs dated October 15,

On November 18, 2015, Petitioner was evaluated for physical therapy, which ended after 12 visits on January 8, 2016. Petitioner reported to the therapist that she had chronic back pain "even before the incident on 8/28/15." She also reported that her doctor told her prior to the incident that she would benefit from a spinal fusion, but she did not want to proceed yet.

By November 30, 2015, Dr. DiSanto noted that Petitioner's brain MRI was essentially normal, noting that Petitioner had an "empty sella," calling it a very common variant that was not causing any of Petitioner's symptoms.

On December 10, 2015, Petitioner returned to Dr. Mather, reporting that her neck and back pain had not improved. Petitioner also reported that Dr. DiSanto had ordered a brain MRI with normal results. Dr. Mather ordered cervical and lumbar spine MRIs.

On December 19, 2015, Petitioner underwent a lumbar spine MRI, for which the interpreting radiologist's impressions were of: (1) normal lumbar vertebral lumbar signal; (2) no lumbar disc extrusion or specific nerve root compression; and (3) degenerative facet osteoarthritis of the lower lumbar spine. On December 21, 2015, Petitioner underwent a cervical spine MRI, for which the interpreting radiologist's impressions were of: (1) multilevel spondylotic changes indenting the spinal cord, most pronounced at C4-5 and C6-7; and (2) multilevel neural foraminal narrowing, most pronounced at C5-6 on the right.

On January 9, 2016, Petitioner had an appointment at Grove Dental Services, during which she reported pain and a change in her bite following an accident and head injury. The note states that Petitioner may need a muscle deprogrammer.

On January 13, 2016, on referral from Dr. DeLorenzo, Petitioner began seeing Dr. Samuel Girgis with complaints of chronic sinus problems, sore throat, earache, and dizziness. Petitioner reported that her sinus symptoms began 20 years earlier. Dr. Girgis assessed Petitioner with: (1) vertigo; (2) concussion without loss of consciousness, sequela; (3) chronic pansinusitius; and (4) esophageal reflux.

On January 15, 2016, Petitioner reported to Dr. Mather that she could barely turn her neck. Dr. Mather reviewed Petitioner's cervical spine MRI, noting degenerative disc disease at C5-C6-C7, apparently the same as the 2014 MRI. He also reviewed the lumbar spine MRI, noting mild disc desiccation at L3-L4, L4-L5, and L5-S1 with facet arthropathy at L4-L5, which again appeared to be the same as the 2014 MRI. Dr. Mather recommended a cervical epidural steroid injection.

On January 22, 2016, Petitioner was seen by Dr. Martin Fetzer, D.O. of DuPage Medical Group, who noted Petitioner's two prior shoulder surgeries, "after which she was 5/10." Dr. Fetzer also noted that Petitioner had low back pain rated 2-3/10, but "[b]oth pains are worsened since the fall [on] 8/31/15." The doctor's impressions were that: (1) Petitioner had neck, right

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2015 being located in Petitioner's Exhibit 3. It appears that these records were printed on that date but dictated on November 13, 2014 and March 13, 2014. Moreover, there is no reference to MRIs from this date in the Section 12 report. The discrepancy does not affect the Commission's decision in this case.

upper limb, and low back pain since a work injury the prior August; (2) Petitioner's cervical imaging showed a right-sided disc bulge at C5-C6 which might account for her symptoms, as well as spondylolisthesis in the lumbar spine. Dr. Fetzer indicated that he would try an ESI at C7-T1 and would consider facet/medial branch blocks in the future.

On January 27, 2016, Petitioner underwent CT scans of temporal bones and sinuses on referral from Dr. Girgis. The interpreting radiologist's impressions were of: (1) an unremarkable temporal bone scan; and (2) a rightward deviation of the nasal septum.

On February 8, 2016, Petitioner followed up with Dr. DeLorenzo, complaining of pain in the low back and cervical spine. Petitioner reported that the current episode of pain started more than five years earlier, with a fall injury to the shoulder from an automatic door. However, Petitioner also reported head pain from a fall backward from a broken chair. The doctor recommended continued home exercise.

On February 17, 2016, Petitioner returned to Dr. Girgis, who noted that Petitioner's vertigo and esophageal reflux were improving.

On February 29, 2016, Petitioner saw Dr. Mather, reporting that she felt like she had to return to work due to financial constraints. Dr. Mather released Petitioner to work without restrictions and recommended an ergonomic chair.

On July 25, 2016, Petitioner followed up with Dr. Girgis, who found that Petitioner's vertigo was resolved. Dr. Girgis also found that Petitioner's chronic pansinusitis and esophageal reflux were controlled.

On November 22, 2016, Dr. Girgis noted that Petitioner's sinus symptoms and reflux had improved, but that Petitioner had an episode of dizziness one day earlier.

On January 16, 2017, Petitioner returned to Dr. Mather, complaining of neck and back pain. Dr. Mather reviewed Petitioner's MRIs again, noting mild degenerative disc disease in the cervical spine and minimal disc desiccation in the lumbar spine. Petitioner was assessed with fibromyalgia and referred for trigger point injections.[2]

E. Section 12 Examination by Dr. Thomas Gleason

On March 6, 2018, Petitioner underwent a Section 12 examination by Dr. Thomas Gleason at Respondent's request. Dr. Gleason recorded a history of the August 31, 2015 incident and Petitioner's subsequent treatment, reviewed Petitioner's treatment records and diagnostic studies, obtained new X-rays, and conducted a physical examination.

[2] The Decision and Respondent refer to Petitioner's Exhibit 6 containing an October 5, 2017 DuPage Medical Group treatment note, in which Petitioner ostensibly reported that her pain had worsened over the prior three months but that she could live with her current neck and shoulder pain. However, this note does not appear in any of the exhibits containing DuPage Medical Group's medical records or bills. Moreover, the note is not mentioned in Respondent's Section 12 report. The discrepancy does not affect the Commission's decision in this matter.

Dr. Gleason found no positive objective findings on physical examination with respect to the cervical spine and upper extremities. He opined that Petitioner presented without obvious signs of malingering or exaggeration. He also opined that there was no causal connection between Petitioner's current objective findings on diagnostic tests and the reported accident, characterizing the objective findings as the result of natural aging, primarily influenced by heredity and genetics. Dr. Gleason further opined that the prior treatment had been reasonable and necessary, but not causally connected to the August 31, 2015 injury. He added that no further treatment was required regarding Petitioner's cervical spine. Dr. Gleason concluded that Petitioner had no restrictions regarding her work and life capabilities and had reached MMI regarding any condition of the cervical spine related to the reported injury.

F. Additional Information

Petitioner claimed temporary total disability benefits for 26 weeks, representing the period from August 31, 2015 to March 1, 2016. Respondent agreed but disputed the underlying liability. Petitioner testified that neither her group insurance or the workers' compensation carrier had paid her medical bills.

Regarding her current condition of ill-being, Petitioner testified that she experienced cognitive and memory issues from a traumatic brain injury. She stated that she does not sleep well due to pain in her head, neck, and back. She also stated that she is hesitant to drive due to her difficulty in turning her neck. Petitioner further stated that her mouth and jaw had shifted, which causes her teeth to grind and makes her speech less clear than it used to be. She testified that she declined recommended narcotic medication and was self-treating with heat, ice, and chiropractic sessions. She later added that she had received treatment from her regular doctor after October 2017 for headaches, memory loss, back pain and neck pain, but these records were not submitted into evidence. Petitioner testified that she remained employed by Respondent in the same position at the same rate of pay.

II. CONCLUSIONS OF LAW

A. Employer-Employee Relationship

At trial, the parties stipulated that the parties were in an employer-employee relationship on the claimed accident date. Moreover, the issue is not marked as disputed in the Decision and the "Findings" section thereof specifically finds that the relationship existed. Nevertheless, in dicta, the Arbitrator found that an employer-employee relationship did not exist between the parties at the time of the injury. Given that Respondent stipulated to the employer-employee relationship and thereby may have affected whether Petitioner submitted evidence on the issue, the Commission reverses the Arbitrator's finding in the dicta of the Decision and finds that that the parties were in an employer-employee relationship on the claimed accident date as stipulated.

B. Accident

The Arbitrator found Petitioner failed to prove by a preponderance of evidence that she sustained an accident that arose out of and in the course of her employment which resulted in a

disabling injury. 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. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). "In the course of" employment refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). An injury "arises out of" one's employment if, at the time of the occurrence, the employee was performing acts she was instructed to perform by her employer, acts which she had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to her assigned duties. See *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204 (2003) (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). "An activity is incidental to the employment if it carries out the employer's purposes or advances its interests, either directly or indirectly." *Bolingbrook Police Department v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130869WC, ¶ 43 (citing *Sears, Roebuck & Co. v. Industrial Comm'n*, 79 Ill. 2d 59, 71-72). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989).

In the instant matter, Petitioner was injured during her normal work shift while on Respondent's property, thus acting within the course of her employment. Accordingly, the issue is whether Petitioner was engaged in activity which she might reasonably be expected to perform incident to her employment, which encompasses activity directly or indirectly advancing Respondent's interests. The fact that an employee of a Respondent is injured while engaged in union-related activity does not automatically preclude recovery where there is sufficient evidence to demonstrate that some benefit accrued to Respondent as a result of the union's activity. Rather, focus is appropriately placed on the incidental benefit to Respondent, if any. See *Schultheis v. Industrial Comm'n*, 96 Ill. 2d 340, 347-48 (1983); see also *Walden v. Industrial Comm'n*, 76 Ill. 2d 193, 195 (1979) (claimant failed to establish that his union activity in Cleveland was in the course of and arose out of employment); *Giganti v. Industrial Comm'n*, 73 Ill. 2d 1, 6 (1978) (claimant injured in an altercation failed to prove she was acting pursuant to authority under the collective bargaining agreement).

In denying Petitioner's claim, the Arbitrator in this matter relied upon the Commission's decision in *Mitchell v. Construction Cleaning Company*, Ill. Workers' Comp. Comm'n, No. 11 WC 08571, 15 IWCC 598 (July 30, 2015), *aff'd sub nom*. *Mitchell v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161052WC-U (unpublished order under Illinois Supreme Court Rule 23). In *Mitchell*, the employee was a local union steward who received a call on her lunch hour from a union BA who advised her that there were "non-union people working on the job next door" and asked her "to check this out." On her way back from checking it out, Petitioner slipped on ice and injured her knee. The Commission affirmed the Arbitrator's findings of no accident in that Mitchell offered no proof that her union activity was allowed by the CBA and that Petitioner's off-site activity thus did not arise out of and was not in the course of her employment. *Id*.

This instant case is easily distinguishable from the facts of *Mitchell*. In this case, Petitioner was injured on Respondent State of Illinois property while assisting another employee of the Respondent State of Illinois regarding a pre-disciplinary hearing, an activity expressly

authorized by the CBA between the State of Illinois and AFSCME Council 31. Unlike in *Mitchell*, Ms. Hall's testimony in this case additionally establishes that Petitioner and Respondent both acted within the terms of Article VI of the CBA regarding Petitioner's union activity in this matter. Some union activities, such as participation in grievance procedures, exist to prevent strife between labor and management. See *Cook v. Caterpillar Tractor Company*, 85 Ill. App. 3d 402, 406 (1980). Petitioner also testified without rebuttal that when management was contemplating pre-disciplinary proceedings against an employee, management often contacted her to reach an understanding or mediate disputes. The Commission therefore concludes that Respondent State of Illinois directly benefits from Petitioner's participation in the pre-disciplinary process as provided for in the CBA between Respondent and AFSCME Council 31. As noted above, an employee's activity is incidental to the employment if it carries out the employer's purposes or advances its interests, *either directly or indirectly*. *Bolingbrook Police Department*, 2015 IL App (3d) 130869WC, ¶ 43. Accordingly, the Commission concludes that Petitioner's accident, suffered upon sitting upon an apparently defective chair on Respondent's property while engaged in the pre-disciplinary process which benefits Respondent, activity which Respondent contemplated and was aware of under its CBA with AFSCME Council 31, occurred in the course of and arose out of Petitioner's employment.

C. Causal Connection

Having determined that Petitioner suffered an accident on August 31, 2015, the Commission addresses whether Petitioner established a causal connection between the accident and her current conditions of ill-being. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land 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 her 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 she can show that a work-related injury played a role in aggravating her 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). Moreover, "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). A claimant also may rely on the "chain of events" in her 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.

Petitioner claims continuing conditions of ill-being to her head, jaw, neck and back as result of her work accident. The Commission addresses each of these claims in turn.

Petitioner testified that she was knocked out for a few minutes after she struck her head in her fall on August 31, 2015. Petitioner presented at the Elmhurst Memorial Hospital emergency department, complaining in part of a headache, nausea and blurry vision. However, CT images of the head disclosed no evidence of calvarial fracture or intercranial hemorrhage and Petitioner was diagnosed in part with a head contusion. On September 15, 2015, Petitioner sought treatment from Dr. DeLorenzo for additional complaints of headache and vertigo, reporting that she was awakened with nausea and vomiting two nights earlier. On October 6, 2015, Petitioner was seen by Dr. DiSanto, reporting that her vomiting and nausea had improved, but complaining of a constant dull headache. Dr. DiSanto diagnosed Petitioner with post-concussive syndrome, chronic migraine without aura and ordered a brain MRI, which was interpreted as essentially normal. On January 13, 2016, on referral from Dr. DeLorenzo, Petitioner began seeing Dr. Samuel Girgis with complaints of chronic sinus problems, sore throat, earache, and dizziness. Petitioner reported that her sinus symptoms began 20 years earlier and Dr. Girgis assessed Petitioner with: (1) vertigo; (2) concussion without loss of consciousness, sequela; (3) chronic pansinusitius; and (4) esophageal reflux. Petitioner underwent CT scans of her temporal bones and sinuses, with the interpreting radiologist having impressions of: (1) an unremarkable temporal bone scan; and (2) a rightward deviation of the nasal septum. By July 25, 2016, Dr. Girgis found that Petitioner's vertigo was resolved and her chronic pansinusitis and esophageal reflux were controlled.

Based on this record, while Petitioner previously had sinus problems, she consistently suffered from issues related to her head after the accident, initially being diagnosed with a head contusion, but subsequently diagnosed with post-concussive syndrome, chronic migraine, and ultimately vertigo, which ultimately resolved by July 25, 2016. Petitioner testified that she currently experienced cognitive and memory issues from a traumatic brain injury. However, Petitioner's treatment records, particularly the brain MRI, do not support this complaint. Accordingly, the Commission finds that Petitioner proved a causal connection between her accident and the condition of ill-being of her head through July 25, 2016.

Petitioner testified that her mouth and jaw had shifted, which causes her teeth to grind and makes her speech less clear than it used to be. However, Petitioner did not report any issue with her jaw until January 9, 2016, at which point the dentist noted only that Petitioner may need a muscle deprogrammer. Petitioner provided no testimony or evidence that she was provided with a muscle programmer for diagnostic or therapeutic purposes. Given this record, the Commission concludes that Petitioner failed to establish a causal connection between her accident and the current condition of her jaw.

Petitioner testified that she injured her neck in 2010, but treatment recommended by her surgeon was not approved. After the August 31, 2015 accident, Petitioner complained of neck pain at the Elmhurst Memorial Hospital emergency department, but a CT scan of the cervical spine disclosed no acute fracture or subluxation, finding mild degenerative changes, worst at C5-6 and C6-7, with moderate to severe asymmetric right-sided neuroforaminal stenosis at C5-6. Petitioner was diagnosed with a cervical neck strain. On September 11, 2015, Dr. Mather diagnosed cervical strain with cervical degenerative disc disease and recommended physical therapy for Petitioner's neck. On December 10, 2015, Petitioner reported that her neck pain had not improved, causing Dr. Mather to order a cervical spine MRI, for which the interpreting

radiologist's impressions were of: (1) multilevel spondylotic changes indenting the spinal cord, most pronounced at C4-5 and C6-7; and (2) multilevel neural foraminal narrowing, most pronounced at C5-6 on the right. On January 15, 2016, Petitioner reported to Dr. Mather that she could barely turn her neck, but Dr. Mather interpreted the MRI as apparently the same as a 2014 MRI and recommended a cervical epidural steroid injection. On January 22, 2016, Petitioner was seen by Dr. Fetzer, who noted that Petitioner had neck pain since her work injury and Petitioner's cervical imaging showed a right-sided disc bulge at C5-C6 which might account for her symptoms. Dr. Fetzer indicated that he would try an ESI at C7-T1 and would consider facet/medial branch blocks in the future. On February 8, 2016, and January 16, 2017, Petitioner continued to complain of neck pain. Dr. Mather reviewed Petitioner's MRIs again, assessed Petitioner with fibromyalgia and referred her for trigger point injections.

Respondent's Section 12 examiner, Dr. Gleason, focused his examination on Petitioner's cervical spine and upper extremities. He opined that Petitioner presented without obvious signs of malingering or exaggeration, but that there was no causal connection between Petitioner's current condition and the accident, characterizing the objective findings as the result of natural aging, primarily influenced by heredity and genetics.

The record establishes that Petitioner had a prior condition of ill-being regarding her neck, but Petitioner was working for Respondent without restrictions prior to the August 31, 2015 accident. Thereafter, Petitioner treated for consistent complaints of pain related to her cervical spine. Dr. Fetzer noted a right-sided disc bulge at C5-C6 which might account for her symptoms. Although Dr. Mather did not interpret Petitioner's cervical MRIs as showing significant change, he ultimately diagnosed Petitioner with fibromyalgia. Dr. Gleason's opinions are unpersuasive given the chain of events, the acknowledgement that Petitioner showed no signs of malingering, and the lack of any discussion of whether the work accident aggravated Petitioner's condition of ill-being. Accordingly, the Commission concludes that Petitioner proved that the current condition of ill-being of her neck is causally connected to the August 31, 2015 accident aggravating the pre-existing condition of her neck.

Regarding the lumbar spine, Petitioner testified that MRIs indicated that she had lumbar degenerative disc disease and lumbar herniation before her current work accident. She also testified that a spinal fusion had been recommended. She further sought chiropractic treatment for back pain resulting from the 2010 injury. Petitioner did not immediately report back pain after the accident, but on September 11, 2015, Dr. Mather diagnosed her in part with lumbar spondylolisthesis and recommended physical therapy for her back. On September 28, 2015, Petitioner complained of pain in her low back. Dr. Mather noted lumbar spinal stenosis and recommended continued therapy. On December 10, 2015, after Petitioner reported that her back pain had not improved, Dr. Mather ordered a lumbar spine MRI, for which the interpreting radiologist's impressions were of: (1) normal lumbar vertebral lumbar signal; (2) no lumbar disc extrusion or specific nerve root compression; and (3) degenerative facet osteoarthritis of the lower lumbar spine. On January 15, 2016, Dr. Mather reviewed the lumbar spine MRI, which he interpreted as the same as Petitioner's 2014 MRI. However, on January 22, 2016, Dr. Fetzer noted that Petitioner had low back pain which had worsened since the work accident. On February 8, 2016, and January 16, 2017, Petitioner continued to complain of back pain, which along with Petitioner's neck pain resulted in Dr. Mather diagnosing Petitioner with fibromyalgia.

Given the record, similar to the treatment record for the cervical spine, the Commission concludes that Petitioner proved that the current condition of ill-being of her back is causally connected to the August 31, 2015 accident aggravating the pre-existing condition of her back.

D. Medical Expenses

The Commission next addresses Petitioner's necessary reasonable expenses. Section 8(a) of the Act requires employers to pay all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of the work-related injury. 820 ILCS 305/8(a) (West 2014). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)). However, the employee is only entitled to recover for those medical expenses which are reasonable and causally related to his industrial accident. *Second Judicial District Elmhurst Memorial Hospital*, 323 Ill. App. 3d at 764 (citing *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 389 (1981)). The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 267 (2011). If the employer fails to introduce any evidence to suggest that services rendered were not necessary or that the charges were not reasonable, an award to a claimant who presents some evidence in support of the award will be upheld. *Max Shepard, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 893, 903 (2004); *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 718 (1993).

Petitioner listed her claimed medical expenses in an attachment to the Request for Hearing. Respondent generally disputed liability, but raised no specific objection to the medical bills. Respondent also claimed in the Request for Hearing that it paid an "unknown" amount of Petitioner's medical expenses through its group medical plan. However, Petitioner testified that the group plan declined to pay for any of her treatment and Respondent submitted no evidence to the contrary. Given the Commission's conclusions regarding causal connection, the Commission further concludes that Petitioner is entitled to an award of the medical expenses stated in the attachment to the Request for Hearing pursuant to sections 8(a) and 8.2 of the Act, excepting the November 22, 2016 charges from Dr. Girgis & Associates and the January 9, 2016 charges from Grove Dental Associates.

E. Temporary Total Disability

The Commission turns to address Petitioner's claim for temporary total disability (TTD) benefits. In the Request for Hearing, Petitioner claimed TTD representing the period from August 31, 2015 to March 1, 2016, a period of 26 and 2/7ths weeks. Respondent agreed, while disputing liability. Having found liability in this case, the Commission awards the TTD benefits Petitioner claimed in the Request for Hearing.

F. Permanent Partial Disability

Lastly, the Commission addresses Petitioner's claim for permanent partial disability (PPD) benefits. The Commission bases its determination of the level of PPD benefits upon factors set forth in the Act, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

In this case, the Commission gives no weight to factor (i), as no impairment report was submitted. The Commission gives little weight to factor (ii), as Petitioner's occupation as an Executive II is not physically demanding. The Executive II position may require the sort of cognitive ability Petitioner claims to have lost, but as noted earlier, there is no evidence in the treatment records that Petitioner suffered a traumatic brain injury. The Commission gives some but not great weight to factor (iii), as Petitioner was 57 years old at the time of her injury and may now have only a few years of work remaining before retirement. The Commission gives no weight to factor (iv), as Petitioner remains employed by Respondent in the same position at the same rate of pay. Petitioner also did not submit additional evidence regarding future earnings. The Commission places some weight on factor (v), as Petitioner's current complaints of neck and back pain find support in the treatment records.

Ultimately, Petitioner sustained an aggravation of her pre-existing cervical and lumbar spinal conditions, has received conservative treatment, and did not testify to significant disability regarding the activities of daily life beyond a hesitancy driving an automobile. Accordingly, the Commission awards PPD benefits to the extent of 5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner and Respondent were in an employer-employee relationship on August 31, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner sustained an accident on August 31, 2015 that arose out of and occurred in the course of employment.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current conditions of ill-being regarding her neck and back are causally related to the accident, while the condition of ill-being regarding Petitioner's head was causally related to the accident through July 25, 2016.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services to the medical providers as stated in the attachment to Arbitrator's Exhibit 1, pursuant to §§8(a) and 8.2 of the Act, excepting the November 22, 2016 charges from Dr. Girgis & Associates and the January 9, 2016 charges from Grove Dental Associates.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

the sum of $1,147.70 per week for the period from August 31, 2015 to March 1, 2016, a period of 26 and 2/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $755.22 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 5% 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) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

December 8, 2021

d: 11/4/21
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0596
NOTICE OF ARBITRATOR DECISION

WHITE, SHARON Case# **15WC035264**
Employee/Petitioner

ST OF IL - MADDEN MENTAL HEALTH CENTER
Employer/Respondent

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

If the Commission reviews this award, interest of 1.79% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0139 CORNFIELD & FELDMAN LLP
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5604 ASSISTANT ATTORNEY GENERAL
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2101 S VETERANS PARKWAY
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SPRINGFIELD, IL 62794-9255

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

OCT - 7 2019

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

Sharon White
Employee/Petitioner

v.

State of Illinois – Madden Mental Health Center
Employer/Respondent

Case # **15 WC 35264**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **May 23, 2019 and September 26, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 21, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$89,520.78** the average weekly wage was **$1,721.55**.

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

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

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

Respondent shall be given a credit of **$0** for TTD, $-- for TPD, $-- 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

DENIAL OF BENEFITS

Workers' compensation benefits are denied as Petitioner failed to present sufficient, credible evidence that her injury arose out of and during the course of work performed for Respondent-Madden. The evidence admitted at trial shows that pursuant to *Mary Mitchell, Petitioner v. Constr. Cleaning Co., Respondent*, 11 IL. W.C. 008571 (Ill. Indus. Com'n July 30, 2015) the Petitioner's injury did not occur during the course of her employment and that it did not arise out of her employment as Petitioner was not instructed to perform the grievance hearing by Respondent Madden Petitioner did not have a common law or statutory duty to perform such acts and the union grievance hearing was not an act which might be reasonably expected to be performed incident to her Madden assigned duties as a policy distributor.

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

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

David A. Kane

Signature of Arbitrator

October 7, 2019
Date

OCT 7 - 2019

STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sharon White Case # **15 WC 35264**
Employee/Petitioner

v. Chicago – Arb. David Kane

State of Illinois – Madden Mental Health Center
Employer/Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

This action was pursued under the Illinois Workers' Compensation Act ("Act") by the Petitioner-Employee, Sharon White, and sought relief from the Respondent-Employer, State of Illinois – Madden Mental Health Center, ("Madden").

On May 23, 2019, a hearing was held and on September 26, 2019 proofs were closed before Arbitrator David Kane in Chicago, Illinois. Attorney Jim Vainikos represented the Petitioner. The Illinois Attorney General's Office represented the Respondent.

A. Summary of Petitioner's Testimony at Trial

On August 31, 2015, Petitioner was an Executive II for Madden. [Tx7-8]. Petitioner worked from seven a.m. to three p.m. Monday through Friday. [Tx8]. She is required to sign in and out. [Tx49]. Petitioner was a policy distributor and conducted policy meetings, worked with managers and the leadership team to

formulate, change and rescind policies and would distribute those policies. [Tx8]. Petitioner's Madden supervisor at that time was Kent Martin. [Tx59].

Petitioner was the Vice President and a Steward for the American Federation of State County and Municipal Employees ("AFSCME"). AFSCME is the Union for State employees. Petitioner was a member of Local 386. AFSCME covers employees of Madden as well as employees of the Office of Clinical Administrative and Program Support ("OCAP") which operated the pharmacy [Tx11]; and employees of the Office of the Inspector General (OIG). [Tx10]. Petitioner testified that OIG employees were located in Pavilion 12 "which is like adjacent to our Administration Building." [Tx11].

Petitioner's duties as Vice President of the union included enforcing the contract, speaking with management regarding various issues and pre-disciplinary hearings, [Tx13]. Petitioner's duties as an union Steward included covering grievances, pre-disciplinary meetings and employee problems with management. [Tx12].

Union meetings could take place anywhere and could occur on the property of Madden Mental Health Center [Tx14]. Union duties could be performed at any time. [Tx48]. The amount of hours she performed union duties varied. [Tx49]. Linda Hall was above the Petitioner in the Union and Petitioner "would never like make a decision on my own without running it past her." [Tx50]. Petitioner did not have to report how many hours she performed union duties to the Union. [Tx51]. Petitioner is not required to account for the time she spends on union activities to the Union or to Madden. [Tx52-53]. When performing union duties for a grievance Petitioner had to turn in copies of paperwork to Administration, Labor and the Union. [Tx51]. Petitioner later testified that she was required to inform her supervisor at Madden when she was taking time off for union activities. [Tx60]. However, Petitioner confirmed that her Madden supervisor could not refuse to

allow her to take time to perform the union duties. [Tx60]. Petitioner confirmed that no one at Madden could remove her from her union positions. [Tx61].

Petitioner testified that she was not given any rules or procedures by the Union [Tx54] but later testified that she was sent to training [Tx55] and was given a manual on how to perform grievances. [Tx56-57]. Petitioner testified that the training was eight hours a day. [Tx57]. Petitioner was not paid by Madden for this time but was given a per diem from the Union. [Tx58].

Respondent's Exhibit #5 was Article VI of the AFSCME Union Contract dealing with union activities during work hours. [Rx5, Tx15-16]. She is familiar with this contract. Petitioner testified that Section 1 of Article 6 states "the employee is given appropriate notice with their supervisor, be allowed reasonable time off with pay during work hours to attend the grievance hearings…" [Tx 16]. Petitioner explained that Section 2(a) states "The employer agrees that local representatives and officers and AFSCME, State Representatives, shall have reasonable access to the premises of the employer, giving notice upon arrival to the appropriate employer representative." [Tx17]. Petitioner testified that Section 3 states "Local union representatives shall be allowed time off without pay for legitimate union business…" [Tx18]. Petitioner confirmed that if she was "leaving the building and you are going to like a training or are going to Springfield for negotiations…" that would be non-paid time for which Madden had a particular code. [Tx53-54].

On August 28, 2015, the OIG Bureau Chief Donny Williams went to Respondent's Administrative building looking for the Petitioner. Jacqueline Young, the Workers' Compensation Coordinator for Madden showed Mr. Williams where Petitioner was. [Tx21]. Mr. Williams asked Petitioner to come to the OIG offices in Pavilion 12 on Monday August 31st to perform a pre-disciplinary hearing for "his employee Meghan…Adams." [Tx19]. Petitioner

testified that Pavilion 12 is part of the "Madden Complex" and OIG had permanently stationed employees in the "Madden Facility." [Tx19-20].

On August 31, 2015, Petitioner arrived at work at seven a.m. in the Administrative Building [Tx23]. At 9:30 a.m. Petitioner went to "Pavilion 12, OIG." [Tx22]. Petitioner had never been there before. [Tx62]. Petitioner needed to be let in. Petitioner met Meghan, who she had never met before. [Tx22/27]. Petitioner and Meghan went to a private room [Tx22] which was an empty office [Tx28] containing a desk and two chairs. [Tx64]. Three of the four walls were drywall and one wall was brick. [Tx64]. The Petitioner sat in a chair in front of the desk. [Tx30]. Petitioner's back was to the brick wall. [Tx65]. It was not a wheeled chair and its legs broke. [Tx30/32]. Respondent's Exhibit 6 is a photo of the chair she was sitting in. [Tx67]. The right side legs folded under the rest of the chair. [Tx67]. Petitioner claimed she flew backwards into a brick wall behind her. [Tx29-30]. Petitioner admitted she does not know how she went backward. [Tx69]. Petitioner hit her head and her whole upper torso. [Tx30].

Petitioner testified that she hit the floor and was knocked out for minutes. [Tx33]. Meghan asked if she was ok, the Petitioner responded no and Meghan went for help. [Tx34]. Petitioner did not know any of the people who responded. [Tx33]. Petitioner was put in a wheel chair. [Tx33]. Someone called Ms. Hall. [Tx72].

Petitioner testified that Respondent's Exhibit 1 was her accident report in which it states that she "Hit head on brick wall, injured my neck, back, head, bit my tongue on both sides." [Tx34]. Petitioner was taken to Elmhurst Hospital by her husband. [Tx35].

Petitioner remains employed by Madden in the same position. [Tx44]. She current earns more money than at the time of the injury. [Tx44].

B. Testimony of Linda Hall Witness for Petitioner [Tx81].

Ms. Linda Hall ("Hall"). Hall is employed by Madden as a dietary manager and cook. [Tx82]. In 2015 she was also the local president of AFSCME Local 386. [Tx83]. Hall testified that Local 386 covers employees from several agencies, including OIG, OCAPS and the State Police. [Tx86]. Hall testified that the Petitioner was a steward for employees of OIG and employees of Madden. [Tx91]. Hall testified that it is common for stewards to represent people from more than one agency. [Tx91]. Hall confirmed that Meghan was a member of their Local. [Tx90].

Hall is familiar with the AFSCME contract, was part of the bargaining for the contract and signed it. [Tx83-84]. It is her interpretation that Article V [the Arbitrator notes Hall almost certainly meant Article VI] provides that "any person that's an active Union steward or has the right to either go to Pre-Ds, listen to the grievant's complaint in regards to any violation that the State has imposed." [Tx85]. It is her understanding that Sections one and two "gives us the right to go to any department that we represent and be able to talk to the grievant or to investigate…" [Tx85].

Hall is familiar with and has worked with the Petitioner. [Tx83]. Hall was informed of the injury the day it occurred. [Tx87]. Hall also had to be let into the offices of the OIG. [Tx88]. Hall observed the Petitioner "shaking and like kind of out of it, like really bad." [Tx89]. Hall asked the Petitioner if she was ok and Petitioner told her she was really hurt. [Tx89]. Hall then left. [Tx89].

Hall confirmed that the Petitioner was required to report to her and that Hall gave her specific tasks to perform. [Tx92]. Hall confirmed that Madden could not tell the Petitioner she could not perform her union duties. [Tx94]. Hall confirmed that Petitioner was given time off with pay to attend the Pre-disciplinary meeting. [Tx96]. Hall confirmed that Section 1 of Article VI was not violated. [Tx96]. Hall also confirmed that Section 2 of Article was not violated. [Tx97]. Hall also

confirmed that Section 3 of Article VI did not apply to these circumstances. [Tx97].

C. Testimony of Mike Ally Witness for Respondent [Tx100].

Mr. Mike Ally ("Ally") is the HR Director and Labor Relations Manager for Madden. He has worked there for 34 years. [Tx101]. Ally is responsible for the seven unions that interact with Madden. [Tx101]. The seven unions are: AFSCME, Illinois Nurses' Association, Illinois Federation of Public Employees, Teamsters and the Trades Union, and the Oil and Fireman Union. [Tx106]. The OIG is a separate entity [Tx107] and he does not know if employees of OIG are members of Local 386. [Tx107].

On August 31, 2015, Petitioner, as part of her union activities, was representing a member of her Local. [Tx101-102]. The member was an employee of the OIG. [Tx102]. Petitioner was asked to perform those duties by the member. [Tx102].

The union activities took place at the Office of the Inspector General which is located near Madden. [Tx102-103]. Ally described its location as "I guess if you could compare it to if you walked out the Thompson Center way to Randolph Street, then you go to the Bilandic Building, that would be the distance from Madden Center to where the Office of the Inspector General is." [Tx103]. Ally confirmed that Madden employees do not go to the OIG building. [Tx103]. Ally confirmed that OIG is a separate entity. [Tx107].

Ally confirmed that Madden has no control over Petitioner's union activities. [Tx104-105]. Ally testified that Petitioner's Madden supervisor could have denied Petitioner's request to perform her union duties but only under exceptional circumstances. [Tx104]. Ally confirmed that no one from Madden would have told her where to go, when to be there, when to come back or what to do there. [Tx104]. No one from Madden was at the hearing. [Tx105].

D. **Summary of Petitioner's Medical Treatment Based Upon Petitioner's Testimony and Medical Records**

Petitioner sought treatment that same day at Elmhurst Memorial Hospital. [Px1]. She complained of head and neck pain. She underwent a CT scan of her head which was normal and a CT scan of her cervical spine which showed no acute injuries but mild degenerative changes at C5-7 and disc bulges from C3-6. [Px1]. Petitioner was diagnosed with a head contusion and cervical strain.

On September 1, 2015, Petitioner sought follow up treatment now complaining of nausea and blurred vision. Her diagnosis remained the same.

On September 11, 2015, she returned for treatment and now reported that she had lost consciousness. It was noted that she had previously been seen for low back pain, left leg pain and "Is known to have L4-5 spondylolisthesis ... and degenerative disk disease at L5-S1 with a small right L5-S1 disk herniation." [Px2] She was diagnosed with a cervical strain, lumbar spondylolisthesis and cervical degenerative disk disease. She was sent for physical therapy. [Px2]

On September 15, 2015, she returned for treatment with complaints of headache and vertigo. [Px3].

On September 28, 2015, she complained of neck pain, low back pain, right thigh pain. Her prior back conditions were again noted. She was diagnosed with lumbar spinal stenosis and cervical degenerative disc disease. She declined the recommended injections and physical therapy was again suggested. [Px2].

On October 6, 2015, she sought treatment at DuPage Medical Group. She was diagnosed with a concussion, post concussion syndrome, chronic migraines and cervicalgia. [Px6].

Also, on October 6, 2015, she returned for treatment and was referred for an MRI. [Px3]. On October 15, 2015 she underwent both a lumbar and a cervical

MRI. The lumbar MRI showed: (1) no fracture, multilevel disc desiccation with mild L4-S1 disc height loss. (2) mild diffuse L5-S1 disc bulge; (3) mild bilateral neural foraminal stenosis at L5-S1 secondary to hypertropic facet arthropathy. The Cervical MRI showed a shallow right paracentral disc protrusion C6-7. [Px3].

On November 18, 2015 she returned for treatment which notes "Pt reports that she has had chronic back pain even before the incident on 8/28/15. Pt reports that she has been told by her MD that she would benefit from a spinal fusion (discussed prior to the incident) but patient does not wish to do this yet." [Px6].

From November 20, 2015 to January 8, 2016, Petitioner underwent a short course of physical therapy. [Px6].

On November 23, 2015, Petitioner underwent a brain MRI which returned normal results. [Px6].

On December 10, 2015, Petitioner returned for treatment with complaints of neck and low back pain. It was noted that "She states she cannot work. She does sedentary work." She was diagnosed with cervical and lumbar pain/strain syndrome after the work injury. She was sent for MRIs. It was noted that "If they are normal except for some disk degeneration, she should probably be returned to work." [Px6].

On December 19 and 21, 2015, she underwent MRIs of the lumbar and cervical spine. The lumbar spine MRI showed: (1) normal lumbar vertebral marrow signal; (2) no lumbar disc extrusion or specific nerve root compression; (3) degenerative facet osteoarthitits of the lower lumbar spine. The cervical MRI showed: (1) multilevel spondylotic changes indenting the spinal cord most pronounced at C6-7 and C4-5; (2) multilevel neural foraminal narrowing at C5-6 on the right.

On January 7, 2016, Petitioner underwent a brain MRI which showed: a partially empty sella. It was noted that "Your MRI is essentially normal. You have

an "Empty Sella." This is a very common variant and it is not causing any of your symptoms." [Px1].

On January 9, 2016, Petitioner sought treatment at Grove Dental [Px4]. It was noted she had pain in her bite and that the accident and head injury led to a change in her bite. [Tx29] [Px4].

On January 13, 2016, Petitioner sought treatment with Dr. Girgis and Associates with complaints of sinus problems, vertigo and tinnitus. [Px5]. {Tx40].

On January 15 and 22, 2016, Petitioner returned to DuPage Medical Group with continued neck and low back complaints and now shoulder complaints. The MRIs were reviewed and it was noted that "It appears to be the same as the 2014 MRI." She was diagnosed with neck and back pain post fall. Injections and physical therapy were again recommended. [Px6]. It was noted that "She had low back pain prior to the recent work injury, it was 2-3/10 and in the same areas. Both pains are worsened since the fall 8/31/15" [Px6].

On January 27, 2016, Dr. Girgis diagnosed the petitioner with a deviated septum. [Px5].

On February 8 and 16, 2016, Petitioner returned for treatment with continued low back and shoulder pain, headaches and dizziness complaints. It was noted that the shoulder and back pain predated the current injury date. She was diagnosed with a C5-6 disc bulge/herniated disc, brachial cervical neuritis, low back pain, sponydlolistheis. Again injections were recommended. [Px3 and 6].

On February 17, 2016, Petitioner returned to Dr. Girgis with complaints of dizziness, chronic sinus trouble. She was diagnosed with vertigo, chronic pansinusitis, esophageal reflux. [Px5].

On February 29, 2016, Petitioner returned to DuPage Medical Group with low back and neck complaints. It was noted that "She feels like she has to return to

work due to financial constraints." She was returned to work with no restrictions. [Px6].

On January 16, 2017 Petitioner returned to DuPage Medical Group with neck and low back complaints. Her MRIs were reviewed and it was noted that she had very mild degenerative disk disease in cervical spine. She was diagnosed with fibromyalgia. She was again referred for injections. [Px6].

On October 5, 2017 Petitioner returned to DuPage Medical Group with low back, neck, right shoulder, right thigh and knee pain. It was noted that "Pt has had low back pain for years but feels pain has worsened over past 3 months." X-rays where reviewed which showed: lumbar spine L4-5 spondylolisthesis and cervical spine C5-7 spondylosis with disc space narrowing. She was referred for physical therapy, MRIs and injections and it was noted that "Pt feels she can live with current neck and shoulder pain." [Px6].

On March 6, 2017 Petitioner underwent and independent medical examination by Dr. Gleason. [Rx4]. After a review of the records and an examination of the Petitioner the doctor noted that Petitioner's report of no prior injuries was not consistent with the records and found that:

> There is no causal connection between the claimant's current objective findings, on physical examination of which there are none, as well as objective findings on diagnostic tests, and the reported accident. To the degree there exists objective findings on diagnostic tests, these would be a result of natural aging wearing changes, primarily influenced by heredity and genetics. [Rx4 p8]

Dr. Gleason opined that the treatment had been reasonable but was not causally related to the reported injury and that no further treatment was necessary. The doctor released her to work full duty. [Rx4].

Petitioner testified that she currently has cognitive issues, memory problems and trouble sleeping due to her head, neck and back pain. [Tx44]. She refuses to take pain medication. [Tx44]. She has problems driving because she cannot turn her neck like she used to. [Tx45]. Petitioner testified that her mouth shifted and she now grinds her teeth. [Tx 45]. Petitioner testified that her speech is not as clear as it used to be. [Tx45].

Petitioner admitted she had prior injuries in 2008, to her left shoulder, and in 2010 to her right shoulder. [Tx72-73]. After prompting, Petitioner admitted she had injured her neck in the 2010 as well. [Tx74]. Petitioner admitted she never underwent or sought the treatment that had been recommended for her neck. [Tx74]. After further prompting, Petitioner admitted she had also injured her back in the 2010 injury. [Tx74]. Petitioner admitted she never underwent or sought the treatment that had been recommended for her back. [Tx76]. Petitioner also admitted that she had pre-existing degenerative disk disease and a pre-existing lumbar herniation. [Tx76]. Petitioner also admitted that her providers had recommended a spinal fusion prior to this injury. [Tx76]. Petitioner also confirmed that her providers post this injury stated there were no changes in her cervical and lumbar MRIs. [Tx76]. Petitioner also admitted that her post injury CT and MRI of her head had normal results. [Tx78].

II. CONCLUSIONS OF LAW

A. Petitioner's Injury did Not Arise Out of and During the Course Petitioner's Employment with Respondent.

An employee's injury is compensable under the Act only if it arises out of an in the course of the employment. 820 ILCS 305/2.

First, this Arbitrator notes that Article VI Sections 1-3 [Rx5] are not relevant to this analysis. Petitioner's own witness, Hall, clearly testified that there was no breach of these contractual provisions. [Tx97].

Second, the Arbitrator notes the distinction between AFSME membership and an employee-employer relationship. The evidence made clear an individual could be a member of AFSME and not an employee of Madden. Petitioner's witness, Hall, confirmed that their Local 386 includes employees from several agencies, including OIG, OCAPS and the State Police. [Tx86]. Petitioner and Hall distinguished between the employees of OIG and the employees of Respondent Madden. [Tx10, 91]. Petitioner had never met the OIG employee before, [Tx27], and did not know any of the employees who first responded to her injury. [Tx33]. The OIG Bureau Chief, not a Madden employee, asked for her to provide union services to an OIG employee, not a Madden employee. [Tx19]. Respondent's witness, Ally, also distinguished between union membership and employee status. He confirmed that there are seven unions that interact with Madden. [Tx106]. Ally, who is knowledgeable about the Madden employee's union membership confirmed that he is not familiar with OIG's employees' union status and does not know if employees of OIG are members of Local 386. All the witnesses agree that the union member being represented was an OIG employee not a Madden employee. [Tx19, 90, 102].

Third, the Arbitrator notes that the injury did not occur on Respondent Madden's property. Petitioner confirmed that the OIG and its employees were located in a separate building, [Tx11], that as a Madden employee she had never been to, [Tx62], and that she needed to be let in. [Tx22]. Hall, also a Madden employee, had to be let into the offices of the OIG. [Tx88]. Ally also confirmed that the union activities took place at the OIG office, which is in a separate building, [Tx102-103] and that Madden employees do not go to the OIG building.

[Tx103]. Mr. Ally confirmed that OIG is a separate entity. [Tx107]. But for Petitioner's union duties, Petitioner would not have been in the OIG building.

The Arbitrator finds that AFSME covers multiple agencies and covers non Madden employees, that the member being represented at the time was not a Madden employee but was an employee of OIG [Tx102]; that the union activities took place at the offices of the OIG not the offices/building where Madden is located [Tx102-103]; and that Madden employees do not go to that building and do not have access to that building. [Tx11 and 22]. The OIG is a separate and distinct entity, has separate and distinct employees and is at a separate and distinct location which but for her union duties the Petitioner would never have gone to.

ISSUE

The Arbitrator is presented with a single issue, whether an employee's injury arises out of or occurs during the course of her employment when she is performing union duties for an individual who is not an employee of the Respondent at the location of another employer/entity.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003).

IN THE COURSE OF

As relates to the requirement that the injury occur within the course of employment, in *Mary Mitchell v. Constr. Cleaning Co.*, 11 IL. W.C. 008571 (Ill. Indus. Com'n July 30, 2015). An employee asked permission from her boss to go to another job site to perform a union function and was injured coming back. The injury was held not compensable. In that claim "Petitioner testified that after lunch on … a Friday, she received a call from John Joe, the Union BA and Joe advised her that there were non-union people working on the job next door and he asked

her to check this out. Petitioner said that she … received permission to go next door and take a look." *Id.* Petitioner fell and was injured on her way back to the job site. The Commission stated

> Here, the risk of injury was connected with union business, not that of Respondent. Perhaps the CBA allows stewards to leave a job site to check credentials of workers on other job sites, but there was no proof on this.... In the course of employment refers to the time, place and circumstances surrounding the injury... Here, Petitioner was on the clock for Respondent, but the fall occurred on a sidewalk while she was returning to her work area after conducting union business. The injury did not occur in the course of Petitioner's employment by Respondent. *Mary Mitchell, Petitioner v. Constr. Cleaning Co., Respondent*, 11 IL. W.C. 008571 (Ill. Indus. Com'n July 30, 2015)

Just as in *Mary Mitchell v. Constr. Cleaning Co.*, the Petitioner in this matter, while on the clock for Respondent, was conducting union business, for a union member, at non employer location. Therefore the injury did not occur during the course of employment.

ARISING OUT OF

In regards to the arising out of requirement:

> 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. … Stated otherwise, "an injury arises out of one's employment

> if, at the time of the occurrence, the employee **was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties**. ... A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.
>
> *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 203–04, 797 N.E.2d 665, 672 (2003)(emphasis added) citing to *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665.

The Arbitrator notes that Petitioner was a policy distributor for Madden and conducted policy meetings, worked with managers to formulate, change and rescind policies and would distribute those policies. [Tx8]. The Arbitrator finds that conducting a union grievance meeting is not an act that could be reasonably expected to be performed incident to the job duties assigned by Madden. The union duties Petitioner was performing at the time of her injury were a direct result of Petitioner's duties as Vice President and Steward of the Union which included pre-disciplinary hearings. [Tx12-13]. The Arbitrator further notes that Hall, not Madden, instructed the Petitioner as to the specific union tasks she was to perform. [Tx50, 92].

The Arbitrator notes that Petitioner testified that Madden could not tell her how, when or whether to perform her union duties. [Tx60-61]. Hall confirmed that Madden could not tell the Petitioner whether or how to perform her union duties. [Tx94]. Ally confirmed that Madden has no control over Petitioner's union

activities. [Tx104-105]. Finally, the Arbitrator notes that the union activities were requested by an OIG employee for another OIG employee. [Tx19]. The Arbitrator finds that conducting the union grievance hearing was not an activity performed by the Petitioner at the request of Madden.

Finally, the Arbitrator notes that there was no evidence of any common law or statutory duty compelling the Petitioner to perform the union duties. The Arbitrator briefly notes that the AFSCME contract has no effect on any of the above factors. As set forth in more detail above Hall confirmed that no contractual violation occurred. [Tx97]. Even if a contractual breach had occurred this would be the incorrect venue in which to address that issue. The Arbitrator finds that the Union's negotiating "reasonable time off with pay during work hours to attend grievance hearings," [Rxp1] does not constitute an instruction by Respondent Madden to the Petitioner to attend grievance hearings. The contractual term does not create a common law or statutory duty, and it does not render union services tendered to employees of another agency incidental to Petitioner's Madden job duties as a policy distributor.

The Arbitrator finds that Petitioner failed to present sufficient, credible evidence that her injury arose out of and during the course of work performed for Madden. The evidence admitted at trial shows that pursuant to *Mary Mitchell v. Constr. Cleaning Co.*, 11 IL. W.C. 008571 (Ill. Indus. Com'n July 30, 2015) the Petitioner's injury did not occur during the course of her employment and it did not arise out of her employment as Petitioner was not instructed to perform the grievance hearing by Madden, Petitioner did not have a common law or statutory duty to perform such acts and the union grievance hearing was not an act which might be reasonably expected to be performed incident to her Madden duties as a policy distributor.

THE FACTORS

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

The evidence introduced at hearing clearly shows that Petitioner was not acting as an employee of Madden at the time of the injury.

As to the first and second factors, the right to control the manner in which the work is performed and to control her schedule, the evidence was clear that Madden had no control over whether, when, where or how the Petitioner performed her union duties. She reported to the Union, Ms. Hall, not Madden. [Tx50, 92]. Ms. Hall gave her instructions. [Tx92]. Madden could not stop her from performing the union duties. [Tx60]. Madden could not fire her from her union position. [Tx61]. The Union trained her. [Tx56-57]. No one from Madden could have told her where to go, when to be there, when to come back or what to do there. [Tx104-105].

As to the third and fourth factor, whether the Petitioner was paid hourly and whether taxes were withheld, the evidence was clear that Article VI of the AFSCME Union Contract (Respondent's Exhibit #5) Section 1 states "Employees shall … be allowed reasonable **time off** with pay during working hours to attend grievance hearings…." [Rx1 p1 emphasis added]. While the Petitioner was paid by the Respondent during this time, that is a result of the contractual agreement with the Union regarding time off. That contractual agreement does not and cannot determine any issues of arising out of or in the course of employment as relevant to a workers' compensation determination.

As to the fifth factor, whether the alleged employer could discharge the Petitioner at any time, the Petitioner's testimony was also clear. Petitioner confirmed that no one at Madden could remove her from her union positions. [Tx61].

As to the sixth factor, whether the alleged employer provided the tools used, there was no testimony regarding any tools used. Petitioner was provided a manual on how to perform grievances by the Union. [Tx56-57].

As to the seventh factor, whether the Respondent-Employer's general business involved the Petitioner's work, it would be more accurate to state that the

Union's general business involved the Petitioner's work performing union duties. The evidence clearly showed that Respondent was only one of several entities at which the Union had members, [Tx10-11, 86]. The evidence also showed that the Union was only one of several that had members at the Respondent. [Tx106]. The union duties Petitioner was performing at the time of her injury did not involve an employee of the Respondent [Tx 19, 27, 91], were not at the Respondent's location, [Tx11], were not performed at the request of Respondent [Tx19], and provided no benefit to the named Respondent.

As to the eighth factor what, if any, label the parties put on their relationship while it is clear that in the normal course of her job duties Petitioner was an employee of Madden it is also clear that while performing her union duties she was not considered an employee. Article VI of the AFSCME Union Contract (Respondent's Exhibit #5) Section 1 states "Employees shall … be allowed reasonable **time off** with pay during working hours to attend grievance hearings…." [Rx1 p1 emphasis added]. It is clear that the Petitioner, while contractually entitled to pay, was also on her own time while performing her union duties. Much akin to taking paid vacation or sick time, Petitioner would be entitled to pay but would not be considered to be working at the same time she was performing union duties.

As the ninth and final factor, whether the relationship was long, continuous and exclusive, Petitioner was hired by Respondent in April of 1992. [Tx8]. Petitioner testified that she was always a union member that but she held a position of authority only since 2010 [Tx47]. Based upon the evidence presented the Arbitrator finds that the relationship was long and continuous but not exclusive.

Petitioner's relationship with Madden at the time she was performing union duties does not meet any of the 9 factors. Critically, their relationship does not

meet the most significant factor, the right to control the manner in which the work is performed.

Based upon the evidence presented, the Arbitrator finds that an employee / employer relationship did not exist between Madden and Petitioner at the time of the alleged injury.

Based on the foregoing, all claims for benefits are hereby denied. All other issues are rendered moot by this determination.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016032
Case Name	PEREZ, WILLIAM v. GERBER COLLISION & GLASS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0597
Number of Pages of Decision	30
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Jim Magiera

DATE FILED: 12/9/2021

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM PEREZ-HERNANDEZ,

Petitioner,

vs. NO: 18 WC 16032

GERBER COLLISION & GLASS,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review under §19(b) of the Decision of the Arbitrator. Therein, the Arbitrator denied Petitioner's claim on the threshold issues of accident and causal connection. Notice having been given to all parties, the Commission, after considering the issues of whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, whether his current condition of ill-being is causally related to the work injury, entitlement to temporary disability benefits, entitlement to incurred medical expenses as well as prospective medical care, and whether §19(l) and §19(k) penalties and §16 attorney's fees are warranted, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on March 8, 2018 and his condition of ill-being is, in part, causally related to that work injury. 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).

FINDINGS OF FACT

The Commission finds two aspects of the Findings of Fact set forth in the Decision of the Arbitrator require further elucidation: 1) the written statements of Norberto Cruz, Jr. and Ralph

Ferraro, and 2) the written statement and testimony of Charles Lee. The Commission provides the following supplemental Findings of Fact.

In addition to witness testimony and written statements from Charles Lee and Steven Ferraro, Respondent offered the written statements of Norberto Cruz, Jr., and Ralph Ferraro. Cruz authored his statement on June 23, 2018, and his description of the March 8, 2018 event is as follows:

> I, Norberto Cruz Jr was working at Gerber Collision South Elgin with William Perez Hernadez [*sic*] hanging a door on a stand so that it could be painted. Steven Ferraro came over to assist us and pulled one of the arms off of the stand as it was in the way of what we were doing and dropped it on to the floor from about waist high. When dropped, the arm hit the floor and bounced and may or may not have hit William Perez Hernadez [*sic*] on the foot after contacting the floor first. This arm is hollow, about two feet long and weighs just over a pound. Resp.'s Ex. 17, Group Ex. A.

Ralph Ferraro provided his statement on July 2, 2018; Ralph observed the following:

> I Ralph Ferraro was working in the paint shop at the time of the incident. I was walking towards Norberto, Steven, and William hanging a door on one of our stands. I saw Steven remove one of the rods from the stand and he reached back and dropped it. I heard the rod hit the floor and bounce. I am not sure if it hit his leg or not. There was no immediate reaction from Willie and then he turned and started limping away. Resp.'s Ex. 17, Group Ex. A.

Charles Lee too provided a written statement at Respondent's request. Lee's statement, written on July 10, 2018, reflects Petitioner came into his office on March 8, 2018 and reported he had been injured:

> He stated that he was working in the back hanging a part on a stand with Norberto Cruz and that Steven Ferraro had come over to help. He said that Steven had removed one of the arms from the stand and dropped it and that it had hit the floor and then bounced and hit his foot. He took his shoe off and showed me his foot and it appeared swollen and his small toe was purple and bruised looking. I was concerned for him and asked him to stay in my office while I checked our poster in the lunch room for where he should go for treatment. When I came back to advise him where to go he was already gone. I went and talked to staff to see what had happened and their account was consistent with what William had told me although two of the employees involved question whether the part had even hit him. This was a Thursday.
> On Monday, March 12th William came in to the shop and brought paperwork from the doctor stating he could not work. When we discussed further what had happened William changed his story and was very animated as he said that Steven had taken the arm from the stand and hurled it with force directly onto his foot. When I questioned William about why his account had changed and why Steven would do

> something like that he became agitated and left. I started thinking about the interaction from the day that the incident happened and it now struck me as odd that his foot would have been swollen and his toe purple and bruised within minutes of this happening as bruising normally takes some time. I went into the shop and weighed the part, it was 1.1 pounds, about 2 feet long, and hollow. I question how something of this size and weight, dropped from waist high and hitting the floor first and then bouncing onto someone's foot (if it did indeed hit him) could create a serious injury. Out of curiosity I took that same piece and dropped it from over my head directly onto my own foot and received absolutely no injury or even a bruise.
> On February 9th of this year William had a similar injury to his left foot that happened outside of work and he sent me pictures as he missed work. I still have those photos. Based on the totality of the situation I firmly believe William came to work injured and has filed a false claim against us. Resp.'s Ex. 17, Group Ex. A.

At trial, Lee's testimony as to March 8, 2018 was consistent with his written statement. Lee testified he was working in his office when Petitioner came into the office and reported an injury: "I asked him what happened. He told me they were working taking a door off a stand and one of the arms on the stand had been dropped by Steven Ferraro and had bounced and hit his foot and he was injured." T. 114. When he and Petitioner were discussing what happened, Petitioner took his shoe off and showed Lee his foot. T. 115. Lee stated he needed to find out where to send Petitioner for treatment, so he consulted the posters in the lunchroom, and when he returned to his office, Petitioner was gone. T. 115, 117. Lee testified he went to the back of the shop and spoke to Steven, Norberto, and Ralph, and they gave accounts of what occurred. T. 123.

Lee's testimony as to his interactions with Petitioner in the days thereafter, however, was not fully consistent with his written statement. Lee testified the next time he spoke to Petitioner was when Petitioner came in to prepare the accident report on March 14, 2018. T. 117. Lee testified nothing unusual happened that day; Petitioner provided a doctor's note indicating he could not work, then Petitioner left. T. 117-118. Presented with Respondent's Exhibit 5, Lee identified it as the accident report he prepared for Petitioner: "Well, basically I started at the top and I just went down question by question and asked him and he responded and then I filled it in." T. 119. Lee memorialized that Petitioner was helping another employee hang a door on a part stand and a third employee came to help, attaching rod from the stand was dropped on his right foot. T. 119-120.

Lee testified he had another conversation with Petitioner a few days later, then volunteered the following: "And just for clarification I looked back through my statement and I can tell you that I have the date wrong on this on my statement…Because this other conversation happened after the time he came in and filled out his accident report." T. 118. Lee then again stated he next spoke to Petitioner a few days later, "after his next doctor's visit so maybe the following week." T. 120-121. Lee testified that when Petitioner gave him the doctor's note, he questioned Petitioner about how a serious injury could have resulted from a metal piece bouncing off his foot; at that point, Petitioner became "kind of agitated," and told Lee that Steven had thrown the pipe directly at his foot. T. 122. Lee stated that when Petitioner demonstrated what happened, he indicated Steven raised the pipe over his head before throwing it down. T. 122. Lee testified it did not make sense to him that Steven would do that, and after Petitioner left, he started to investigate. T. 122.

CONCLUSIONS OF LAW

I. Accident

In finding Petitioner failed to prove he sustained an accidental injury on March 8, 2018, the Arbitrator made an adverse credibility determination; specifically, the Arbitrator did not find Petitioner's testimony to be credible and instead deemed Steven Ferraro's version of the event to be "more plausible." The Commission views the evidence differently. The Commission finds the preponderance of the credible evidence establishes that Petitioner's foot was hit by a metal tube. See *R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870 (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.")

Our analysis begins with the witness statements. There were three people involved in the incident: Petitioner, Norberto Cruz, and Steven Ferraro. T. 17, 40, 101. As such, these three are the only individuals possessing personal knowledge of what occurred. Petitioner testified he started work at 7:30 a.m. on March 8, 2018. T. 39. Later that afternoon, Petitioner was working in his area of the shop when Norberto approached and asked for his assistance hanging a door on the painting stand. T. 14. Petitioner testified that as he and Norberto were holding the door, Steven arrived, removed one of the three arms attached to the door, "and he threw it to the ground without paying attention." T. 41, 43. Petitioner was holding the door, so he could not see which direction Steven was facing; however, he was not claiming Steven intentionally threw the pipe at him: "I didn't say he threw it to my foot. I said he threw it to the ground and he hit me without realizing it." T. 44. Petitioner believed the pipe hit his foot before hitting the floor. T. 48.

Steven Ferraro, in turn, offered a conflicting account. Prior to detailing Steven's version of events, the Commission feels it necessary to acknowledge that Steven testified he and Respondent entered into a financial arrangement to compensate him for testifying and, further, that Respondent employed Steven's father (T. 90, 92); it is with that understanding that we consider his testimony. As to the March 8, 2018 incident, Steven testified that he and Norberto were holding a finished door and attempting to remove it from the painting stand:

> I was holding the front of the door with my left hand and Norberto was on the other side of the door. And as we were trying to get it off it got wedged or jammed because these hooks usually have over spray from paint so every hole size is different, and we were trying to get it off. So it got lodged and at first we tried shaking it off a little bit, tried to wiggle it off, but it wasn't going on. So I told Norberto to hang on real quick, let me try and wedge it off. So what ended up happening is we got the door off but the arm was still connected into the door. So at that point I took the arm off, twisted the arm off the panel, and I set it by my waist height and I had dropped it. T. 94.

Steven indicated Petitioner was standing behind him on his left side, and he dropped the pipe on his right. T. 97, 95. Steven stated that after he dropped the pipe, he heard the metal hit the concrete,

then after a pause, "I heard Willy say ow, ow, my foot." T. 96. Steven and Norberto put the door on a horse then Steven asked Petitioner what happened, and Petitioner stated the pipe hit his foot then left the area. T. 97. Steven testified his thought at the time was, "I didn't really think it was possible that I dropped it on his foot…I dropped it on my right and he was standing behind me on my left." T. 97. He does not believe it is possible that the pipe hit Petitioner's foot. T. 101.

Norberto Cruz did not testify at trial but at Respondent's request, he did provide a written statement on June 23, 2018; this was admitted in Respondent's Exhibit 17, Group Exhibit A. Norberto's account of the March 8, 2018 events is different from the account provided by Steven Ferraro, and is described as follows:

> I, Norberto Cruz Jr was working at Gerber Collision South Elgin with William Perez Hernadez [*sic*] hanging a door on a stand so that it could be painted. Steven Ferraro came over to assist us and pulled one of the arms off of the stand as it was in the way of what we were doing and dropped it on to the floor from about waist high. When dropped, the arm hit the floor and bounced and may or may not have hit William Perez Hernadez [*sic*] on the foot after contacting the floor first. This arm is hollow, about two feet long and weighs just over a pound. Resp.'s Ex. 17, Group Ex. A.

The Commission observes Norberto's statement corroborates Petitioner's testimony while contradicting Steven's testimony. Significantly, Norberto confirms it was he and Petitioner who were holding the door, thereby discrediting Steven's assertion that he and Norberto were holding the door while Petitioner was standing off to the side. We further observe Norberto's statement is consistent with the description of the event in the accident report: "Was helping another employee hang a door on a parts stand and a 3rd employee came to help. An attaching rod from the stand was dropped on his foot." Pet.'s Ex. 25, Resp.'s Ex. 5.

The Commission finds Petitioner's testimony about the circumstances of the accident to be credible. The Commission emphasizes that both Norberto and Steven confirmed that a pipe was tossed down, while neither Norberto nor Steven definitively refuted that the pipe hit Petitioner's foot. Rather, Norberto's statement reflects the pipe "may or may not" have hit Petitioner's foot (Resp.'s Ex. 17, Group Ex. A), and although Steven did not believe the pipe could have hit Petitioner, he conceded that he did not see whether or not the pipe hit Petitioner's foot. T. 107. Further, the written statement of Ralph Ferraro, who was not involved in the incident but was in the shop at the time, suggests the pipe impacted Petitioner's foot: "I heard the rod hit the floor and bounce. I am not sure if it hit his leg or not. There was no immediate reaction from Willie and then he turned and started limping away." Resp.'s Ex. 17, Group Ex. A. Moreover, Chuck Lee testified Petitioner reported the injury to him shortly thereafter, and in the process, Petitioner showed Chuck his right foot, and Chuck observed the foot was discolored. T. 116. After Petitioner left to get medical treatment, Chuck spoke with Steven and Norberto and was told the pipe was dropped from about waist height, hit the floor, and then may have hit Petitioner's foot. T. 124-125.

The Commission further finds the medical evidence corroborates that an accidental injury occurred as alleged. Petitioner presented to the emergency room at Advocate Sherman Hospital at approximately 2:30 p.m. with complaints of right foot pain, rated 8/10, after a coworker "took part

of the door frame (a solid metal tube) and threw it on the ground, striking his foot." Pet.'s Ex. 11. Physical examination findings included tenderness with erythema across the top of the right foot and tenderness to palpation; X-rays were negative for acute osseous injury. Pet.'s Ex. 11. Diagnosing a foot contusion, the emergency room physician placed Petitioner in an Ace bandage and orthopedic shoe, directed him to follow-up with his primary physician, and recommended over-the-counter pain medications. Pet.'s Ex. 11. Petitioner took photographs of his foot while he was in the emergency room; the Commission has reviewed the photographs, and we note Petitioner's Exhibit 26 and Respondent's Exhibit 21 reveal a distinct red area on the top of Petitioner's foot, and Respondent's Exhibit 20 demonstrates that Petitioner's foot is noticeably swollen. The Commission acknowledges that some medical records include a history of a metal tube being "slammed" or "thrown" on Petitioner's foot. However, we find the difference to be inconsequential as an injury could have occurred regardless of whether the tube was dropped, thrown, or slammed. We further note variations in verbiage are less striking given the medical records evidence a Spanish language interpreter was not present at several medical appointments.

"Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Id*. The Commission finds the preponderance of the evidence establishes Norberto and Petitioner were hanging a door on the painting stand and Steven came to assist with a troublesome stand arm; Steven removed the arm from the stand, tossed it to the ground, and it struck Petitioner's right foot. As such, the Commission finds Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on March 8, 2018.

II. Causal Connection

Petitioner alleges he developed complex regional pain syndrome ("CRPS") as a consequence of his March 8, 2018 work injury to the right foot. The Commission disagrees.

When Petitioner was evaluated at the emergency room on March 8, 2018, he was diagnosed with a right foot contusion. Pet.'s Ex. 11. Over the next two weeks, Petitioner returned to Advocate on three occasions with complaints of pain and swelling of the right foot. Petitioner's examination findings remained consistent, with tenderness, swelling, and limited range of motion, and the contusion diagnosis carried forward. Pet.'s Ex. 11. Ultimately, on March 20, 2018, Petitioner was referred to Dr. Peterson, a podiatrist with Suburban Orthopaedics. Pet.'s Ex. 11.

On March 30, 2018, Petitioner was evaluated by Dr. Peterson. Dr. Peterson memorialized that Petitioner sustained a right foot injury while he was helping a coworker; Petitioner stated another coworker came in, grabbed a tube and slammed it against his foot. Petitioner complained of persistent pain and swelling. Dr. Peterson's examination findings included antalgic gait, moderate effusion/swelling, tenderness to palpation, and ecchymosis and edema. Dr. Peterson diagnosed right soft tissue contusion and hematoma of the foot. The doctor placed Petitioner in a CAM walker boot, noted physical therapy could be a future option, and authorized Petitioner off

work. Pet.'s Ex. 12.

When Petitioner followed up with Dr. Peterson on April 13, 2018, his symptoms and examination findings had not improved. Dr. Peterson ordered a right foot MRI, directed Petitioner to continue with the CAM boot, and maintained Petitioner's off work status. Pet.'s Ex. 12. The recommended MRI was completed on April 16, and when Petitioner returned to Dr. Peterson on April 20, Dr. Peterson noted the MRI demonstrated acute inflammation of the soft tissues in the midfoot consistent with the contusion. The doctor prescribed Tramadol, directed Petitioner to continue weightbearing as tolerated in the CAM boot, and again authorized Petitioner to remain off work. Pet.'s Ex. 12.

Petitioner returned to see Dr. Peterson in early and late May. On both occasions, Dr. Peterson memorialized that Petitioner's symptoms and positive examination findings persisted and had been recalcitrant to treatment. As of May 22, Dr. Peterson continued to limit Petitioner to weightbearing as tolerated in the CAM boot and modified duty, sitting work only, desk only, no extended walking or standing, and no lifting greater than 10 pounds. Pet's Ex. 12.

That same day, May 22, Petitioner presented to Grandview Health Partners, where he was evaluated by Nellie Christ, D.C. Petitioner gave a history of injury of a solid metal tube being thrown down and hitting the top of his right foot, and complained of persistent pain in the foot and ankle as well as numbness and tingling. Upon examination, DC Christ's impression was right foot effusion and pain consistent with the previously diagnosed contusion, as well as a new diagnosis of right ankle instability. DC Christ recommended both manual therapy and physical therapy, which began the next day with exercise modalities focused on Petitioner's right foot and ankle. Pet.'s Ex. 13.

The Commission observes the first mention of possible CRPS is in Dr. Lee's May 30, 2018 §12 report. With the assistance of a Spanish translator, Petitioner advised that a coworker slammed a metal tube down onto his right dorsal foot. Dr. Lee memorialized that Petitioner complained of "pain essentially circumferentially around his foot and ankle all the way up to the distal third of the tibia." Petitioner further described numbness, burning and sensitivity throughout that area, shooting pain along the fifth metatarsophalangeal region, as well as pain medially and laterally over his ankle, arch of the foot and over the forefoot metatarsophalangeal joints. Dr. Lee's examination findings included generalized venous flushing of the right lower extremity compared to the left with some mild fullness in the foot and ankle region, no discrete skin temperature changes, generalized sensitivity throughout the right lower extremity, extreme guarding throughout examination, and decreased range of motion on the right with guarding. Dr. Lee concluded Petitioner's diagnosis was status post right foot contusion with possible complex regional pain syndrome. Dr. Lee opined the diagnosis appeared to be causally related to the March 8, 2018 work injury but further observed Petitioner's objective findings did not support the current symptoms:

> Specifically, he really has absence of any objective abnormalities on diagnostic studies as well as to the clinical examination and assessment as well as the mechanism of injury. Certainly a diagnosis of chronic regional pain syndrome can be initiated from a traumatic occurrence. This would be the only other plausible

> diagnosis short of symptom magnification or malingering. Pet.'s Ex. 14, Resp.'s Ex. 3, Dep. Ex. 2.

Dr. Lee recommended evaluation by a pain management specialist to determine whether or not Petitioner's symptoms were consistent with CRPS, but opined chiropractic intervention was not indicated. The doctor further opined Petitioner was capable of sit down duty and had not reached maximum medical improvement. Pet.'s Ex. 14, Resp.'s Ex. 3, Dep. Ex. 2.

The first treating physician to diagnose CRPS is Joshua Hedman, D.P.M. Dr. Hedman's June 6, 2018 office note reflects Petitioner complained of severe pain dating back to March 8, 2018, when a "heavy metal tube fell on top of his right foot." Pet.'s Ex. 14. Petitioner reported symptoms including severe pain with light touch of bed sheets, inability to bear weight on the foot, burning pain at rest, daily discoloration and swelling of the foot, as well as tremors and uncontrollable jerking of the foot. Examination findings included darker pigmentation of the right lower leg and foot as compared to the left, generalized pitting edema of the right foot, severe pain out of proportion with light touch to the lower leg extending distally to the forefoot, and inability to actively move the right foot and ankle joints. Dr. Hedman opined Petitioner had developed "CRPS of the right foot following a crush injury at work on 3/08/2018," and referred Petitioner back to pain management. Pet.'s Ex. 14. Pursuant to Dr. Hedman's CRPS diagnosis, physical therapy was put on hold for completion of a series of lumbar paravertebral sympathetic nerve blocks. Pet.'s Ex. 14. Dr. Neeraj Jain performed the injections at Midwest Ambulatory Care on June 21, June 28, and July 12. Pet.'s Ex. 15. The pain management physicians at Chicago Pain & Orthopedic Institute thereafter recommended trial implantation of a spinal cord stimulator. Pet.'s Ex. 14.

At Respondent's request, Dr. Kenneth Candido evaluated Petitioner on March 5, 2019. The doctor's evidence deposition was admitted as Respondent's Exhibit 4. Dr. Candido is board certified in anesthesiology and has an added qualification in pain medicine. Resp.'s Ex. 4, p. 6. Dr. Candido testified that in his initial report he concluded that, per the history provided by Petitioner, Petitioner was status post a crush injury of the right foot; the diagnosis was neuropathic pain and superficial peroneal neuritis. Resp.'s Ex. 4, p. 27. Dr. Candido explained he ruled out CRPS and instead Petitioner met all the diagnostic criteria for superficial peroneal nerve neuritis. Resp.'s Ex. 4, p. 20. Dr. Candido testified he thereafter received additional information and prepared an addendum on July 4, 2019. Resp.'s Ex. 4, p. 24. Specifically, Dr. Candido reviewed the Chicago Pain & Orthopedic Institute records, surveillance video of Petitioner obtained in June 2019, a picture of the pipe, and witness statements. Resp.'s Ex. 4, p. 24-25. Dr. Candido stated that from the new information, he concluded the only plausible injury Petitioner could have sustained was a neuropraxia, not a crush injury. Resp.'s Ex. 4, p. 37. He explained the basis of his opinion:

> My basis was reviewing the eyewitness reports and also assessing the device which was alleged to have been dropped onto the foot or tossed upon the foot, and realizing that a one-pound weight falling from a height or even being thrown from a height of a couple of feet could not have resulted in a crush injury, especially in someone with footwear on at the time of the alleged injury. Resp.'s Ex. 4, p. 38.

Dr. Candido reiterated Petitioner does not have CRPS. Resp.'s Ex. 4, p. 41.

The Commission finds Dr. Candido's conclusion that Petitioner does not have CRPS to be persuasive. Dr. Candido testified that Petitioner did not meet the diagnostic criteria for CRPS and notably, the doctor indicated one of Petitioner's objective findings (warmth of the right foot) is considered a rule out for CRPS. Resp.'s Ex 4, Dep. Ex. 2. Dr. Candido further emphasized that based upon his review of the surveillance video, Petitioner had no visible evidence of persistent pain or dysfunction. The Commission notes Dr. Candido's conclusions are corroborated by Dr. Lee who, upon review of the surveillance video as well as Dr. Candido's report, agreed that Petitioner does not have CRPS. Pet.'s Ex. 14, Resp.'s Ex. 3, Dep. Ex. 2. The Commission further observes we have analyzed the surveillance video and find it significantly undermines Petitioner's testimony as to the severity of his current complaints. The approximately one hour and 15 minutes of video filmed on June 18, 19, and 20, 2019, shows Petitioner walking, detailing vehicles, cleaning a service bay, and pushing a large trash bin. Petitioner moves fluidly, is able to ambulate without difficulty, and does not display any pain behaviors. Resp.'s Ex. 15.

The Commission finds Petitioner failed to prove he has CRPS. The Commission further finds Petitioner's right foot condition of ill-being reached maximum medical improvement as of July 4, 2019, the date of Dr. Candido's addendum report wherein he opined that that Petitioner was maximum medical improvement and had no visible evidence of any ongoing pain or dysfunction of the lower extremities.

III. Temporary Disability

The disputed period of temporary total disability is July 19, 2018 through January 1, 2019. Arb.'s Ex. 1. The Commission observes Petitioner was initially placed under modified duty restrictions by the physicians at Advocate Sherman, and he thereafter remained either authorized off work or under modified duty restrictions until January 2, 2019, when he started a new job at Service King. T. 30. As such, we find Petitioner proved entitlement to the disputed period of Temporary Total Disability benefits.

The parties stipulated Petitioner's average weekly wage is $497.49. Arb's. Ex. 1. This yields a Temporary Total Disability rate of $331.66. Therefore, the Commission finds Petitioner entitled to Temporary Total Disability benefits of $331.66 per week for a period of 23 6/7 weeks.

IV. Medical

Petitioner offered into evidence multiple medical bill exhibits: Petitioner's Exhibit 17 (Advocate Sherman Hospital, DOS March 8, 2018); Petitioner's Exhibit 18 (Advocate Sherman Occupational Health, DOS March 14, 2018); Petitioner's Exhibit 19 (Chicago Pain & Orthopedic Institute, DOS May 31, 2018 through June 6, 2019); Petitioner's Exhibit 20 (Grandview Health Partners, DOS May 22, 2018 through December 6, 2018); Petitioner's Exhibit 21 (BHS/Matrix Medical Supply, DOS June 5, 2018); Petitioner's Exhibit 22 (Midwest Ambulatory Care, DOS June 21, 2018 through July 12, 2018); Petitioner's Exhibit 23 (Windy City Anesthesia, DOS June 21, 2018 through July 12, 2018); and Petitioner's Exhibit 24 (Delaware Physicians, DOS July 11, 2019 and October 2, 2019). The Commission finds the charges incurred for right foot treatment rendered through July 4, 2019 were reasonable, necessary, and related to the March 8, 2018 with

the following exceptions:

1) The Commission finds the charges at Midwest Ambulatory Care (Pet.'s Ex. 22) and Windy City Anesthesiology (Pet.'s Ex. 23) were incurred for the unrelated and unsubstantiated diagnosis of CRPS, and we deny these claimed expenses.

2) The Commission notes both physical therapy and chiropractic modalities were administered at each session at Grandview Health Partners, which we find to be neither reasonable nor necessary; to the extent that a date of service includes both chiropractic therapy and physical therapy, the chiropractic charges are denied.

Further, pursuant to our resolution of the causal connection issue, Petitioner's request for prospective medical treatment is denied.

V. §19(l) and §19(k) penalties and §16 attorney's fees

The Commission finds that an award of penalties and fees is not warranted in this case. The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301, 412 N.E.2d 468, 470 (1980). The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772, 777-78. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*. Here, in refusing to pay additional benefits, Respondent relied on the conflicting witness statements as to the accident itself, the contrary medical opinions provided by its experts, and the surveillance video. The Commission does not find it unreasonable for Respondent to have terminated benefits under those circumstances.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on March 8, 2018.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $331.66 per week for a period of 23 6/7 weeks, representing July 19, 2018 through January 1, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses incurred for right foot treatment rendered through July 4, 2019, subject to the limitations detailed above in the Decision, pursuant to §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective care is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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 $13,800.00. 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.

December 9, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 10/13/21

/s/ *Stephen J. Mathis*

43

/s/ *Deborah L. Simpson*

21IWCC0597

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

PEREZ-HERNANDEZ, WILLIAM Case# **18WC016032**

Employee/Petitioner

GERBER COLLISION AND GLASS

Employer/Respondent

On 4/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5625 GRAUER & KRIEGEL LLC
KARINA B ESTRADA
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

0532 HOLECEK & ASSOCIATES
CASEY HUNTER
PO BOX 64093
ST PAUL, MN 55164-0093

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)

WILLIAM PEREZ-HERNANDEZ,
Employee/Petitioner

v.

GERBER COLLISION AND GLASS,
Employer/Respondent

Case # **18** WC **16032**

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 **SOTO**, Arbitrator of the Commission, in the city of **WHEATON, Illinois**, on **1/30/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **3/8/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**25,869.48**; the average weekly wage was $**497.49**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **3** dependent children.

Respondent shall be given a credit of **$6,305.21** for TTD, and $**0** in PPD, for a total credit of **$6,305.21**.

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

ORDER

On 3/8/18, Petitioner did not sustain an accident that arose out of and in the course of employment.

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

Respondent is not liable for any unpaid medical bills.

Respondent shall receive credit $6,305.21.

Petitioner is not entitled to TTD.

Petitioner is not entitled to any additional medical care, including a spinal cord stimulator.

The petition for penalties is denied.

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

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

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

Signature of Arbitrator

4/10/2020
Date

ICArbDec19(b)

APR 16 2020

Procedural History

This matter was tried on January 30, 2020, pursuant to Sections 19(b) and 8(a) of the Act. The issues in dispute are whether Petitioner sustained accidental injuries that arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to an injury, whether Respondent is liable for medical expenses and TTD benefits and whether Petitioner is entitled to prospective medical treatment. Petitioner also penalties/attorney's fees under Sections 19(k), 19(l) and 16 of the Act.

Findings of Fact

Petitioner's testimony

William DeJesus Perez-Hernandez (hereafter referred to as "Petitioner") testified he worked as a porter for Gerber collision and Glass (hereafter referred to as "Respondent"). As part of his job duties Petitioner would wash and polish cars and clean offices. (T. 14).

Petitioner testified that, on March 8, 2018, he was working in the back when a coworker, named Norberto, asked for assistance with a car door. Petitioner testified a second coworker arrived, named Steven, who seemed mad took a tube hanging on the door and "*...threw it to the ground and then he threw it at us*". (T. 14).

Petitioner testified the tube was solid and was about 2 feet long. Petitioner also testified he was not sure which tube was thrown because there were 3 tubs and that he didn't know the weight of the tube. (T. 16). Petitioner testified after being struck by the tube he felt pain and discomfort. (T. 15). Petitioner reported the incident to Chuck Lee and requested to go to the hospital. (T. 17).

Petitioner testified he went to the emergency room and was given a bandage and boot after x-rays were taken. (T. 17, 18). The medical records from Advocate Sherman Hospital indicate Petitioner was treated for a right foot contusion. (Px. 11). Petitioner testified he was referred to Dr. Peterson of Suburban Orthopedics. (T. 21, 22). The medical records from Dr. Peterson, a pediatrist, diagnosed a right soft tissue contusion and hematoma of the right foot. (Px. 12) Petitioner was prescribed physical therapy, which he underwent at Grandview Health Partners, and he was referred to Chicago Pain and Orthopedic Institute where he received 3 shots in his lumbar spine and was prescribed a spinal cord stimulator, which has not been approved. (T. 21-25).

Petitioner testified he would like to have the spinal cord stimulator procedure. (T. 26). As to his current condition, Petitioner testified his right foot is red, swollen, itchy and tingles. (T. 26). Petitioner testified that, prior to March 8, 2018, he had no right foot pain or symptoms. (T.28). Petitioner also testified that since his accident it is difficult to run, play soccer and play with his children. (T. 26, 27).

Petitioner testified he never returned to work for Respondent, but he started working for Service King detailing cars on January 2, 2019. (T. 30). Petitioner testified he was paid TTD benefits through July 19, 2019. (T. 29).

On cross examination, Petitioner was asked whether he liked to play soccer and he responded, "*I didn't mention that I liked to play it or not I just said I haven't' played it anymore.*". (T. 32). Petitioner was asked about the left foot injury he suffered in February of 2018, a month before his right foot injury, and he responded, "*I saw a doctor for my left foot but I don't where sought medical treatment for my left foot.*". (T. 37).

Petitioner was asked about the accident report Petitioner signed which states, "*Was helping another employee hang a door on a parts stand and a 3rd employee came to help. An attaching rod from the stand was dropped on his [Petitioner's] right foot.*". (Px. 25). Petitioner testified he agreed the pipe was dropped on his right foot. (T. 47). Petitioner further testified that, "I *didn't say that it was slammed, I said he took it and they he threw it to the ground.*" (T. 47). Petitioner was asked whether he told Dr. Peterson that someone slammed a pipe onto his foot and he responded, "*I told him as best I could because, like I said, my English isn't the best.*" (T.53).[1] Petitioner testified that he can speak and read a little English and he has never needed an interpreter while working for Respondent. (T. 46). Petitioner was asked whether he told Dr. Lee, the Section 12 examiner, that a coworker slammed a pipe on your foot and he responded, "*Like I said, I only told him—he got a pipe and he threw it to the ground and it hit me.*". (T.55).[2] Petitioner was asked why he believes his testimony was different than what he reported to Dr. Lee and Petitioner respondent. "*Perhaps I didn't explain myself well. Like I said, my English isn't good.*". Dr. Lee's records indicate that a Spanish translator was present for his examination. *See Rx. 14.* Petitioner further testified as follows:

Q: Mr. Perez, was the pipe dropped or slammed?
A: It was thrown on the ground and without realizing it, it hit my foot.
Q: It was thrown with force, correct?
A: I would think so because of the impact.
Q: And for the record, you are holding your hand, your right hand high. Are you saying Mr. Ferraro had the pipe high above his head when he threw it down?
A: I never said. I simply said I was holding on to the door with my coworker, he arrived, and then I felt that he threw it. I can't say that I didn't see physically. (T. 26).

Petitioner was asked whether he told Dr. Lee that his pain level was 10 out of 10 and Petitioner responded, "*Ten out of ten? I never said ten out of ten. Otherwise I would have stayed I the hospital.*". (T. 87). Petitioner further testified as follows:

Q: Okay. Let's talk about pain scales. Did your doctors ever tell you what a pain scale is?
A: No, they never told me it was a pain scale. I was just understanding what they asked ten out of ten that it's a very unbearable pain.
Q: So if you could for the Court just tell us what you think a ten out of ten pain scale would mean?
A: I can't explain because I am not a doctor. I am just a patient. That's it. (T. 57).

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[1] Dr. Peterson's medical records, dated March 30, 2018, indicates that Petitioner reported a coworker grabbed a tube and slammed it against his foot. (Px. 12).

[2] Dr. Lee's report dated May 30, 2018, indicates a Spanish translator was present and Petitioner reported "*...his coworker without any specific cause or reason walked up to grab one of the metal tubes... and then slammed it down onto his right dorsal foot.*". See Rx 14).

Petitioner was asked whether he told Dr. Vargas his pain levels were 10 out of 10 and he responded, "*I never told him that I had pain 10 out of ten*". (T. 67). [3] Petitioner was further asked whether he told any physicians at Chicago Pain and Orthopedic Institute, after January of 2019, that he was working. Petitioner testified "*I never told the doctors whether I was working or not...The doctor knows that I'm working...the doctor knew, I told him that I was working. He asked me.*". (T. 66).[4]

Regarding the incident, Petitioner testified he and Norberto were holding the door when Steve arrived. (T. 41). Petitioner testified he was holding the door so the door would fall. (T. 43). Petitioner testified Steve came over grabbed the tube holding the door and threw it. (T. 43). Petitioner testified he was in front of the door and Steve did not turn around, he just stretched out the pipe and slammed it on the ground. (T. 41). Petitioner further testified as follows:

Q: Was he [Steve] facing your direction when he slams it on your foot?

A: To tell the truth I didn't pay attention to that.". (T. 42).

Testimony of Steven Ferraro

Steven Ferraro testified he worked for Respondent until July of 2019. Mr. Ferraro currently works for a body shop inn St. Charles as a senior service advisor. Mr. Ferraro testified he was working for Respondent on March 8, 2018. Mr. Ferraro testified he was removing a door from a horse with Norberto. The door had just been painted and the door was secured to a horse with 3 arms that hook into the door panel. Mr. Ferraro testified he and Norberto were holding the door attempting to remove the door from the horse. Mr. Ferraro was holding the front of the door with his left hand while Norberto held the other side of the door. Mr. Ferraro testified the door stuck to the horse because paint overspray caused the arm to be stuck. Mr. Ferraro testified he told Norberto to hold onto the door so he could try to remove the door off the horse. Mr. Ferraro testified they got the door off, but an arm was still connected to the door, so he twisted the arm off, with his right hand, and dropped it to the ground. (T. 93-95).

Mr. Ferraro testified he dropped the pipe behind his right leg from about waist height. (T. 94, 95). Mr. Ferraro testified he heard the pipe strike the ground two times and it make a "Tink Tink" noise as if you drop a coin on the ground. (T. 96). Mr. Ferraro testified Petitioner was standing behind him and to his left. (T. 95). Mr. Ferraro testified after the pipe struck the ground there was a pause and then he heard Petitioner say "ow" my foot. At that time, Mr. Ferraro turned around to see what had happened, thinking he must have stepped on Petitioner's foot and he asked Petitioner's what's wrong. (T. 96, 97). Mr. Ferraro testified Petitioner responded saying my foot and pointing to the arm. (T. 97).

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[3] The medical record, dated July 11, 2019, authored by Dr. Vargas, of Delaware Physicians, LLC, states that Petitioner reported pain levels of 9 and 10 out of 10. (Px. 16).

[4] The Chicago Pain and Orthopedic Institute's records dated January 18, 2019 and April 25, 2019, state Petitioner was not working, and he will continue not to work. (Px. 14).

Mr. Ferraro testified he did not think it was possible he dropped the pipe on Petitioner's foot because Petitioner was standing behind him to the left and he dropped the pipe with his right hand. (T. 97). Mr. Ferraro testified he did not slam the pipe or forcibly hurl the pipe. (T. 99, 101).

Testimony of Charles Lee

Charles Lee was called to testify for both Petitioner and Respondent. Mr. Lee testified he was the general manager and he completed the accident report with Petitioner. Mr. Lee testified he asked Petitioner the questions and he wrote down Petitioner's responses. (T. 83-84).

Mr. Lee testified that, on March 8, 2018, Petitioner came into his office and said he was injured while they were taking a door off a stand when Steve dropped one of the arms which bounced before hitting his foot. (T. 114, 115). At that time, Petitioner took off his shoe and showed him his foot. Mr. Lee testified Petitioner's toe looked a little purple. (T. 116). Mr. Lee testified that something didn't feel right to him, so he spoke to Steven, Norberto and weighed the pipe. (T. 123). Mr. Lee decided to weigh the pipe based upon Petitioner changing his story and the other employee's statements and that a pipe dropped from about waist high which the struck the ground before hitting Petitioner's foot didn't make sense. (T. 124). Mr. Lee testified he used a paint scale to weigh the pipe which weighed 1.1 pounds. (125, 126).

Medical Records

On March 8, 2018, Petitioner presented to Advocate Sherman Hospital presenting with a right foot injury and reporting pain levels of 8 out of 10. (Px. 11). The medical records contain two different histories provided by Petitioner. In one record, Petitioner reported he was working when a tube fell on his foot. *Id.* In another record, Petitioner reported he was at work helping a colleague remove a door when another colleague took part of the door frame (a solid metal tube) and threw it on the ground striking his foot. *Id.* X-rays were taken which showed no acute fractur or dislocation of the right foot. The injury was located at the right dorsal surface foot and toes. Petitioner was diagnosed with a right foot contusion and his foot was wrapped with an Ace bandage and he was told to follow up with his primary care physician. *Id.* On March 12, 2018, Petitioner returned to Advocate Sherman Hospital reported one of his coworkers threw a pipe at his foot. Petitioner reported that he did not know how much the pipe weighed but that he could lift it with one hand. *Id.* Petitioner also reported increased pain in the base of all of his toes especially the fifth toe and the dorsal area of his foot. The examination noted some mild erythema, mild tenderness, no ecchymosis and no swelling to suggest DVT. The x-rays were taken and found to be normal. NSAIDs were recommended and Petitioner was given crutches and a cast shoe. Petitioner was diagnosed with a foot contusion and issued work restrictions. *Id.*

On March 30, 2018, Petitioner presented to Dr. Peterson, D.P.M., at Suburban Orthopedics. (Px. 12). At that time, Petitioner reported helping a coworker put in a door in a car when another coworker came over grabbed a tube and slammed it against his foot. *Id.* Petitioner complained of constant stabbing pain and burning in his foot and toes. Petitioner was diagnosed was suffering a soft tissue contusion and hematoma of the right

foot. An MRI was ordered which Petitioner underwent on April 16, 2018. *Id.* The MRI identified the following findings: (1) query fibrocartilaginois coalition involving the middle facet of the subtalar joint; (2) dorsal subcutaneous edema/inflammation; (3) mild fasciitis involving the central band. The MRI also noted the moderate dorsal subcutaneous edema/inflammation shows no organized cystic fluid collection to suggest a hematoma. The MRI also noted the intrinsic muscular tissue of the forefoot demonstrated normal morphology and signal response. The MRI further noted there was no intramuscular edema fiber tearing or hematoma formation. *Id.*

On April 20, 2018, Petitioner returned to Dr. Peterson reporting pain levels of 9 out of 10. Dr. Peterson noted the MRI showed no fractures and only acute inflammation of the soft tissue in the midfoot consistent with a contusion. Dr. Peterson proscribed NSAIDS and he took Petitioner off work. *Id.* On May 4, 2018, Petitioner followed up with Dr. Peterson reporting no changes. Dr. Peterson proscribed Mobic and he issued light duty restrictions. *Id.*

On May 22, 2018 Petitioner returned to Dr. Peterson reporting no change in his condition. The examination showed the ankle DF knee extension was 15 on the right and 15 on the left. The ankle DF knee flexion was 15 on the right and 15 on the left. The ankle PF was 45 on the right and 45 on the left. The subtalar inv/ever was 25/5 on the right and 25/5 on the left. Dr. Peterson prescribed Mobic and renewed the light duty restrictions and Petitioner advised to return in two weeks. *Id.* Petitioner never returned to Dr. Peterson or Suburban Orthopedics.

On May 22, 2018 Petitioner started treating with Nellie Christ, a chiropractic physician, at Grandview Health Partners. Petitioner reported he and a coworker had just hooked a car door onto a freestanding frame to paint when another coworker walked over and removed a piece of the frame (solid metal tube) and threw it down hitting Petitioner on the top of his right foot. At that visit, Petitioner complained of pain in the right foot/ankle with associated numbness and tingling. Petitioner's treatment consisted of myofascial release, electrical stimulation, hot/cold packs, ultrasound, and exercises. Petitioner continued to treat with Grandview Health Partners until December 6, 2018. (Px 13).

On May 31, 2018, Petitioner started treating at Chicago Pain and Orthopedics Institute. (Px14). At that visit, Petitioner was seen by physician assistant Mohammad Memon. Petitioner reported he was fixing a door at work when a tube fell from above onto his right foot. Petitioner said his pain level was 9 out of 10 and his pain was constant. Petitioner also said the felt burning, throbbing, tingling that radiated up to his calf but below his knee. The examination noted ecchymosis on the anterior aspect of the foot and the left 5th digit of the foot. The medical records state due to pain Petitioner was unable to invert or exvert his right foot or ankle nor was he able to dorsiflex or plantar flex. Petitioner was assessed with a right ankle contusion and was taken off work. Petitioner was prescribed Tramadol, Meloxicam, Flexeril and Terocin Patches. *Id.*

On June 6, 2018, Petitioner returned to Chicago Pain and Orthopedic Institute and was seen by Dr. Hadman, DPM. At that visit, Petitioner reported a heavy metal tube fell on top of his foot. Petitioner also reported his foot turns purplish and swells almost daily. Petitioner further reported experiencing tremors and uncontrollable jerking and that even the light touch of a bed sheet causes severe pain. *Id.* Dr. Hedman reviewed the MRI and noted the MRI showed no acute pathology. *Id.* Dr. Hedman diagnosed complex regional pain syndrome (CRPS) following a crush injury and recommended a pain management consultation. *Id.*

On June 18, 2018, Petitioner returned to Chicago Pain and Orthopedics Institute and was evaluated, again, by physician assistant Mohammed Memon. At this visit, Petitioner reported pain of 7/10. Petitioner denied numbness and tingling. Physician assistant Memo also diagnosed chronic regional pain syndrome (CRPS) of the right foot and prescribed 3 lumbar paravertebral sympathetic nerve blocks. Petitioner was prescribed Flexeril and Mobic and taken off work. The medical record do not reflect the participation or review by a supervising physician at that visit. Petitioner underwent three injections by Dr. Jain on 6/21/18, 6/28/18, and 7/12/18. (PX 14).

Petitioner returned to Chicago Pain and Orthopedic Institute on July 26, 2018 and was evaluated, again, by physician's assistant Mohammed Memo. At this visit, Petitioner reported his pain level as 2 out of 10 that goes up to 6 out of 10 with strenuous activities. Petitioner further reported significant pain relief of approximately 80% but he was still experiencing mild numbness and tingling. Petitioner was assessed with CRPS and was prescribed physical therapy and kept off work. (Px 14).

On September 20, 2018, Petitioner returned to Chicago Pain and Orthopedic Institute and was evaluated by physician's assistant Sana Atcha. The medical record do not show that a supervising physician participated in the visit. At this visit, Petitioner reported since the nerve block, he experienced significant amount of pain. Petitioner further reported pain level of 2 out of 10 that increases to 6 out of 10 when the foot is touched or with any type of friction on the foot. The examination noted good range of motion, very mild discoloration, no bruising and minimal swelling. Petitioner was prescribed physical therapy and, if Petitioner's pain persists, a spinal cord stimulator trial and another set of lumbar paravertebral sympathetic nerve blocks. (Px. 14).

On November 28, 2018, Petitioner returned to Chicago Pain and Orthopedic Institute and was examined by Dr. Geoffrey Dixon who noted normal strength in both upper and lower extremities, equal and symmetric deep tendon reflexes and diminished sensation over the dorsum of the root foot. Dr. Dixon also noted an erythema and edema in the same area as well as a positive straight leg raise test. Dr. Dixon opined that Petitioner appears to have complex regional pain syndrome (CRPS) affecting his right lower extremity, specifically the dorsum of the right foot and he recommended a trial of the spinal cord stimulator. (Px. 14).

On November 30, 2018 Petitioner retuned to Chicago Pain and Orthopedic Institute and was evaluated by physician assistant Russ Wudel who also recommended a spinal cord stimulator for Petitioner's right lower CRPS. Petitioner. (Px 14). Petitioner returned to Chicago Pain and Orthopedic Institute on January 18, 2019

and April 25, 2019. Petitioner reported he was not working and pain levels of 5-6 out of 10. Petitioner further reported difficultly walking due to pain and numbness in is right foot. The records state Petitioner was performing home exercises and taking over-the-counter medications for pain. The records further state Petitioner will continue to remain off work. (Px. 14).

On July 11, 2019, Petitioner presented to Dr. Axel Vargas, of Delaware Physicians, a pain clinic. (Px 16). Dr. Vargas opined that Petitioner developed symptoms of sympathetic mediated pain syndrome and CRPS had developed on March 8, 2018 at work. Dr. Vargas noted Petitioner complained of burning like pain to his right foot and Petitioner's pain level was 9-10 out of 10. Dr. Vargas recommended additional nerve blocks, a spinal cord stimulator and additional physical therapy. (Px. 16).

On August 16, 2019, Petitioner was evaluated Dr. Katazyna Pilewicz, psychologist. (Rx 18). Dr. Pilewicz noted that since May 22, 2018, Petitioner has been under the care of Dr. Vargas. Dr. Pilewicz noted that Petitioner came to the United States in 2013 following a traumatic indecent in Mexico which gave him PTSD. *Id.* She reported that Petitioner did not utilize cognitive techniques to manage his pain and he had deficits coping with his pain. *Id.* Dr. Pilewicz noted that cognitive behavioral treatment, possible rehabilitation setting, could improve his overall coping and pain management. Dr. Pilewicz recommended psychological treatment for the PTSD and she agreed that Petitioner was a good candidate for a spinal cord stimulator given his severe restrictions caused by his ongoing pain which restricts his daily function and autonomy. (Rx 18).

On October 2, 2019, Petitioner returned to see Dr. Axel Vargas. (Px 16). Petitioner denied any changes since his last visit and he reported his pain level as pain 8-9 out of 10. *Id.* Dr. Vargas noted the Petitioner's psychological evaluation found that Petitioner was an excellent candidate for a spinal cord stimulator. *Id.* Dr. Vargas recommended a dorsal column spinal cord stimulator trial and he continued to keep Petitioner off work. (PX 16).

Video Surveillance

Video Surveillance was taken of Petitioner on June 18, 19, and 20th of 2019. Each of those days, the video surveillance shows Petitioner driving and walking into a business named Service King. Petitioner was seen walking briskly showing no signs of distress or otherwise favoring his right foot. Petitioner's gait appears to be normal and steady.

On June 18, 2019, Petitioner was observed walking on numerous occasions. On June 19, 2019, Petitioner was observed washing and/or detailing a vehicle. Petitioner began washing and/or detailing a vehicle at 8:11 a.m. and completed washing the vehicle at 8:32 a.m. During this time, Petitioner was walking around the vehicle continuously. Petitioner performed the task without showing any signs of distress or that he was favoring his right foot/ankle. Petitioner was also observed walking around the building and parking lot.

On June 20, 2019, at 7:04 a.m., Petitioner arrived at work and was observed walking briskly into the building wearing matching white gym shoes. Petitioner was observed walking, mopping and sweeping. At

11:04 a.m. Petitioner was observed pushing a large industrial sized garbage container overflowing with debris. The container had wheels. Petitioner was observed pushing the overfilled container across the garage area and later returning with the container empty. Petitioner did not appear to have any difficulty or under any distress while pushing the container. At 11:21 a.m. Petitioner was observed washing and/or detailing a vehicle. While detailing the vehicle, Petitioner was observed continuously walking around the vehicle. At no time, was Petitioner observed limping or showing any signs of distress or otherwise favoring his right foot. (Rx 15).

Testimony of Dr. Simon Lee, Section 12 examiner

Dr. Simon Lee is a board orthopaedic surgeon who serves on the clinical committees of the American Orthopaedic Foot and Ankle Society. (RX 3). Dr. Lee testified that 99% of his practice involves foot and ankle related conditions and performs approximately 450 surgeries a year related to foot and ankle conditions. Id. at 7.

Dr. Lee testified that Petitioner reported he was hanging a door with a coworker and another coworker grabbed a metal tube and slammed it down onto his right foot. *Id.* at 13-14. Dr. Lee testified after his examination and reviewing the medical records and objective opined that Petitioner was symptom magnifying or malingering, so he referred Petitioner to a specialist for CRPS because he does not treat or manage CRPS. *Id.* 20-23.

Dr. Lee noted Dr. Hedman, a podiatrist, and Mohamed Memon, a physician's assistant, diagnosed CRPS abut it did not appear that any physician or any licensed doctor from Chicago Pain and Orthopedic Institute, actually physically examined Petitioner and established a diagnosis of CRPS. *Id.* at 26-27. Dr. Lee further noted that Dr. Jain, also from Chicago Pain and Orthopedic Institute, did not exam Petitioner or established a diagnosis, he only referred Petitioner to a podiatrist. Dr. Lee testified CRPS is a medical diagnosis which may be out of the scope of practice for a podiatrist to diagnose. *Id.* 28.

Dr. Lee reviewed Dr. Candino's report and he agrees with Dr. Candino that Petitioner was misdiagnosed as suffering a crush injury to his right foot. *Id.* at 33. Dr. Lee opined Petitioner was exhibiting symptom magnification or malingering. *Id.* at 37. Dr. Lee reviewed the video surveillance and noted that Petitioner had a normal gait, performed lifting and carrying activities without any evidence of difficulty. *Id.* at 35.

Dr. Lee testified the MRI, taken within 5 weeks of the incident, does not indicate any real specific orthopedic injury or trauma to indicate the level of symptoms Petitioner described. Dr. Lee opined the mechanism of injury would not be enough specific trauma or type of injury to trigger a CRPS diagnoses. *Id.* at 38.

Testimony of Dr. Kenneth Candino, Section 12 examiner

Dr. Candino testified he is board certified in anesthesiology and additionally qualified in pain medicine. Dr. Candino testified he is a professor of clinical surgery with the University of Illinois College of Medicine and professor of Clinical anesthesiology at UIC. (Rx 4).

Dr. Candino examined Petitioner on March 3, 2019. At that time, Petitioner reported he was helping a coworker lift a car door when another coworker threw a hollow pipe to the ground that landed on his right foot. Dr. Candino testified he reviewed the medical records including the report from Dr. Vargas and addendum report of Dr. Simon Lee, video surveillance, witness statements and photographs of the pipe. *Id* at 26.

Dr. Candino opined that Petitioner does not have complex regional pain syndrome (CRPS). Dr. Candino said Petitioner's pain was not reginal. Dr. Candino further opined based upon Petitioner's subjective complaints, Petitioner's pain was localized to the dorsal of his foot in the distribution of the superficial peroneal nerve. Dr. Candino testified warmth is typically seen in an inflammatory condition not in CRPS, which is typically vasoconstriction causing reduced blood flow and reducing the skin's temperature. *Id.*

Dr. Candino opined that Petitioner does not meet the Budapest diagnostic clinical Criteria for CRPS. Dr. Candino testified that you need to exercise due diligence to assess other potential etiologies before ascribing that a given condition is related to CRPS. Dr. Candino testified after reviewing the medical records from Dr. Vargas, which do not show that he attempted to utilize or even note the criteria for making a CRPS diagnoses. *Id.* at 43. Dr. Candino opined Petitioner did not meet the Budapest Criteria because Petitioner had a condition that met all the criteria which was superficial peroneal nerve neuritis. *Id.* at 20. Dr. Candino testified superficial peroneal nerve neuritis or neuropraxia heals 100% of the time within 2 years and in the vast majority of time within 6 months of the onset of the injury. *Id.* at 24.

Dr. Candino reviewed the reports from Drs. Vargas and Pilewicz. Dr. Candino testified you cannot determine whether a spinal cord stimulator would help Petitioner because the stimulator relies upon subjective reporting by the individual and if that person does not give reliable responses it will be a failed modality. Dr. Candino said Petitioner's somatization levels, as noted by Dr. Pilewicz, were obviously manifestly elevated and that somatization is the process of over exaggerating complaints. Dr. Pilewicz noted Petitioner was also previously diagnosed with PTSD from some event in Mexico. Dr. Candino testified that PTSD is a condition which typically undermines the success of a spinal cord stimulator because PTSD causes an over manifestation of symptoms and over reporting of subjective symptoms. *Id.* at 30.

Dr. Candino observed the video surveillance and noted Petitioner's ambulated normally, Petitioner's gait was normal, Petitioner had no limp and he was not favoring one side. Dr. Candino opined the video surveillance shows that Petitioner is fully functional, nonlimited individual showing with the absence of any painful behaviors such as grimacing, stopping to rest or grasping the affected areas. *Id.* at 32

After reviewing the video surveillance, photographs of the pipe and additional medical records, Dr. Candino opined that Petitioner does not have CRPS. Dr. Candino opined that CRPs could not be related to the alleged mechanism of injury or accident as Petitioner described. *Id.* at 43. Dr. Candino further opined if Petitioner had an injury the only mechanism of injury he could of had was neuropraxia but that after reviewing

the eye witness reports and the photos of the pipe, Petitioner did not have a crush injury and it was unlikely he had any injury at all. *Id.* at 37.

Dr. Candino testified that a 1-pound pipe falling from the height of a couple of feet would not cause a crush injury.. Dr. Candino further testified the pipe falling from 4 feet would be unlikely to cause any type of trauma unless it also caused an abrasion on the open foot which was exposed to the environment without the benefit of a sock or shoe. *Id.* 40. Dr. Candino testified to have a nerve not function appropriately requires a substantial stretch or compression. *Id.* at 49. Dr. Candino opined the peroneal nerve injury was not related to the alleged work accident. Dr. Candino noted one of the medical records states that Petitioner had a similar report on his left side of a very similar magnitude and nature, which occurred prior to his alleged right foot injury. *Id.* at 44.

Dr. Candino opined Petitioner does not require additional medical treatment including a spinal cord stimulator and Petitioner reached maximum medical improvement within a few hours of the incident. *Id.* at 45. Dr. Candino testified the video surveillance, taken over 3 days, demonstrates no limitations in functionality and demonstrates no inability to perform normal activities or ambulation, pushing a cart, driving an automobile and emptying garbage. Dr. Candino opined that he could not ascribe any ongoing mechanism of ill-being or injury associated with the alleged accident of March 8, 2018. *Id.* at 45-46.

The Arbitrator does not find the testimony of Petitioner to be credible. The Arbitrator does find the testimony of Steven Ferraro and Charles Lee to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002).

In support of the Arbitrator's decision relating to issues "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 recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "arose out of" and "in the course of" his employment. 820 *ILCS* 305/1(d) (West 2014). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105, 853 N.E.2d. 799, 803 (2006).

The requirement that the injury "arise out" of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 2017 Ill. 2d. 193, 203. 797 N.E.2d 665, 672 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out

of" the claimant's employment. *Parro v. Industrial Comm'n,* 167 Ill. 2d 385, 393, 212 N.E.2d 882, 885 (1995). Rather, "[T]he "arising out of" component is primarily concerned with causal connection and is satisfied when the claimant has "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,* 207 Ill. 2d at 203. Liability "cannot rest on imagination, speculation or conjecture, but must be based solely upon the facts contained in the record." *Caterpillar Tractor Co. v. Indus. Comm'n,* 129 Ill. 2d 52, 61, 541 N.E.2d 665, 668 (1989).

After careful review of the evidence presented, the Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that an accident arose out of and in the course of Petitioner's employment by Respondent on March 8, 2018.

Mr. Ferraro testified he and Norberto were holding the car door and Petitioner was not. Mr. Ferraro testified he was holding the front of the door with his left hand while Norberto was holding the other side of the door. Mr. Ferraro testified the door was stuck on a horse because of over spraying of paint caused when the door was painted. Mr. Ferraro testified he removed the door from the horse but the one of the arms or connecting tubes was still attached to the door, so he twisted it off and dropped it to the ground with his right hand from about waist high. Mr. Ferraro testified Petitioner was standing behind him and toward his left side. Mr. Ferraro testified he did not throw the connecting rod to the ground with force. Mr. Ferraro testified that after dropping the connecting rod to the ground he heard it impact the ground twice. Petitioner testified he was holding the door with Norberto and Mr. Ferraro walked over mad or upset and grabbed the connecting rod and threw it down on Petitioner's foot. The Arbitrator finds Mr. Ferraro's testimony more plausible than Petitioner's testimony.

The Arbitrator notes that Mr. Ferraro's testimony was very detailed. The door was freshly painted, and the connecting rod was stuck to the horse by paint overspray. Mr. Ferraro was holding the front of the door with his left and twisted the connecting rod off with his right hand before dropping it to the ground. On the other hand, Petitioner provide various versions of what occurred. Petitioner told his Mr. Lee two different stories. Petitioner first told Mr. Lee that Steve dropped one of the arms which bounced before hitting his foot. Later Petitioner told Mr. Lee that Steve threw the arm on the ground striking his foot. The Arbitrator notes the Employee's Report of Incident is consistent with Petitioner's original explanation but inconsistent with his trial testimony.

The Arbitrator also notes Petitioner provided different versions of what occurred to the medical providers. On one of the records from Advocate Sherman Hospital records Petitioner reported a tube fell onto his foot but in another records Petitioner reported that a coworker struck his foot with a sold metal tube. Petitioner told other medical providers his coworker slammed a steel tube on his foot and other medical providers tube fell and others medical providers a coworker threw it to the ground striking his foot. Petitioner

told some medical provider the tube was hollow, and he told other medical providers the tube was solid. Petitioner testified that he was not even sure which rod struck his foot because there were 3 of them. The Arbitrator notes Petitioner also disputed the history contained in several of the medical providers records. Petitioner testified he did not tell doctors a coworker slammed the tube on his foot, and he blamed the miscommunications on his limited skills speaking English even when a translator was provided.

Petitioner also disputed medical records regarding his work history after returning to work in January of 2019. After Petitioner returned to work, the medical records state that Petitioner reported he was not working and will continue to remain off work. When questioned regarding this inconsistency, Petitioner testified he told his doctor he was working, and they knew. The Arbitrator notes the inconsistence regarding Petitioner working occurs in several of the records involving more than one doctor. The Arbitrator does not find it reasonable that Petitioner's work status would be misrepresented several times over multiple visits with different medical providers. The Arbitrator finds it more probable that Petitioner misrepresented his employment status to the medical providers.

Petitioner even disputed the medial records showing that he reported pain levels of 10 out of 10. Petitioner testified he never reported to doctors he was experiencing pain levels of 10 out of 10. A review of Petitioner's medical records show that Petitioner reported pain levels of 10 out of 10 and levels close to 10 on multiple occasions. When questioned on about this inconsistence, Petitioner blamed the problem on his English proficiently even when a translator was provided. The Arbitrator also notes that Petitioner's reported inconsistent symptoms to various medical providers. To some medical providers Petitioner numbness and tingling while he denied experiencing numbness and tingling to others medical provers. Once Petitioner reported tremors and uncountable jerking in his right foot.

The Arbitrator also notes other situations of inconsistent or misleading testimony. During direct examination Petitioner was asked how his injury has impacted his life and he testified that it was difficult to run, play soccer and to play with his children. (T. 27). On cross examination, Petitioner was asked whether he liked to play soccer and he responded, "*I didn't mention that I liked to play it or not I just said I haven't' played it anymore.*". (T. 32). Petitioner also testified that it was very difficult to work because of his pain but a review of the surveillance videos shows Petitioner working over three consecutive days without showing signs being in pain while working. The Arbitrator finds numerous examples of Petitioner's testimony being unreliable. 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 & Bayler/Hucks*, 08 IL.WC. 004187 (Ill. Indus. Comm'n 2010).

The Arbitrator finds the testimony of Mr. Ferraro and Mr. Lee to be credible and not the testimony of Petitioner. The Arbitrator finds that Mr. Ferraro, not Petitioner, was holding the car door and that Mr. Ferraro

did not throw the metal rode, which was hollow, down with force as described by Petitioner. The Arbitrator further finds that hollow metal rod fell to the ground without striking Petitioner's right foot.

With respect to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

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. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. See *Sisbro*, 207 Ill.2d at 205.

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that his current condition of ill-being is causally related to injury.

The Arbitrator finds the opinions of Drs. Lee and Candido to be more persuasive than the opinions of Drs. Peterson, Hadman, Vargas and Pilewicz. The Arbitrator finds the mechanism of injury Petitioner provided to his treating physicians regards to the impact, force of the impact, weight of the tube and characteristics of the tube Petitioner was not accurate. The Arbitrator further finds that Petitioner's physicians were not aware Petitioner returned to work and the nature of physical activity Petitioner was performing at work which undermined their opinions. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it' an expert opinion cannot be based on guess, surmise or conjecture. *Wilfert v. Retirement Board*, 318 Ill.App.3d 507, 514-15 (First Dist. 2000).

Dr. Lee, a board-certified orthopedic surgeon, testified that Petitioner completed a pain form and he marked the most extreme values for the entire 30 questions on the form. (Rx 3, pg. 16). Dr. Lee testified he rarely sees anybody list all the extremes for all the criteria on the form regardless of the type of trauma or injury they have. *Id.* at 16. Dr. Lee stated after his evaluation, he found Petitioner's objective findings did not support his complaints based on an absence of any objective abnormalities or the diagnostic studies. *Id.* at 20. At the time of his May 30, 2018, Dr. Lee opined that Petitioner had either symptom magnification or CRPS so he recommended a pain management consultation to rule out CRPS. *Id.* at 22. After Dr. Lee reviewed Dr. Candido's reports, who is a pain management doctor, he opined that Petitioner did not have CRPS or a crush injury. *Id.* at 34-37.

The Arbitrator notes Dr. Lee also reviewed the additional medical records from Petitioner's treating doctors. Dr. Lee took issue with the fact that Chicago Pain and Orthopedics Institute indicated treatment and intervention based on a physician assistant's evaluation and diagnosis of CRPS. *Id.* at 27. Dr. Lee questioned whether the physician's assistant's training or level of education assessing CRPS because it is a complicated and nuanced diagnosis. *Id.* at 27. Dr. Lee also noted that Petitioner was not examined by Dr. Jain. *Id.* at 28.

Dr. Lee also questioned with Dr. Hedman, a podiatrist, could render a diagnosis of CRPS and whether it is within the scope of practice of a podiatrist.

The Arbitrator notes that Dr. Lee agreed with Dr. Candido, a pain management doctor, who opined that Petitioner does not have CRPS. (Rx 3, pg. 34, 37). Dr. Lee further opined that since Petitioner did not have CRPS, he was exhibiting symptom magnification and malingering during his original evaluation on May 30, 2018. Dr. Lee found also noted discrepancies between Petitioner history and the information contained in the witness statements of Chuck Lee and Steven Ferraro. *Id.* at 37. Dr. Lee opined the level of trauma described from the witness statements would not be enough to cause CRPS. *Id.* at 38. Dr. Lee further noted the MRI did not show any real specific injury after five weeks from the accident. *Id.* at 39.

The Arbitrator also finds the testimony of Dr. Candido, board certified in pain medicine for anesthesiology, credible. Dr. Candido opined that Petitioner never had CRPS because his pain was isolated, to the dorsum of his foot, and not regionalized. *Id.* at 37. Dr. Candido testified that CRPS does not contain warmth because of the reduction of blood flow. Dr. Candido opined that Petitioner did not meet the Budapest Criteria because Petitioner had peroneal nerve neuritis. *Id.* at 20. Dr. Candido testified the Budapest Criteria is a test of exclusion and peroneal nerve neuritis could not be excluded. *Id.* at 20. Dr. Candido also testified that Dr. Vargas did not utilize any of the Budapest Criteria in his reports when he diagnosed CRPS. *Id.* at 43.

The Arbitrator notes Dr. Candido opined that Petitioner did not suffer a crush injury. *Id.* at 37. Dr. Candido testified he reviewed a picture of the pipe, which only weighed 1.1 pound, and the witness statements and he opined that it was extremely unlikely any injury occurred at all. *Id.* at 37. He opined that a one-pound pipe falling from a couple of feet could not cause a crush injury. *Id.* at 38.

Dr. Candido reviewed Dr. Pilewicz medical report finding evidence of somatization, which is a process where people overexaggerate complaints, and that Petitioner had a preexisting Post-Traumatic Stress Disorder. Dr. Candido testified PTSD is a condition that undermines the successful use of a spinal cord stimulator and patients with untreated PTSD often fail the use of spinal cord stimulator. *Id.* at 30.

Dr. Candido reviewed the video surveillance taken during June 18, 2019, June 19, 2019, and June 20, 2019 and testified Petitioner was ambulating normally with a normal gait with no limp. *Id.* at 31. Dr. Candido testified the surveillance demonstrated Petitioner was fully functional showing performing certain activities with no limitations and the absence of any painful behaviors. Dr. Candido opined after reviewing all of the evidence, Petitioner had a peroneal nerve injury which was not related to the alleged work accident. *Id.* at 44. Dr. Candido opined it was not possible to relate the alleged mechanism of injury or accident. *Id.* at 43.

With respect to issues "J, K and O" the Arbitrator finds as follows:

Based upon the Arbitrator's findings regarding issues C and F, the Arbitrator further finds issues J, K, and O are moot and need not be decided. Petitioner's claims regarding those issues are hereby denied.

With respect to issue "M" penalties or fees, the Arbitrator finds as follows:

Based upon the Arbitrator's findings regarding issues C and F, the Arbitrator further finds that Petitioner's claim for penalties or fees is hereby denied.

With respect to issue "N" is Respondent entitled to Credit, the Arbitrator finds as follows;

Based upon the Arbitrator's findings regarding issues C and F, the Arbitrator finds that Respondent is entitled to a credit in the amount of $6,305.21 for TTD benefits paid by Respondent.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC032251
Case Name	BERGER, JAMES v. AXIUM FOODS INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0598
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	William Warmouth

DATE FILED: 12/9/2021

/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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Berger,
Petitioner,

vs. No. 17 WC 032251

Axium Foods,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

I. Findings of Fact

Petitioner was employed by Jamco Products on January 30, 2017 when he suffered an injury to his right shoulder and neck. He sought treatment at the Mercy Urgent Care, with his primary care physician and with Physicians Immediate Care (PIC). Petitioner was initially diagnosed with sprains of the neck and right shoulder and prescribed physical therapy, Norco, naproxen, and Flexeril. He remained off work for approximately one week, then returned to work with a lifting restriction of ten pounds. On February 8, 2017 he reported to Physicians Immediate Care that his injury occurred while holding a 10-foot long heavy part. Two days later he was working on another part and felt a pop and had pain in his right shoulder radiating into his arm. He also complained of intermittent numbness and swelling in his right thumb, index, and middle fingers. Petitioner then sought pain management treatment at Mercy Hospital with Dr. Jaymin Shah on March 29, 2017. Petitioner reported that he developed neck and right arm pain after a work injury on January 30, 2017. His neck pain traveled down his right arm to his fingers. He described numbness in his thumb, index, and middle fingers and waking up throughout each night in horrible pain. Petitioner reported that he had been fired from his job and had not been able to do anything because of his pain. Dr. Shah noted Petitioner's complaints were tracing the C6-7

dermatomes. He read a February 15, 2017 MRI as showing a disc bulge at C6-7, diagnosed degenerative disc disease with radiculopathy/radiculitis, and provided an injection at that level on April 13, 2017.

Petitioner settled a workers' compensation case with Jamco concerning his January 30, 2017 accident. (No. 17 WC 005150). The settlement contract provided $2,500 for prospective medical treatment and was approved by the Arbitrator on May 9, 2017.

Petitioner began working for Respondent in May 2017. However, he continued to treat for his January 30, 2017 Jamco injury. On September 21, 2017, Petitioner returned to Dr. Shah for increased severe pain starting in his neck and running down his right arm and constant numbness and edema to his right third finger (intermittent to his thumb and second digit). Petitioner described a six-month history of neck and shoulder pain and reported that that his pain had returned shortly after the injection so severely that he felt he was "not able to take it anymore." Petitioner described his pain at the time as 10 out of 10 and worsened by any activity. He told Dr. Shah at this appointment that his complaints were "not workers comp" and explained that he had been forced to seek treatment at other clinics because the workers' compensation insurer had stopped covering his treatment after possible "dirty urine."

Dr. Shah noted that Petitioner had congruent pain along with a consistent physical exam with a C7 dermatomal pain and so ordered a repeat C6-7 injection, prescribed Lyrica, and referred Petitioner to a physiatrist for an EMG. He also instructed Petitioner to follow up with him in a month.

Less than a month later, Petitioner alleged that he suffered this October 15, 2017 accident while working for Respondent. Petitioner described working as a sanitation laborer and being instructed to move a heavy ramp. He was unable to move the ramp alone and sought assistance from a co-worker. Together both were unable to move the ramp, and Petitioner immediately reported to his supervisor that he had injured his neck and right shoulder while attempting to lift the ramp.

When Petitioner's pain did not resolve by the following day, Respondent advised him to seek evaluation and treatment with OrthoIllinois. Petitioner was evaluated by Dr. Robin Borchardt on October 16, 2017. Although Petitioner's primary complaints were shoulder/arm related, Dr. Borchardt ordered x-rays of his neck and right shoulder, which were negative. Dr. Borchardt concluded from his exam that Petitioner had suffered strains to his neck and right shoulder. At no time did Petitioner advise Dr. Borchardt of his January 30, 2017 work injury, prior diagnostic testing or treatment, or ongoing cervical/shoulder complaints. Petitioner complained that his neck and right shoulder pain were at 8/10, and his second and third right digits were numb and swollen.

Despite conservative treatment, Petitioner complained that his pain worsened, and on October 19, 2017, Dr. Borchardt ordered an MRI of the right shoulder, which showed mild cuff tendinitis but no evidence of tearing. Dr. Borchardt recommended that Petitioner discontinue use of the sling to avoid a frozen shoulder.

Dr. Borchardt then ordered a cervical MRI, which was performed on November 2, 2017 and showed a disc protrusion at C6-7. The doctor believed that the disc protrusion at C6-7 was small and would resolve without intervention. Petitioner continued to suffer from pain and grinding in his shoulder and numbness and tingling in his right second and third digits. Dr. Borchardt ordered a C7-T1 epidural steroid injection, which was administered on February 16, 2018. The injection provided short-term relief, but Petitioner continued to complain of pain in both his neck and right shoulder.

Dr. Borchardt ordered a new cervical MRI, which showed no significant changes. Dr. Borchardt referred Petitioner to spinal surgeon, Dr. Braaksma, for further evaluation and treatment. Petitioner did not advise Dr. Braaksma of his January 30, 2017 injury and attributed his current pain to a July lifting incident, as well as the October 15, 2017 work accident. Dr. Braaksma performed an anterior cervical discectomy at C6-7 with instrumentation on November 6, 2018 and returned Petitioner to work without restrictions on January 11, 2019.

The case was tried on July 15, 2020. At that time, Petitioner testified that at the time of his accident he had been employed by Respondent for approximately one year. He stated he had hurt his back/shoulder area a few years prior on another job and that it had been at least a year since he'd seen a doctor for his prior medical condition. He stated he wasn't receiving treatment for his neck or shoulder during that time. Petitioner testified that he was able to work full duty for Respondent until this October 15, 2017 accident and that he was in "hard core" pain after this accident. He said he cried every night for a year due to his nerve pain. Following surgery by Dr. Braaksma, Petitioner enjoyed tremendous improvement in his symptoms.

On cross examination Petitioner testified that he injured his right shoulder in the Jamco accident. He denied that his neck was injured in that accident and denied seeking treatment for his neck or shoulder in September of 2017.

The Arbitrator found that an accident did occur on October 15, 2017 and arose out of and in the course of Petitioner's employment with Respondent. He noted that Petitioner acknowledged a prior work accident but described treatment for those injuries as sporadic and his symptoms as minor. The Arbitrator found causal connection and awarded medical and temporary total disability benefits and 15% loss of use of the person-as-a-whole.

II. Conclusions of Law

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. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment "'if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204 (2003) (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). "In the course of" employment refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

The 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. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). 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 Comm'n*, 37 Ill. 2d 123, 127 (1967). 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. *Int'l Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

The Commission finds that Petitioner failed to prove that he suffered an accident on October 15, 2017 as his testimony was not credible. Under direct examination, Petitioner specifically denied injuring his neck in the Jamco accident and specifically denied undergoing any treatment for it in the year preceding the alleged October 15, 2017 accident. (Tr. 27). However, Petitioner's medical records reflect that he was in fact receiving treatment for his Jamco injuries during the year proceeding the alleged October 15, 2017 accident. Most notably, less than a month before his alleged work accident, Petitioner sought pain management treatment from Dr. Shah for ongoing neck and shoulder pain related to the January 30, 2017 Jamco accident. The medical records reflect Petitioner's reporting that his condition was, "too painful to bear." In response, Dr. Shah ordered a repeat steroid injection, prescribed Lyrica for the nerve pain, ordered an additional MRI, and provided a referral for EMG testing. Dr. Shah's office note of September 21, 2017 directly contradicts Petitioner's statement of his physical condition prior to his alleged October 15, 2017 accident and undermines his claims as to whether an accident occurred which caused him injury in this case.

The Commission also notes that there was no increase in pain following the October 15, 2017 accident, as Petitioner reported his pre-accident pain level at 10 out of 10. He complained of the same pain running from his neck down his right shoulder and into his arm and hand. He complained of the same numbness, tingling and swelling in his right second and third fingers. Moreover, Petitioner's post-accident November 2, 2017 MRI showed no significant changes from the pre-accident February 16, 2017 MRI. Both revealed small C6-7 disc protrusions. After a careful review of the entire record, the Commission concludes that Petitioner failed to prove he sustained an accident on October 15, 2017. Therefore, the decision of the Arbitrator is reversed and all benefits are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 6, 2020, is hereby reversed. The Commission finds Petitioner failed to prove that he sustained an accident on October 15, 2017 that arose out of and in the course of his employment.

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

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

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

December 9, 2021

/s/ *Marc Parker*
Marc Parker

mp/dak
o 11/18/21
068

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BERGER, JAMES
Employee/Petitioner

Case# **17WC032251**

AXIOM FOODS
Employer/Respondent

On 8/6/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2489 BLACK & JONES ATTORNEYS AT LAW
TRACY L JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

5077 WARMOUTH LAW PC
WILLIAM T WARMOUTH
17 N WABASH SUITE 650
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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

James Berger
Employee/Petitioner

Case # **17** WC **32251**

v.

Axiom Foods
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **July 15, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 15, 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 $**7,871.01**; the average weekly wage was $**457.62**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**10,080.30** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,080.30**.

Respondent is entitled to a credit of $**16,867.35** under Section 8(j) of the Act.

ORDER

The Arbitrator orders respondent to pay to petitioner the related medical bills and hold petitioner harmless for reimbursement to the group insurance carrier and Medicaid as outlined in petitioner's exhibit 4 consistent with Section 8(a) and the Illinois Worker's Compensation Fee Schedule.

Respondent shall pay Petitioner temporary total disability benefits of $305.08/week for 60 6/7 weeks, commencing October 16, 2017 through December 15, 2018, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $10,080.30 for temporary total disability benefits that have been paid.

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.

Arbitrator Anthony C. Erbacci

August 4, 2020
Date

AUG 6 - 2020

FACTS:

Petitioner testified that in October of 2017, he was employed with the respondent in the sanitation department and had been so employed for approximately one year. Petitioner testified that his job duties included cleaning and sanitizing equipment and the building. Petitioner testified that on October 15, 2017 he was asked by his boss, Tom, to move a large ramp in the dock area. He indicated these ramps were used between the dock doors and semi-trailers. Petitioner testified that he attempted to grab the ramp with his hands and move it but it would not budge. He obtained assistance from a coworker. When trying to lift the ramp up with the coworker, he felt pain in his shoulder and neck area. Petitioner testified that he gave notice to his boss Tom immediately following the incident and asked to seek medical treatment. Petitioner testified that he was told and to wait until the following day to see if it improved on its own.

The next day petitioner reported to work and advised his boss that his symptoms had not resolved and asked to seek medical treatment. Petitioner was advised to report for consultation at Ortho Illinois. Petitioner was seen on October 16, 2017 at Ortho Illinois by Dr. Borchardt. A history was noted in the record that the petitioner was asked to lift a ramp that goes from the floor to a semi-trailer and, while doing so, he had pain in his arm and neck. The history further indicated that the following morning the pain had been worse. X-rays were taken on the right shoulder and neck but were unremarkable. He was diagnosed with a sprain, given restrictions and medication. Petitioner followed up at Ortho Illinois on October 19, 2017 reporting ongoing pain which was worse than the prior visit. Dr. Borchardt ordered an MRI of the right shoulder given that the pain was radiating down the arm. The MRI was carried out November 2, 2017 and was interpreted as showing mild cuff tendinosis and peritendinobersitis with no macrotear. Petitoner was advised to begin active range of motion movements with his arm. Because the petitioner was still symptomatic on November 16, 2017, Dr. Borchardt ordered an MRI of the neck which was carried out on November 28, 2017. The MRI was interpreted as showing a C6-7 broad-based central and slightly eccentric rightward disc displacement and protrusion with near ventral cord abutment, mild bilateral foraminal narrowing and a tiny central non-compressive disk displacement at C5-6. On December 19, 2017, Dr. Borchardt recommended that the petitioner undergo an epidural steroid injection and continue work restrictions. The injection was again recommended on January 2, 2018 and a course of physical therapy was completed January 4, 2018. Due to lack of insurance approval, the petitioner was unable to get the injection and followed up with Dr. Borchardt on January 25, 2018 and the injection was again recommended.

Petitioner finally had the injection by Dr. Enke on February 16, 2018. He was diagnosed with the radiculopathy of the cervical region and cervical disc displacement at C6-7. He was reporting numbness and tingling as well as pain down the right arm. The epidural injection at the C6-7 level performed by Dr. Enke did provide approximately one week worth of pain relief. By July 12, 2018 numbness in the right arm and shoulder as well as tingling in the hands and pain were the main complaints. Dr. Borchardt was advised that a section 12 independent medical evaluation was being set up and deferred recommendations for ongoing treatment pending the exam. On August 14, 2018 Dr. Borchardt noted continued right shoulder pain and cervicalgia. On physical examination the petitioner was noted to have bicep atrophy measuring 31 cm on the right as compared to 33 cm on the left. The doctor recommended ongoing treatment and referral to Dr. Braaksma for consideration of surgery. Petitioner was examined by Dr. Braaksma on August 20, 2018. History was obtained of the work injury as well as an additional history of increased neck pain following an incident picking up a child at a wedding in July 2018. Dr. Braaksma reviewed the MRI that was previously done along

with the treatment rendered by Dr. Borchardt. Dr. Braaksma diagnosed right-sided radicular pain and parasthesia of the C7 dermatomal distribution. Dr. Braaksma indicated that the symptoms were the result of an injury sustained while working in November 2017. Dr. Braaksma recommended that the petitioner undergo surgery but wanted a new MRI prior. Following the updated MRI, Dr. Braaksma recommended surgery to the petitioner's cervical spine. On November 6, 2018 surgery was performed including an anterior cervical discectomy and fusion at C6-7. Petitioner underwent an uncomplicated postoperative course of treatment and therapy. He was released from care on January 11, 2019 and has not been back for treatment since.

Petitioner testified that he received temporary total disability from the respondent's workers' compensation insurance carrier through the date of the IME with Dr. Levin on March 20, 2018. However, petitioner did not get released to return back to work until December 16, 2018 by Dr. Braaksma.

Petitioner did testify that he had had some prior treatment to his neck and shoulder before the work injury of November 2017. However, that treatment was sporadic and he had not been treating nor was he under any restrictions or unable to carry out his full job duties prior to the date of the accident of October 15, 2017. Petitioner did admit to a prior motor vehicle accident in 2010 as well as a prior work injury for a different employer. Again, petitioner testified that he had only minor symptoms and was capable of doing his full job duties for respondent up to his injury on October 15, 2017. Petitioner testified that following the work injury of October 15, 2017, his pain was substantially worse, and he was unable to carry out his full job duties. Furthermore, surgery was not recommended until after the work injury of October 15, 2017.

Petitioner was 30 years old at the time at the time of the accident and was 33 years old at the time of trial. Petitioner no longer works for the respondent. He had no work restrictions upon his release from care. Petitioner testified that there was great improvement in his symptoms following surgery.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the petitioner sustained a work-related accident that arose out of and in the course of his employment on October 15, 2017. Although the respondent disputed that an injury occurred, the Arbitrator notes that the respondent offered no evidence or testimony to dispute that an accident occurred when the petitioner was lifting a ramp manually at the direction of his supervisor on October 15, 2017. The Arbitrator notes that the medical records all contain a consistent and contemporaneous history of the work injury. Most significantly, when the petitioner was examined by Dr. Borchardt on October 16, 2017, the record contained a clear history of the work injury which was consistent with petitioner's testimony. As such the Arbitrator finds that the petitioner sustained an accidental injury that arose out of and in the course of his employment on October 15, 2017 while working for the respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the petitioner's condition of ill-being is causally related to the work injury of October 15, 2017. The petitioner relied upon a chain of events theory regarding causation as well as the opinion of the treating surgeon, Dr. Braaksma. The petitioner alleged a specific injury on a specific date while working for the respondent. He notified the employer the same day and sought treatment the next day on October 16, 2017 at Ortho Illinois. When seen on that date, the petitioner gave a clear history of the work injury to the doctor's office. Despite conservative treatment, petitioner was ultimately referred to a surgeon. When Dr. Braaksma examined the petitioner on August 20, 2018, he noted that the symptoms were the result of an injury he sustained while working in November 2017. Dr. Braaksma noted that history and opinion and indicated that he was aware of an outside incident in July 2018 when the petitioner was lifting a child in a wedding resulting in neck pain. Despite those clear histories in the record, Dr. Braaksma still related to the condition to the October 15, 2017 work injury.

The respondent offered three reports from Dr. Jay Levin who performed a section 12 examination of the petitioner in March 2018. Dr. Levin opined that the petitioner's C6-7 herniated disc was pre-existing based on an MRI dated February 15, 2017 (prior to the work injury). Dr. Levin opined that the herniated disc did not appear to be any different in October 2017 as compared to the February 2017 MRI. Therefore Dr. Levin opined that there was no acute injury to the cervical spine on October 15, 2017 and that his clinical symptoms were pre-existing. The Arbitrator acknowledges that the petitioner did have treatment prior to the work injury and that the petitioner appeared to have some anatomical changes in the cervical spine prior to the work injury. However, the Arbitrator finds that the work injury of October 15, 2017 was a causative factor in a worsening of his condition resulting in the symptomatology including his right upper extremity radiculopathy. The change in the symptomatology associated with the C6-7 herniation directly caused the need for treatment including surgery and caused the petitioner to be unable to carry out his full job duties as he had been prior to the October 15, 2017 injury. Because the work injury caused a worsening of a pre-existing condition, the work injury was a causative factor leading to the need for surgery. This finding is supported by the contemporaneous medical records and the opinion of Dr. Braaksma, the treating surgeon. As such, the Arbitrator finds that the petitioner's condition of ill-being was causally related to the October 15, 2017 work injury.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Having found that the petitioner suffered an accidental injury at work which was causally related to the cervical surgery, the Arbitrator finds that the respondent is responsible for paying to the petitioner the related medical bills associated with care and treatment at Ortho Illinois, Ortho Illinois Surgery Center, Quest Diagnostics, Atletico and the Illinois Department of Health and Family Services. The respondent is further responsible for paying the related medical bills and holding petitioner harmless for reimbursement to the group insurance carrier and Medicaid as outlined in petitioner's exhibit 4 consistent with section 8(a) and the Illinois Worker's Compensation Fee Schedule.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Having found that the petitioner sustained an accidental injury that arose out of and in the course of his employment with the respondent on October 15, 2017 which led to the cervical surgery carried out by Dr. Braaksma, the Arbitrator finds that the petitioner is entitled to temporary total disability benefits from the date of accident through December 15, 2018 subject to a credit for TTD paid in the amount of $10,080.30. Respondent is ordered to pay TTD from October 16, 2017 to December 15, 2018 in a weekly amount of $305.08 for a total of $18,522.71 less a credit of $10,080.30 for a balance of $8,442.41.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Pursuant to the Act, the Arbitrator must take into account the following factors when determining the nature and extent of an injury: 1) the reported level of impairment pursuant to an AMA report, 2) the occupation of the injured employee, 3) the age of the employee at the time injury, 4) the employee's future incapacity, and 5) evidence of disability as corroborated by the treating medical records. In this case, there was no impairment rating offered by either party. As such the Arbitrator gives no weight to factor 1. The petitioner was employed as a sanitation worker. The job was described as requiring manual physical labor and required petitioner to clean and sanitize equipment at the respondent. A neck injury certainly would impact how one does that type of work. Therefore, the Arbitrator has considered and gives weight to the occupation of the injured employee. The employee was 30 years old at the time of the injury and was 33 years old at the time of trial. Given his young age, the petitioner will have to deal with a fused cervical disc for a number of years prior to retirement. The Arbitrator has taken into account and gives credible weight to the fact that the petitioner was so young at the time of the injury.

The Arbitrator has also taken into account the employee's future earning capacity and notes that there was no testimony or evidence provided by either party which suggest the petitioner was unable to earn the same amount of money that he had been prior to the injury. In fact, the records indicate that the petitioner was released full duty and the petitioner testified to the same. Therefore, the Arbitrator finds there was no change in the employee's future earning capacity. Finally, the Arbitrator takes into account evidence of disability as corroborated by treating medical records. Dr. Braaksma released the petitioner at maximum medical improvement and noted an improvement in symptomatology following surgery. Petitioner testified that he had wonderful improvement in symptoms and had not sought any further treatment since January 2019 for the cervical spine. Therefore, the Arbitrator has considered the evidence of disability as corroborated by medical records and weighed it accordingly. Based on the five factors outlined above, the Arbitrator finds that the petitioner sustained 15% disability to his whole body as a result of the injury at respondent on October 15, 2017. Respondent is ordered to pay to Petitioner PPD benefits of $319/week for 75 weeks for a total of $23,925.00.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC038042
Case Name	KALPEDIS, NICHOLAS C v. ILLINOIS DEPT OF TRANSPORTATION
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0599
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Michael Hellman
Respondent Attorney	Sidney Gui

DATE FILED: 12/13/2021

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS	)	☐ Affirm and adopt (with explanation)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICHOLAS KALPEDIS,
Petitioner,

vs. NO: 17 WC 38042

ILLINOIS DEPT. OF TRANSPORTATION,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. However, the Commission corrects the typographical errors contained in the Arbitrator's award of temporary total disability benefits. The Commission agrees that Petitioner is entitled to temporary total disability benefits from December 19, 2017 through December 29, 2017 but calculates that period to equal 1 and 4/7 weeks. Additionally, the Arbitrator's award states that temporary total disability benefits will be paid at a rate of $673.08 per day. The Commission corrects the payrate to $673.08 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2020 is hereby affirmed and adopted with the corrections as started herein incorporated. As such, Respondent shall pay Petitioner temporary total disability benefits of $673.08 per week for 1 4/7 weeks, commencing December 19, 2017 through December 29, 2017, as provided in §8(b) of the Illinois Workers' Compensation Act.

IT IS FURTHER ORDERED that Respondent pay 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.

December 13, 2021

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

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

DLS/met
O- 10/13/21
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/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KALPEDIS, NICHOLAS Case# **17WC038042**

Employee/Petitioner

IL DEPT OF TRANSPORTATION

Employer/Respondent

On 4/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5934 MICHAEL P HELLMAN LAW OFFICES
515 JAMES ST
GENEVA, IL 60134

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

APR 3 - 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

Nicholas Kalpedis
Employee/Petitioner

Case # **17 WC 38042**

v.

Consolidated cases: _____

Illinois Department of Transportation
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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **5/21/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On **12/15/2017**, 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 **$52,500.24**; the average weekly wage was **$1,009.62**.

On the date of accident, Petitioner was **36** 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 **$865.43** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$865.43**.

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

ORDER

Respondent shall pay Petitioner TTD benefits from December 19, 2017 through December 29, 2017, 1 &3/7 weeks, at a rate of $673.08 per day.

Respondent shall pay an unpaid balance of $1413.35 owing to Alexian Brothers Medical Center, to be adjusted in accord with the medical fee schedule provided in §8.2 of the Act.

Respondent shall pay Petitioner's attendance $605.77 per week for 5.7 weeks, because the injuries sustained by Petitioner caused a 15% loss of use of the right middle finger.

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

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

Signature of Arbitrator

April 2, 2020
Date

APR 3 – 2020

Nicholas C. Kalpedis vs. Illinois Department of Transportation
17WC38042

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:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

Petitioner Nicholas C. Kalpedis is a Highway Maintainer/truck driver for Respondent Illinois Department of Transportation. Petitioner has held this position for since December 2015. This is a seasonal position with Respondent from around Thanksgiving to the beginning of April each year. Petitioner is also employed with Plote Construction during the months not employed by Respondent as a Teamster truck driver. He has worked for Plote since April 2015.

Petitioner testified that he was working for Respondent on December 15, 2017 on Illinois Route 20 (Lake Street) and Bartlett Road on the north side of Route 20. His crew was applying new stone to the shoulder of Route 20. As the dump truck bed was slowly dropping stone, a stone got caught in the tailgate of the truck. Petitioner's right hand got caught as the tailgate swung and slammed his hand between the tailgate and the bed of the truck as he tried to free the stone. Petitioner is right-handed.

Petitioner went to Alexian Brothers Medical Center emergency department that same day for an injury to his right middle finger (PX #1). X-rays of the right middle finger which were negative for fracture. The wound was cleaned but six sutures where necessary to close the wound to the right middle finger. Petitioner was released with restrictions of limited lifting, pushing and pulling, limited tight or prolonged gripping or pinching, or repetitive twisting of the right hand. Petitioner was also advised to follow up with Amita Health.

Petitioner then followed up at Amita Health on December 18, 2017 (PX #2). Petitioner was examined and advised to remain on the same work restrictions. Petitioner reported that he had no pain. On examination that day, the doctor noted that there was no cellulitis and that there was no tendon injury. No further workup was ordered. Petitioner returned to Amita Health on December 26, 2017 for his right middle finger laceration and was again advised to stay on the same work restrictions. Petitioner returned to Amita Health on December 29, 2017 and was returned to full duty.

Petitioner testified that prior to his December 15, 2017 accident he never suffered any injuries to or received any medical care for his right middle finger and was completely normal upon reporting to work for Respondent on the morning of the accident. Petitioner also testified that he has not suffered any injuries to his right middle finger since December 15, 2017.

Petitioner testified that his right middle finger is numb on the top where the scar is. He testified that it is a little bit tingly/sensitive on the outside of the scar. Petitioner testified that his finger does tire after a few hours of work with repetitive motions like gripping tools, hammers, and shovels. He testified for his job with Plote he must shift gears. He switches the shifter with his right middle finger and that the finger gets tired after a long day of driving and shifting gears and gets numb and sore. Petitioner also testified that after about 4 to 5 hours of driving the Plote truck his right middle finger gets numb. Petitioner testified that he takes over-the-counter Ibuprofen about every other day for finger pain. Petitioner further testified that when he goes to the gym to work out it is harder to hold onto machines or weights or barbells with the right middle finger. He also testified that if he slaps the finger against anything it tingles and there is sensitivity on the outside of where the scar is and numbness over the scar.

He testified that he continues to work for both IDOT and Plote Construction performing the same jobs as he did prior to the finger injury. He drives and IDOT truck with an automatic transmission. However, he explained that the dump truck he drove for Plote Construction had an 8-speed manual transmission.

Petitioner's scar was viewed by both parties and the Arbitrator at the hearing. The scar was described as between the first distal phalanx and the second distal phalanx, that the scar was somewhat keloid or raised, that the scar was somewhat pink in comparison to the surrounding skin, and that the scar was essentially the length of the first knuckle to the second knuckle which was estimated at probably an inch or an inch and a half long, directly down the top of the right middle finger. Respondent's Counsel stipulated to the accuracy of the description of the scar.

CONCLUSIONS OF LAW

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

This issue was not genuinely disputed. Petitioner's description of the accident and his injury were unrebutted. He was treated in the emergency department of Alexian Brothers Medical Center the same day of his accident. Petitioner's injury was so apparent that it required six sutures to close the wound to his right middle finger.

Accordingly, the Arbitrator finds that Petitioner proved that his current condition of ill being is causally related to his work accident on December 15, 2017.

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 presented a bill from Alexian Brothers Medical Center (PX #1), showing a possible balance of $1,413.35. The evidence was clear that both the medical care was reasonable and necessary to treat Petitioner's work accident injury. The Arbitrator finds that said medical bill was for emergency services on the day of the accident and should be paid directly to the provider if it remains outstanding and adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

K: What temporary benefits are in dispute? TTD

The Arbitrator finds that TTD was properly paid in this case for the period from December 21, 2017 through December 29, 2017. Petitioner was paid by Respondent regular pay for the first three days missed. However, the Arbitrator finds that petitioner was entitled to TTD benefits for December 19, 2017 and December 20, 2017, at a rate of $96.16 or $192.32 total and therefore awards Petitioner 2 days of TTD benefits for those two days.

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

Petitioner's claim permanent partial disability was assessed 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.

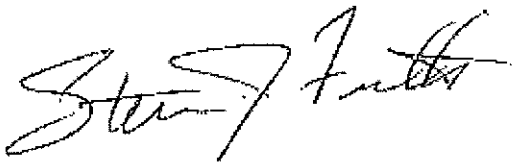
(ii) Petitioner was employed as a truck driver. This occupation requires strength and dexterity of the hands. Petitioner returned to full duty work 14 days after the accident. The Arbitrator gives moderate weight to this factor.

(iii) Petitioner was 36 old time injury. He had a statistical life expectancy of approximately 42 years. He has scarring that will affect the function of his right hand for the remainder of his life. The Arbitrator gives great weight to this factor.

(iv) The is no evidence that Petitioner's earning capacity was affected by his injury. The Arbitrator gives little weight to this factor.

(v) The medical records showed that Petitioner sustained a laceration of his right middle finger which required six sutures for closure. The wound resulted in a keloid scar over the knuckle of his right middle finger. The scarring does limit function of the finger and also the hand. Petitioner has current complaints of numbness and tingling in the finger when manually shifting the gears of a truck. The injured finger tires more than other fingers after many hours of driving. The Arbitrator gives great weight to this factor.

After considering all the evidence, including the above five factors, the Arbitrator finds that Petitioner sustained a 15% loss of use of the right middle finger, 5.7 weeks.



April 2, 2010

Steven J. Fruth, Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC002389
Case Name	TARNOWSKI, PIOTR v. KABINI TRUCKING INC/ SKYWAY EXPRESS TRANSPORT INC & INJURED WORKERS BENEFIT FUND
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0600
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jason Carroll
Respondent Attorney	Randall Wolff, Alyssa Silvestri

DATE FILED: 12/14/2021

/s/Stephen Mathis, Commissioner

Signature

DISSENT - COMMISSIONER DEBORAH BAKER

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

Piotr Tarnowski,

Petitioner,

vs. NO. 11WC 02389

Kabini Trucking, Inc., Skyway Express Transport, Inc., and Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund

Respondents.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 9, 2020 is hereby affirmed and adopted.

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

No bond is required for 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.

December 14, 2021

SM/sj
o-10/13/21
44

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

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

DISSENT

I disagree with the majority's decision to affirm the Arbitrator's finding that Petitioner failed to prove an employment relationship existed between Petitioner and Kabini Trucking, Inc. ("Kabini") and/or Skyway Express Transport, Inc. ("Skyway"). In my view, Petitioner established by a preponderance of the evidence that an employment relationship existed between Respondents Kabini and Skyway.

An employment relationship is a prerequisite for an award of benefits under the Workers' Compensation Act (the "Act"). *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174 (2007). For purposes of the Act, the term "employee" should be broadly construed. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000). The determination of whether a claimant is an independent contractor or an employee is often a difficult task. *Peesel v. Industrial Comm'n*, 224 Ill. App. 3d 711, 716 (1st Dist. 1992). The Illinois Supreme Court has identified several factors that help determine when a person is an employee, namely: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. *Roberson*, 225 Ill. 2d at 175. No one factor determines this issue, but several are considered prominent. *Peesel*, 224 Ill. App. 3d at 716. Among them are the right to control the manner in which the work is done, the right to discharge, the nature of claimant's work as it relates to the employer's business, and who provides the tools, material or equipment. *Wenholdt v. Industrial Comm'n*, 95 Ill. 2d 76, 80 (1983). Of these factors, the right to control the work is the single most important factor in determining the parties' relationship. *Wenholdt,* 95 Ill. 2d at 81. Of growing importance is the nature of claimant's work in relationship to the employer's business. *Ragler Motor Sales v. Industrial Comm'n* (1982), 93 Ill. 2d 66.

In *Peesel*, a claimant appealed the Circuit Court's confirmation of the Commission's determination that no employer-employee relationship existed. The arbitrator found that the

claimant, a truck driver for 43 years, was an independent contractor reasoning, *inter alia*, that: (1) The lease agreement Petitioner had with Respondent indicated Petitioner would be responsible for his own insurance and maintenance of his own tractor and trailer; (2) Respondent gave Petitioner a 1099 tax form at the end of the year wherein Respondent did not withhold Social Security, Federal, State, or local taxes; (3) Petitioner filed reports with the Illinois Commerce Commission (ICC) stating that he was the sole owner of the tractor and trailer and detailing his revenue from operating his own trucking business; and (4) the claimant filed his own tax returns as an independent contractor and business owner. The Commission affirmed and adopted the arbitrator's decision. The Appellate Court reversed and remanded the case and noted that the arbitrator's decision did not address the majority of the factors set out in *Wenholdt* and instead, focused on the claimant's ownership of the tractor and trailer, his filings with the ICC, and his income tax returns. *Peesel*, 224 Ill. App. 3d at 716. The Appellate Court placed more weight on its analysis of the right to control, the right to discharge, and the nature of the claimant's work and found that "the factors cited by the arbitrator as to whether an employer-employee relationship existed with the exception of claimant's providing the equipment are not those given substantial weight in the determination of this issue." *Peesel*, 224 Ill. App. 3d at 718.

There is ample evidence in this case to support a finding that both Kabini Trucking, Inc. and Skyway exercised substantial control over Petitioner's work activities, which is the most important factor in the analysis. Petitioner testified that it was his understanding that both Kabini Trucking, Inc. and Skyway were owned by Marek Myslek ("Myslek"). Petitioner testified further that the trucks he drove would sometimes have the name Kabini Trucking, Inc. on them and would sometimes have the name Skyway on them. Petitioner also testified that he received his dispatch orders from Myslek who also took care of the fuel and repairs. Petitioner testified that he did not know who owned the load he was delivering on the date of the alleged work accident and he did not recall whether Kabini Trucking, Inc. or Skyway dispatched him on the delivery route. Petitioner believed that he worked for both Kabini Trucking, Inc. and Skyway. Petitioner also testified that he was paid by Skyway, however, he could have been fired by Kabini Trucking, Inc. Myslek testified that Kabini Trucking, Inc. and Kabini, Inc. are two separate business entities. Myslek testified that he was a dispatcher for Kabini, Inc. Myslek testified further that Petitioner completed a job application for Kabini, Inc. (not Kabini Trucking, Inc.) and was working for Kabini, Inc. on the day of the alleged work accident. Marek testified that Kabini, Inc. was owned by Marek Budny. Myslek also testified that he issued the paychecks (which were drawn from Skyway's bank account) to Petitioner. Myslek testified that Kabini, Inc., although owned by a different individual and although it was a separate entity from Skyway, reimbursed Skyway for the payroll. There was no documentation indicating that Myslek worked for Kabini, Inc. only. Further, there was no documentation of the job application Petitioner completed or any other hiring paperwork. The corporation reports from the Secretary of State website indicate that Malgorzata Myslek, Marek Myslek's now former wife, was the president of both Kabini Trucking, Inc. and Skyway before the involuntary dissolution of the companies. They also indicate that the president of Kabini, Inc. was Marek Budny before the company's involuntary dissolution.

While some other facts might suggest that Petitioner was an independent contractor – such as the Petitioner's tax filings and the fact that neither Kabini nor Skyway withheld income or social security taxes from the claimant's compensation – these factors should be accorded less

weight than the right to control the claimant's work activities. *See Roberson*, 225 Ill. 2d at 175 (ruling that the right to control the manner of the claimant's work is "the most important consideration"); *see also Ware*, 318 Ill. App. 3d at 1125-26 (characterizing the label that the parties apply to their relationship as a "minor consideration" and noting that "[w]hether income tax is withheld has not been found to be a significant factor"); *and see Peesel*, 224 Ill. App. 3d at 718 (ruling that statements made on a claimant's income tax returns are not given substantial weight). Moreover, as noted above, other relevant evidence further supports the Commission's finding of an employment relationship.

With respect to liability for Petitioner's instant claim, I would find that the preponderance of the evidence shows Kabini Trucking, Inc. and Skyway were joint employers. *See Village of Winfield v. Illinois State Labor Relations Board*, 176 Ill. 2d 54, 60, (1997) ("The test for the existence of joint employers is whether 'two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment'"); *see also Freeman v. Augustine's Inc*., 46 Ill. App. 3d 230, 233 (1977) ("When the control of an employee is shared by two employers and both benefit from the work, the worker is considered to be an employee of both or a joint employee."). Based on facts already stated above, there is ample evidence showing that both employers shared or co-determined the matters governing essential terms and conditions of Petitioner's employment.

The evidence could also support a finding that Kabini and Skyway were borrowing-loaning employers under section 1(a)(4) of the Illinois Workers' Compensation Act, with Skyway Express being the loaning employer and Kabini Trucking, Inc. being the borrowing employer. *See Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 15 ("Pursuant to the loaned employee doctrine, an employee who is in the general employment of one entity may be loaned to another entity for the performance of special work, thereby becoming the employee of the entity to whom he has been loaned" and "the inquiry required to determine whether a loaned-employee status exists is twofold: (1) whether the borrowing employer had the right to control and direct the manner in which the employee performed the work; and (2) whether a contract of hire existed between the borrowing employer and the employee.") As such, the liability of Respondents Kabini and Skyway should be joint and several.

For the above reasons, I respectfully dissent.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0600

TARNOWSKI, PIOTR Case# **11WC002389**

Employee/Petitioner

KABINI TRUCKING INC SKYWAY EXPRESS TRANSPORT INC AND ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE IWBF

Employer/Respondent

On 12/9/2020, 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 0.09% 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:

1938 ALEKSY BELCHER
JASON CARROLL
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

5355 RANDALL A WOLFF & ASSOCIATES
3325 N ARLINGTON HTS RD
SUITE 500
ARLINGTON HTS, IL 60004

6153 ASSISTANT ATTORNET GENERAL
ALYSSA SILVESTRI
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

Piotr Tarnowski
Employee/Petitioner

v.

Kabini Trucking, Inc., Skyway Express Transport, Inc., and Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **11** WC **12389**

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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **September 18, 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 27, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

ORDER

Because an employee-employer relationship did not exist between Petitioner and Respondents on August 27, 2010, Petitioner's claim for benefits is denied.

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

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

Signature of Arbitrator

December 4, 2020
Date

DEC 9 - 2020

STATEMENT OF FACTS

Petitioner testified in Polish with the assistance of a professional translator. He testified he was born on March 17, 1962. Petitioner further testified that as of August 27, 2010, he was legally married with one dependent child under the age of eighteen.

Petitioner testified he was employed by Kabini Trucking, Inc. as of August 2010. Petitioner explained that he began working for Kabini Trucking, Inc. approximately three years prior to August 2010. Petitioner described Kabini Trucking, Inc. as a transport company with its main office located in Crystal Lake, Illinois. Petitioner testified that he operated an eighteen-wheel semi-truck while employed by Kabini Trucking, Inc.

Petitioner testified he was referred to Kabini Trucking, Inc. by an acquaintance who worked there. He testified that he called Kabini Trucking, Inc. and made an appointment with an individual that he believed to be the owner. Following that call, Petitioner met with that person at an office in Elk Grove Village, Illinois and filled out a job application. Following this meeting, Petitioner was hired as a truck driver.

Petitioner testified that the truck he drove for Kabini Trucking, Inc. was provided by Marek Myslek, whom he believed to be the owner of the company. The truck he drove had the name of the company, Kabini Trucking, Inc., on it. When he was not driving the truck, it was kept at a warehouse in Elk Grove Village and later in Maywood Park when the company moved. Petitioner estimated that around ten other employees drove a truck for the company. Petitioner explained that Mr. Myslek was the dispatcher and advised him where he would be driving the truck each week. Once Petitioner completed a trip and returned to the truck yard, he provided everything, such as bills and other paperwork, to Mr. Myslek, who Petitioner indicated was his boss. According to Petitioner, Mr. Myslek paid for the fuel and repairs to the truck. Petitioner explained that Mr. Myslek typically paid him by check, and sometimes cash, upon his return from each trip. Petitioner identified a set of paychecks he received for his work from Mr. Myslek (admitted into evidence as Petitioner's Exhibit Number 16). The employer listed on the paychecks was Skyway Express Transport, Inc. Petitioner testified he believed Skyway Express Transport, Inc. and Kabini Trucking, Inc. were both owned by Mr. Myslek.

On cross-examination, Petitioner contradicted his earlier testimony and testified that the truck he was driving at the time of the accident was a Kabini, Inc. truck. He further admitted that the name Kabini, Inc. was on the side of the truck and that it was owned by Kabini, Inc. Petitioner admitted that Kabini, Inc. controlled what happened with the truck. Petitioner testified that on the date of the accident he was dropping off a load for Kabini, Inc. and picking up a load for Kabini, Inc. and Skyway Express Transport, Inc. Petitioner explained that while he was not sure who owned the load, he was working for Kabini Trucking, Inc. and Skyway Express Transport, Inc. Petitioner concluded that he was working for both companies at the time. Petitioner acknowledged that Kabini, Inc. had the right to fire him. Petitioner did not know if Kabini, Inc. reimbursed Skyway Express Transport, Inc. for whatever he was paid.

Petitioner testified that on Friday, August 27, 2010, he was in Des Moines, Washington in order to drop off a load of Behr paint. His truck was between two trailers and the back door remained open after unloading the paint. Petitioner explained that in order to close the back door of his truck, he needed to move it. Petitioner testified that he had his seat belt on and then put the truck in gear. Petitioner explained that when he saw that his trailer had moved far enough to close the trailer door, he attempted to use the brake to stop the truck. According to Petitioner, when he applied the brakes they did not work. He then grabbed two knobs on the dashboard, which he explained one knob is used for braking and the other is for the air service trailer, and pulled them. Petitioner testified that as he pulled the knobs, the front of his truck hit the trailer of the truck in front of him. Petitioner testified that he felt excruciating pain in his right elbow and in his back immediately after impact. He explained that his arm was driven backwards during the impact and his body turned to the right.

Petitioner testified he was able to exit his truck ten or fifteen minutes after the accident. According to Petitioner, the truck was inoperable following the accident due to the damage sustained. He testified he continued to feel pain in his right elbow, right arm and lower back once he exited the truck. He did not seek medical attention that day, instead taking over the counter pain medication that he purchased from a Walgreens.

Petitioner testified he headed back to Illinois that same day as a passenger in another truck driven by another driver for the same company who was also in the area. Petitioner testified that he called Mr. Myslek about thirty minutes after the accident to report the accident.

Petitioner testified that the drive back to Illinois took three days. Once back in Illinois, Petitioner sought medical treatment at Active Care Center of Chicago on August 30, 2010 due to ongoing "excruciating pain" in his right arm, right elbow and lower back. Petitioner was treated by a chiropractor, Dr. Albert Pawlusiewicz. Dr. Pawlusiewicz noted Petitioner was involved in a motor vehicle accident on August 27, 2010. Dr. Pawlusiewicz noted Petitioner reported that he was not yet buckled into his seat and the steering wheel of his truck "rammed" into his abdomen. Petitioner also reported that he felt immediate pain in his lower back and lower abdominal area and tingling and numbness in his right palm and distal forearm several hours after the accident. Petitioner indicated that he had also developed neck pain and a headache following the accident.

Petitioner underwent x-rays of his neck and left hip, as well as an MRI of his lower back. The MRI revealed 3-4 millimeter and 4-5 millimeter subligamentous posterior disc herniations at the L3-L4 and L4-L5 levels, as well as a 4-5-millimeter posterior and left-sided disc herniation indenting the ventral and left sided thecal sack with left-sided spinal stenosis and left neuroforaminal narrowing at the L5-S1 level. Dr. Pawlusiewicz diagnosed Petitioner as having symptoms of sciatica and an ulnar nerve injury resulting in hypoesthesia/anesthesia. He advised Petitioner to remain off of work for one month.

Dr. Pawlusiewicz subsequently referred Petitioner to physical therapy, however on October 6, 2010, Dr. Pawlusiewicz noted that Petitioner reported that some family issues had kept him from continuing his physical therapy. Petitioner continued to complain of persistent tingling in his right hand, as well as ongoing lower back pain and tenderness. A motor nerve conduction study was completed that same day, which Dr. Pawlusiewicz noted was significant for increased sensory latency at the right wrist. This was suggestive of an irritation of the motor roots of the median nerve on the right side.

On October 11, 2010, Petitioner underwent a cervical MRI, the results of which revealed C5-C6 mild disc bulge and a C6-C7, 2-3 mm, left side disc herniation.

Petitioner's final visit with Dr. Pawlusiewicz was on October 22, 2010. Dr. Pawlusiewicz ultimately referred Petitioner to a hand surgeon for evaluation of his ongoing paresthesias in the right hand in the medial distribution. Petitioner testified that he traveled to Florida for the next couple of weeks.

On November 22, 2010, Petitioner saw Dr. Tom Karnezis at the Illinois Orthopaedic and Hand Center for his ongoing right hand symptoms. Dr. Karnezis reviewed Petitioner's treatment history and objective exams. Dr. Karnezis diagnosed Petitioner as having cervical disc radiculopathy with probable double crush syndrome and possible compression neuropathy with a silent EMG. Dr. Karnezis recommended a repeat EMG/nerve conduction velocity test and that Petitioner use a wrist immobilizing splint.

Petitioner saw Dr. Victor Forys at Central Medical Clinic on November 30, 2010. Petitioner testified that Dr. Forys was his primary care physician. Petitioner complained of neck pain and right hand numbness and reported that he was injured while at work while driving a semi-tractor trailer. Dr. Forys noted that Petitioner

reported that on September 3, 2010, the brakes failed while he was moving the truck forward causing him to crash head on with another trailer that was parked at another warehouse. Petitioner reported neck, head and lower back pain that started after this accident. Dr. Forys indicated that Petitioner's back pain and neck pain had decreased but never resolved. Dr. Forys suspected Petitioner had ulnar neuropathy with medial and radial nerve pathology proximal to his right elbow. He referred Petitioner to Dr. Prasad Chappidi and Dr. Ostric for consultations and kept Petitioner off work.

Petitioner saw Dr. Chappidi at the Center for Neurological Disorders was on December 2, 2010. Dr. Chappidi noted Petitioner was involved in an accident on August 27, 2010 and that he complained of symptoms of paresthesias and weakness in his right hand, as well as constant neck and back pain without any radiation. Dr. Chappidi recommended a repeat EMG/NCV.

Petitioner underwent the EMG/NCV on December 8, 2010, the results of which revealed ulnar neuropathy at the right elbow with likely cubital tunnel syndrome and with likely compression of the right ulnar nerve at the wrist, as well as mild to moderate right median nerve carpal tunnel syndrome.

Petitioner followed up with Dr. Forys on December 17, 2010. Dr. Forys noted Petitioner continued to have right upper extremity weakness and numbness that was work related. Dr. Forys kept Petitioner off work for the next ninety days and again referred him to Dr. Srdjan Ostric at Midwest Plastic & Reconstructive Surgery.

Petitioner saw Dr. Ostric on December 21, 2010. Dr. Ostric recommended surgery for Petitioner's ongoing right upper extremity complaints. On December 29, 2010, Dr. Ostric performed an anterior transposition of the ulnar nerve at the cubital tunnel, Guillain's canal release, ulnar nerve at the wrist release and carpal tunnel release. Petitioner returned to Dr. Ostric's office on January 3, 2011, at which time Dr. Ostric advised Petitioner to return to Dr. Forys for physical therapy. On January 24, 2011, Dr. Forys ordered physical therapy and kept Petitioner off work.

On April 7, 2011, Dr. Forys released Petitioner to return to work, light duty, with no lifting over 30 pounds, avoid stooping, bending or climbing and restricted use of the right hand. Petitioner testified he began working for a new employer, Tir Pl, at the beginning of May 2011.

Petitioner continued to follow up with Dr. Forys regarding ongoing lower back pain. On February 27, 2012, Dr. Forys referred Petitioner to Dr. Mark Sokolowski.

Petitioner testified that he was examined by Dr. Paul Papierski pursuant to Section 12 of the Act at the request of Kabini Trucking, Inc. (The Arbitrator notes that neither attorney for Skyway Express Transport, Inc. nor the attorney for the Injured Workers' Benefit Fund moved to admit Dr. Papierski's report into evidence at arbitration. Petitioner moved to admit the report as Petitioner's Exhibit Number 15, however, based on the objections of Respondents to its admission as hearsay, the Arbitrator sustained the objection and rejected the exhibit.)

Petitioner testified that he continued to follow up with Dr. Forys throughout 2013 and 2014. Petitioner testified that during this same period he continued to drive a truck.

Petitioner saw Dr. Sokolowski on June 23, 2014. Dr. Sokolowski noted Petitioner's chief complaint was lumbar pain with radiation to the left buttock and left lower extremity, which he noted was subsequent to a "collision in the course of his occupation." He diagnosed Petitioner as having lumbar pain and lumbar radiculopathy, which Dr. Sokolowski found were causally related to Petitioner's work injury. Dr. Sokolowski

recommended an MRI of his lumbar spine and continued Petitioner's modified work duties. Petitioner testified that he put off seeing Dr. Sokolowski in order to avoid undergoing surgery. Petitioner attempted to alleviate his lower back pain with acupuncture and massages.

Petitioner underwent the lumbar MRI on July 3, 2014, the results of which revealed posterior disc herniations at the L4-L5 and L5-S1 levels.

Petitioner returned to Dr. Sokolowski's office on July 11, 2014. Dr. Sokolowski reviewed the recent lumbar MRI and noted that the L4-L5 disc herniation with associated neural impingement and noted a smaller herniation at L5-S1. Dr. Sokolowski recommended Petitioner proceed with a left-sided transforaminal steroid injection. Petitioner underwent the injection on September 2, 2014, which was performed by Dr. Julian Paskov at Methodist Hospital of Chicago. The injection failed to alleviate Petitioner's lumbar pain and on November 17, 2014, Dr. Sokolowski recommended Petitioner undergo surgery.

On June 11, 2015, Dr. Sokolowski performed an L4-L5 and L5-S1 bilateral hemilaminectomy and decompression of the thecal sac, nerve root, and partial facetectomy and foraminotomy. Petitioner continued to follow up with Dr. Sokolowski after his surgery throughout June, July, September and October 2015. On October 23, 2015, Dr. Sokolowski noted Petitioner had been working in a light duty capacity and felt he had reached a functional plateau and was at postoperative maximum medical improvement. Dr. Sokolowski provided Petitioner with permanent work restrictions of no bending or squatting and no lifting more than 15 pounds. Petitioner returned to Dr. Sokolowski on November 27, 2018 and May 13, 2019, due to an unrelated motor vehicle accident in August of 2018.

Petitioner testified that he did not receive compensation from his employer for the time he missed from work following his accident of August 27, 2010, nor did his employer pay any of his medical bills. Petitioner currently drives a truck for himself rather than another employer. He testified that he continues to deal with ongoing back complaints as a result of the August 27, 2010 accident. Petitioner testified that upon waking up on the morning of the arbitration hearing, it took him several minutes to half of an hour to stand up and get out of bed. He testified that he continues to have pain in his right elbow, which gets worse while driving his truck due to having to shift gears using his right arm. Petitioner testified he needs to stretch every few hours while driving his truck due to the pain in his back. Petitioner testified that he often takes Ibuprofen 800 milligrams for his pain.

Marek Myslek testified at the request of Skyway Express Transport, Inc. Mr. Myslek testified he was employed as a dispatcher for Kabini, Inc. on the date of Petitioner's accident. Mr. Myslek explained that Skyway Express Transport, Inc., Kabini Trucking, Inc., and Kabini, Inc. are separate companies. He testified that his ex-wife, Malgorzata Myslek, was the owner of Kabini Trucking, Inc. and Skyway Express Transport, Inc. Mr. Myslek testified that they were still married in August 2010. He testified that Marek Budny was the owner of Kabini, Inc. Mr. Myslek testified that he had no ownership interest in any of these three companies. He testified Petitioner filled out a job application for Kabini, Inc.

Mr. Myslek testified that Petitioner was working for Kabini, Inc. on the date of Petitioner's accident. He explained that Petitioner was carrying a load for Kabini, Inc. on that date. Mr. Myslek testified that Kabini, Inc. had the right to terminate or fire Petitioner. Mr. Myslek testified that he was the person who issued paychecks to Petitioner and explained that the paychecks were drawn from the account of Skyway Express Transport, Inc. According to Mr. Myslek, Skyway Express Transport, Inc. was then reimbursed for those payments by Kabini, Inc. He signed the paychecks issued by Skyway Express Transport, Inc. and paid Petitioner with those checks for the work Petitioner performed for Kabini, Inc. Although he testified that these two companies were not

related, he confirmed that Skyway Express Transport, Inc. paid the employees of Kabini, Inc. for the work they performed.

Mr. Myslek testified that he was working as a dispatcher for Kabini, Inc. on the date of the accident and denied working for Skyway Express Transport, Inc. on that day. Mr. Myslek explained that he had not done any dispatch work for either Skyway Express Transport, Inc or Kabini Trucking, Inc. in the months leading up to the date of the accident. According to Mr. Myslek, Kabini Trucking, Inc. was not active in 2010 and did not start any activity until 2011. Mr. Myslek testified that Kabini Trucking, Inc. had only one employee in 2010.

Mr. Myslek opined that Kabini, Inc. had control over Petitioner on the date of the accident. Mr. Myslek confirmed that Petitioner called him on the date of the accident to advise him that the accident had occurred. He testified Petitioner did not tell him that he was injured in the accident until two months later when Petitioner came back from a trip to Poland. Mr. Myslek testified that Petitioner reported a problem with his middle finger. According to Mr. Myslek, Petitioner did not return to work at that time because he was tired rather than due to any injuries. Mr. Myslek testified he never received an off work slip from Petitioner and did not know he was seeking any other benefits until a year and a half after the accident. He testified Petitioner demanded $3,000.00 and "he would be okay" but if he did not pay him, "he would make problems."

Mr. Myslek testified that the truck involved in the accident was driven back to Chicago by another driver following the accident. He testified that the radiator had to be replaced, however, there was nothing wrong with the brakes. Mr. Myslek reviewed a document identified as Respondent's Exhibit Number 20 and identified this document as an inspection report completed by "federal agents;" however, he was unable to identify the signature on the document and did not know the position of the person who signed it. The document made no mention of any problems with the truck's brakes.

Mr. Myslek testified that Petitioner had had problems with his back for a long time. He stated Petitioner went to a chiropractor at least once a month. He testified he did not remember Petitioner ever leaving work for any back problems prior to this accident.

WITH RESPECT TO ISSUE (A), WAS THE RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:

The Illinois Workers' Compensation Act ("Act") defines those businesses that are considered "employers" and, thus, come under its jurisdiction. Under Section 3, various types of businesses automatically come under the Act's jurisdiction due to their business activities. *820 ILCS 305/3.* The Arbitrator finds that the Respondents Kabini Trucking Inc. and Skyway Express Transport, Inc. were operating under and subject to the Act. Section 3 of the Act automatically applies to Respondents who meet any one of the 17 listed "extra-hazardous" activities. Testimony at trial established that Kabini Trucking Inc. and Skyway Express Transport, Inc. falls under Section (3). Therefore, the Arbitrator finds that Kabini Trucking, Inc. and Skyway Express Transport, Inc. were operating under and subject to the Act.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS AS FOLLOWS:

In determining whether there was an employee-employer relationship between the parties, there are multiple factors to be considered. *Ware v. Indus. Comm'n., 318 Ill. App. 3d 1117, 1122, (1st Dist. 2000).* Factors to be considered are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4)

whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. *Roberson v. Indus. Comm'n, 225 Ill. 2d 159, 175 (2000).* Other relevant factors to be considered include: (8) the label the parties place on their relationship; and (9) whether the parties' relationship was "long, continuous, and exclusive." *Ware, 318 Ill. App. 3d at 1122, 1126.* "The single most important factor determining whether a party is an employee or an independent contractor is the right to control the manner in which one's work is done ... an independent contractor is one who undertakes to produce a given result, without being controlled as to the method by which he attains the result." *Bryant v. Fox, 162 Ill. App. 3d 46 (1st Dist. 1987).* "No single factor is determinative, and the significance of these factors will change depending on the work involved." *Roberson, 225 Ill. 2d at 175.* The determination rests on the totality of the circumstances. *Id.*

In considering the testimony of both Petitioner and Mr. Myslek, the Arbitrator notes many contradictions and self-serving statements throughout. Additionally, the Arbitrator notes testimony from both Petitioner and Mr. Myslek regarding specifics about the companies in question, how they handle the payment of employees and the intermingling of the companies of equipment, jobs, staff and pay, makes the testimonies questionable and unreliable. Therefore, the Arbitrator relies on the exhibits provided and entered into evidence.

The Arbitrator notes that, according to the Secretary of State Corporation/LLC search of Kabini Trucking, Inc. and Skyway Express Transport, Inc., the companies were owned by Registered Agent Malgorzata Myslek, not Mr. Myslek. (RX19) Most important, however, is the fact that Petitioner filed Self-Employment Tax documents in 2009 and 2010. (RX23 & RX24) In these filings, Petitioner lists his principal business as trucking. Additionally, Petitioner received 1099 forms in 2009 and 2010 from Skyway Express Transport, Inc. instead of W-2 forms. *Id.* Based on Petitioner's own filings, the relationship between Petitioner and Kabini Trucking, Inc. and Skyway Express Transport, Inc. is that of an independent contractor and not of an employee-employer.

Therefore, the Arbitrator finds that Petitioner failed to establish that an employee-employer relationship existed between Petitioner and Kabini Trucking, Inc. and/or Skyway Express Transport, Inc. on August 27, 2010.

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 adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of accident is moot.

WITH RESPECT TO ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of date of accident is moot.

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

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of notice is moot.

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 adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of causal relationship is moot.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of Petitioner's earnings is moot.

WITH RESPECT TO ISSUE (H), WHAT WAS THE PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of Petitioner's age at the time of the accident is moot.

WITH RESPECT TO ISSUE (I), WHAT WAS THE PETITIONER'S MARITAL STATUS AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of Petitioner's marital status at the time of the accident is moot.

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

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of medical expenses is moot.

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

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of temporary total disability benefits is moot.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of permanency is moot.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of penalties is moot.

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

The Arbitrator adopts and incorporates the findings under Section B above. Accordingly, Petitioner's claim for benefits under the Illinois Worker's Compensation Act is denied and the issue of credit is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC016597
Case Name	GREEN, AUSTIN v. ILLINOIS DEPT OF CORRECTIONS - PONTIAC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0601
Number of Pages of Decision	8
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Dirk May
Respondent Attorney	Bradley Defreitas

DATE FILED: 12/15/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Austin Green,

Petitioner,

vs. NO: 20 WC 016597

Illinois Department of Corrections Pontiac,

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(s) of accident, 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 9, 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.

December 15, 2021

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

o110921
MEP/ypv
049

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0601

GREEN, AUSTIN
Employee/Petitioner

Case# **20WC016597**

ILLINOIS DEPT OF CORRECTIONS PONTIAC
Employer/Respondent

On 3/9/2021, 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 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

6079 ASSISTANT ATTORNEY GENERAL
BRADLEY DeFREITAS
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

MAR - 9 2021

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

21IWCC0601

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

AUSTIN GREEN
Employee/Petitioner

v.

ILLINOIS DEPARTMENT OF CORRECTIONS PONTIAC
Employer/Respondent

Case # **20** WC **16597**

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 **Peoria**, on **February 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 ___

FINDINGS

On **May 31, 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 $**52,799.76**; the average weekly wage was $**1,015.38**.

On the date of accident, Petitioner was **24** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,342.71 to Prescription Partners, $5,536.79 to Dr. Lawrence Li, and $1,960.00 to OSF St. James Medical Center, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $609.23/week for 15.05 weeks, because the injuries sustained caused the 7% loss of the right leg, as provided in Section (12) 8(e) of the Act.

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

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

Signature of Arbitrator Gerald Granada

3/9/21
Date

MAR 11 2021

FINDINGS OF FACT

This case involves Petitioner Austin Green, who alleges he sustained injury while working for Respondent Illinois Department of Corrections on May 31, 2020. Respondent disputes Petitioner's claims and raises the issues of: 1) accident; 2) medical expenses; and 3) nature and extent.

Petitioner works for Respondent as a Correctional Officer. He testified that on May 31, 2020 he was walking from his vehicle to the Illinois Department of Corrections Pontiac Prison in the parking lot designated for employees only. No other personnel was allowed in this parking lot. He testified that he took no detours that morning when was walking from his vehicle to the prison gate house. At the time, he was wearing a backpack and carrying a duty belt in his right hand. He explained that he was not wearing his duty belt at the time because he would be going through the prison's metal detector upon entering the building. As he was walking toward the gate house, Petitioner stepped in an indentation in the pavement that was approximately 3 feet by 3 feet and twisted his right knee when he stepped in a pothole that was 10 inches wide and 2 inches deep. Petitioner took a picture of the area and provided it at hearing. (PX.6) Petitioner testified that after he entered the prison he climbed steps at work and his right knee pain became worse. Thereafter, Petitioner completed an incident report. (PX.3)

Respondent sent Petitioner to OSF St. James Hospital for examination of his right knee and OSF Occupational Health. He was provided with crutches. Petitioner went to Dr. Lawrence Li for further treatment of his right knee. Medical treatment included an MRI, an injection, anti-inflammatories, and physical therapy. Treatment was completed in September 2020. Petitioner testified that he currently notices sharp right knee pain with squatting and stairs. He will occasionally use ant-inflammatory medications. The MRI showed severe proximal patellar tendinosis with superimposed multifocal moderate grade partial thickness tearing at the proximal attachment. Partial thickness cartilage loss in the central trochlea. (PX. 2)

Petitioner has since returned to his regular work as a Correctional Officer with no medical restrictions. Although he did not lose time from work due to this injury, his medical expenses stemming from this incident have not been paid due to the Respondent's dispute of this claim.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's undisputed testimony, the supporting investigative and medical evidence, and the supporting case law. When an employee is travelling to and from work within a reasonable period of time, through an employee parking lot that has a defect, related injuries are considered compensable because it arises out of and in the course of employment. Mores-Harvey v. Industrial Commission, 345 IL.App.3d1034 (3rd Dist. 2004). In the present case, the indentation in the parking lot surface and the pot hole in which Petitioner stepped, presented a defect in Respondent's parking lot. The fact that the Petitioner was using this lot to get to the entrance of Respondent's prison and that the lot was intended for employees only, further supports that the Petitioner's injury arose out of and in the course of his employment. Based on these facts, the Arbitrator concludes that the Petitioner sustained an accident arising out of and in the course of his employment with Respondent on May 31, 2020.

2. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment and related expenses he incurred following his May 31, 2020 accident was reasonable and necessary in addressing his work-related injuries. The Arbitrator notes that Respondent stipulated that if Petitioner's accident is found

compensable, then it would pay the medical bills set forth in Petitioner's Exhibit 1: Prescription Partners, $1,342.71; Dr. Lawrence Li, $5,536.79; and OSF St. James Medical Center, $1,960.00. Consistent with the Arbitrator's conclusion on the issue of accident, the Arbitrator awards the medical expenses as stipulated between the parties subject to the Fee Schedule.

3. 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 correctional officer who returned to this job with no restrictions following his work-injury - a factor to which the Arbitrator gives considered weight; (iii) Petitioner was 24 years old at the time of injury, a factor to which the Arbitrator gives some weight; (iv) there was no evidence of future earnings being affected by this injury, and the Arbitrator gives no weight to this factor; (v), there was evidence of disability which show that the Petitioner sustained a a right knee injury which involved severe proximal patellar tendinosis with superimposed multifocal moderate grade partial thickness tearing at the proximal attachment and partial thickness cartilage loss in the central trochlea, requiring an injection, anti-inflammatory medication, and physical therapy, and resulting in complaints of pain with using stairs and squatting - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a **7% loss of use of the right leg** as a result of the May 31, 2020 work incident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC024165
Case Name	RAYMOND, NATASHA N v. CASEY'S GENERAL STORE
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0602
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Neil Giffhorn

DATE FILED: 12/15/2021

/s/Stephen Mathis, 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

Natasha N. Raymond,

Petitioner,

vs. No. 20 WC 24165

Casey's General Store,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects the date of arbitration hearing on page 1 of the Decision Memorandum to reflect the hearing took place on April 29, 202**1**. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 29, 2021, is hereby corrected, 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 $20,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

December 15, 2021

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

SJM/sk
o-11/17/2021
44

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC024165
Case Name	RAYMOND, NATASHA N v. CASEY'S GENERAL STORE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	James Ruppert
Respondent Attorney	Neil Giffhorn

DATE FILED: 6/29/2021

THE INTEREST FOR THE WEEK OF JUNE 29, 2021 0.05%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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
PETITIONER'S PROPOSED 19(b)
ARBITRATION DECISION

Natasha N. Raymond
Employee/Petitioner

v.

Casey's General Store
Employer/Respondent

Case # **20 WC 024165**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, 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 the date of accident, **July 20, 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 $**1,330.64**; the average weekly wage was $**332.59**.

On the date of accident, Petitioner was **30** years of age, respectively, ***married*** 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 $**8,314.75** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of **$8,314.75**.

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

ORDER

Respondent shall pay all reasonable and necessary medical expenses incurred for right upper extremity care through April 29, 2021, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amount previously paid under Section 8(a) of the Act for medical benefits.

Respondent shall authorize and pay for prospective medical care, including the referral to an orthopedic hand specialist and as recommended by Dr. Lori Guyton, 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 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.

Jeanne L. AuBuchon

Signature of Arbitrator, Jeanne L. AuBuchon

JUNE 29, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on April 29, 2020, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident on July 20, 2020, and the Petitioner's right arm and hand condition; 2) payment of medical bills and 3) entitlement to prospective medical care to the Petitioner's right arm and hand. At arbitration, the parties agreed that the Petitioner would be responsible for medical bills incurred through January 20, 2021.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 30 years old and employed by the Respondent as a pizza cook. (T. 9) On July 20, 2020, she was shutting down the kitchen when she unplugged the fryer and received an electrical shock in her right hand. (T. 10) Afterwards, she felt pain in her right hand, wrist and forearm and had blisters on her right index finger and right middle finger. (Id.) She is right-hand dominant. (T. 18)

The Petitioner first sought medical treatment with her primary care physicians at Horizon Healthcare three days later because her condition worsened to the point where she couldn't use her hand. (T. 11) Physician assistant Kristen Harris examined the Petitioner and ordered blood tests and X-rays at Fairfield Memorial Hospital that came back with normal results. (PX2, PX1) While at the hospital emergency room on July 24, 2020, the Petitioner was diagnosed with contusion and muscular pain, prescribed Norco 5 and Zofran and instructed to follow up with her doctor. (PX1)

On July 27, 2020, the Petitioner returned to Horizon Healthcare, reporting that her arm was swollen and that she was experiencing constant tingling and aching and shooting pain when she used her hand. (PX2) At that time, she was diagnosed with right hand pain, was referred to

physical therapy, prescribed Gabapentin and Tramadol, told to take Tylenol and ibuprophen and given a work restriction for light duty. (Id.)

The Petitioner reported to Fairfield Memorial Hospital on July 31, 2020, for therapy and was evaluated by Mavis Tate, a licensed occupational therapist. (PX1) The Petitioner was assessed as having significant deficit in active and passive range of motion of her right wrist and hand due to having complaints of pain, hypersensitivity and parasthesia along with having severe hyposensation of the dorsal and palmar fingertips. (Id.) The therapy notes state that the Petitioner "may benefit from a consultation with a neurologist for possible consideration of a nerve conduction study and/or electromyography." (Id.) In addition, the notes stated that the Petitioner "also appears to be at risk of developing complex regional pain syndrome." (Id.) The therapy plan was for the Petitioner to receive occupational therapy two to three times per week for six weeks to address training in the right upper extremity range of motion and fine motor coordination, therapeutic exercises and home exercise programs. (Id.)

After her first physical therapy session, the Petitioner went to the emergency room at Wabash General Hospital because the physical therapy aggravated her hand and caused her a lot of pain. (T. 12-13) She was given a shot of Toradol and was instructed to follow up with her primary care doctor. (PX3)

On August 3, 2020, the Petitioner returned to Horizon Healthcare and reported continued pain. (PX2) She was prescribed medication and referred to neurology. (Id.) She had another follow-up on August 10, 2020, and reported that she was trying to find a neurologist who would accept her insurance. (Id.) PA Harris ordered nerve conduction studies. (Id.) The Petitioner had more follow-up visits throughout August, September and October 2020 during which time she and PA Harris were working on finding a neurologist and getting the nerve conduction studies. (Id.)

PA Harris also managed the Petitioner's medications. Throughout her follow-up visits with PA Harris, the Petitioner reported that the physical therapy and medications were helping her. (PX2) She also stated this in her testimony (T. 12)

The Petitioner saw Dr. Lori Guyton, a neurologist with Neurology of Southern Illinois, on October 16, 2020, for an evaluation. (PX4) Dr. Guyton diagnosed her with chronic pain and electrocution and was to review the nerve conduction studies. (Id.) Dr. Guyton recommended that the Petitioner be followed over time by a neurologist for pain management and oversight of her weakness and recommended physical therapy, noting that the Petitioner was expected to have some improvement over a long period of time, but it was questionable as to whether she would regain total function. (Id.)

The Petitioner saw PA Harris again on October 26, 2020, November 23, 2020, during which time the Petitioner's medications were managed and documenting attempts made to find a doctor to treat her. (PX2)

On January 5, 2021, the Petitioner returned to Dr. Guyton, who noted the Petitioner's continuing pain and that the Petitioner had a significant wait to get into pain management. (PX4) Dr. Guyton recommended continuing with physical therapy. (Id.) The Petitioner testified that after this visit, the Respondent stopped approving treatment. (T. 13)

On January 20, 2021, the Petitioner underwent a Section 12 examination by Dr. Andrew Wayne, a physiatrist at Agility Orhopaedics. (RX1) Dr. Wayne reviewed medical records from Horizon Healthcare, Fairfield Memorial Hospital, Wabash General Hospital and Dr. Guyton. (Id.) Apparently, he reviewed the nerve conduction study, which he said was normal, and "a multitude of physical therapy notes." (Id.) These were not submitted as evidence at arbitration. Dr. Wayne stated that the physical therapy consisted of desensitization, range of motion, strengthening

modalities, along with instruction on home exercises and education. (Id.) He noted that the Petitioner appeared to be making progress with therapy. (Id.) Dr. Wayne examined the Petitioner and stated that he did not see any significant abnormalities and that the Petitioner's subjective complaints were far out of proportion to any objective findings. (Id.) He opined that an injury such as the Petitioner's would have resolved typically in two to three months and would not be as symptomatic as the Petitioner reported after six months. (Id) He believed that the treatment the Petitioner had received was medically necessary and did not believe the Petitioner required any additional formal treatment. (Id.) He recommended that she continue home exercises but did not recommend any further prescription medication nor any work restrictions. (Id.) He found the Petitioner to be at maximum medical improvement. (Id.)

The Petitioner saw PA Harris on February 2, 2021, who recommended the Petitioner discuss further work restrictions with neurology and gave the Petitioner a phone number for a pain and spine clinic. (PX2). On March 30, 2021, PA Harris planned to refer the Petitioner to Dr. Julko Fullop, an orthopedic surgeon but noted that the Petitioner's attorney was recommending Dr. Patrick Stewart, an orthopedic hand surgeon. (Id.) She stated that she would refer the Petitioner to Dr. Stewart. (Id.)

The Petitioner testified that she had no issues with her right hand or arm prior to the work accident. (T. 18)

During her treatment, the Petitioner was taking Gabapentin, Cymbalta, Elavil and hydrocodone, the last of which she was no longer taking at the time of arbitration. (T. 13-14) She said the medications give her the ability to move her hand. (T. 18) She stated that she continues doing physical therapy exercises at home and wears a compression glove. (T. 17) The Petitioner testified that at the time of arbitration, she was experiencing constant pain in her hand, wrist and

forearm that she described as numb, tingling pain. (T. 16) She said she had no grip strength and could not perform normal daily activities. (Id.) She wanted to continue treatment to get the pain to go away and be able to do things with her children again. (Id.)

CONCLUSIONS OF LAW

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

Issue (F): Is Petitioner's current condition of ill-being, specifically her hand and arm pain, numbness and tingling experienced after July 20, 2020, causally related to the accident?

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003)

The Petitioner had no issues with her right hand and arm prior to the work accident. The doctors found no other possible cause for the Petitioner's symptoms. The issue is whether the Petitioner's current complaints are still related to the accident. Dr. Wayne says the Petitioner's subjective complaints did not comport with his objective findings. PA Harris believes the Petitioner should see a specialist to try to determine the origin of her symptoms. Dr. Guyton believes she requires more physical therapy.

None of the doctors doubt that the Petitioner suffered an electrical shock to her hand. Although Dr. Wayne believes the Petitioner's current subjective symptoms should not be lingering for this long, he did not give any detail as to why. The Arbitrator finds the Petitioner to be credible. Because the Petitioner had no prior issues with her hand or arm and because her symptoms are still lingering, the Arbitrator finds that the Petitioner's current condition of well-being is causally related to the accident on July 20, 2020.

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 right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

The parties have stipulated that the Petitioner's treatment until January 20, 2021, was reasonable and necessary. Since then, the Petitioner's symptoms persisted, and she has continued to seek treatment. These efforts are reasonable and necessary.

The Arbitrator orders the Respondent to pay the medical expenses incurred through April 29, 2021, pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

With the exception of the nerve conduction studies and the resultant finding that the Petitioner is not suffering from a neurological injury, the doctors who have examined and treated the Petitioner have done little to determine the physiological source of the pain and numbness that

persists in the Petitioner's hand and arm. Although medication and physical therapy have helped, they have not provided long-lasting relief.

An important function of the Act is to give workers the treatment necessary to try to return them to the conditions they were in prior to their work accidents. Although efforts have been made to return the Petitioner to her pre-accident state, this has not been accomplished, and treatment options have not been exhausted. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further evaluation and treatment, including treatment by a hand specialist, such as Dr. Stewart. The Respondent shall authorize and pay for such.

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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023932
Case Name	FLINT, PEGGY A v. DIXON DIRECT LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0603
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Gregory Tuite
Respondent Attorney	Kenneth Smith

DATE FILED: 12/16/2021

/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 §19(l) penalties; Credit	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PEGGY A. FLINT,

Petitioner,

vs. NO: 19 WC 23932

DIXON DIRECT, LLC,

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 whether Petitioner sustained an accidental injury arising out of and occurring in the course of her employment, entitlement to temporary total disability and maintenance benefits, entitlement to permanent total disability benefits, whether §19(l) penalties and §16 attorney's fees are warranted, the amount of Respondent's credit, and whether the Commission can consider the opinions of Patrick Conway, and being advised of the facts and law, modifies the Decision of the Arbitrator and provides additional analysis as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. Accident

The Commission, like the Arbitrator, finds Petitioner sustained an accidental injury arising out of and occurring in the course of her employment on February 9, 2019. We write separately to address Respondent's arguments on Review.

In challenging the accident finding, Respondent first claims Petitioner was not in the course of her employment as the accident occurred around the time her shift ended. Respondent then claims the arising out of element fails as Petitioner was exposed to a neutral risk ("walking out of

the building at the end of her work day"); Respondent argues Petitioner's statement immediately after her fall is more reliable and that description, when coupled with photos of the railing, establishes there was no defect that caused her fall. The Commission disagrees.

Regarding Respondent's assertion that Petitioner was no longer in the course of her employment, the Commission observes Respondent's position is not supported by either the facts or the law. We first note that Obrock testified Petitioner's shift was from 7:00 to 11:00 a.m. (T. 74), and the accident occurred prior to the end of her shift. T. 85-86. Moreover, both accident reports reflect Petitioner's fall occurred at 10:45 a.m. Resp.'s Ex. 5, Resp.'s Ex 6. We further observe Obrock corroborated that Petitioner was going to warm up her car since she was leaving the plant in 15 minutes, which is something Respondent permits its employees to do. T. 85-86. The Commission emphasizes there is long-standing precedent holding that such acts come under the umbrella of the Personal Comfort doctrine. *See, e.g.*, *All Steel, Inc., v. Industrial Commission*, 221 Ill. App. 3d 501, 503, 582 N.E.2d 240 (2nd Dist. 1991) ("…we find that the petitioner's act of going to the parking lot to warm his car during his lunch break should be viewed as a reasonably necessary act of personal comfort which occurred 'in the course of['] his employment.") As such, we find Respondent's in the course of argument to be unavailing.

Turning to the arising out of component, the Commission notes the first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk. *Steak and Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶38, 67 N.E.3d 571. As the Supreme Court of Illinois reiterated in *McAllister v. Illinois Workers' Compensation Commission*:

> Examples of employment-related risks include 'tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling.' *First Cash Financial Services*, 367 Ill. App. 3d at 106. 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. (Citation). *McAllister*, 2020 IL 124848, ¶ 40 (Emphasis added).

Here, Petitioner tripped over a bolt in a guardrail mounting plate. While Respondent argues the photo of the bolt establishes there was no defect, this argument ignores the fact that the bolt shown was not the bolt at issue. Rather, Petitioner testified the bolt she tripped over was "somewhat similar" but protruded appreciably higher from the floor. T. 16. The Arbitrator found Petitioner's testimony credible, and the Commission agrees with that assessment. Moreover, the hazardous nature of the bolts is evidenced by the fact that shortly after Petitioner's accident, Respondent replaced all the bolts along the guardrail to be flush with the bracket plate, and Obrock testified that was done to prevent future accidents. T. 79. As to Respondent's assertion that the accident reports are more accurate than Petitioner's testimony because there is no corroborating evidence of a shoelace snag, the Commission observes that once it is determined that Petitioner tripped over a defective bolt, it is immaterial whether Petitioner's shoe struck the bolt or her shoelace got caught on the bolt; either way, Petitioner encountered a hazard and this caused her to fall. Additionally, Petitioner credibly testified her description in the immediate aftermath of the fall was skewed by the amount of pain she was in having just shattered her elbow. We further note there is in fact

corroborating evidence of Petitioner's shoelace being involved in the incident: at the April 23, 2019 occupational therapy initial evaluation, Petitioner reported "her shoe string got caught on a bolt from a safety guard" (Pet.'s Ex. 1), and the August 20, 2019 FCE reflects "her shoe string got caught on a bolt and she fell" (Pet.'s Ex. 3). The Commission finds Petitioner encountered a hazardous condition on the employer's premises, which constitutes an employment risk.

The Commission further notes that assuming, *arguendo*, we were to accept Respondent's position that there was nothing defective about the bolt, Petitioner's accident would still be compensable under a neutral risk analysis. Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795 (2000). Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800 (2011). Here, Petitioner testified she traversed that walkway several times every workday (T. 52), and Respondent conceded as much: "She walked down this aisle thousands of times before this accident…" Therefore, Petitioner would be deemed to have been exposed to a quantitatively increased neutral risk, and her fall would still be compensable.

The Commission finds Petitioner tripped because of a bolt that protruded too high from the bracket plate and therefore she was exposed to an employment-related risk. As such, Petitioner's fall arose out of and occurred in the course of her employment.

II. Penalties/Fees

Petitioner argues Respondent's conduct merits imposition of the Act's penalties provisions. Petitioner asserts Respondent repeatedly delayed payment of temporary total disability and maintenance benefits, yet presented no evidence to justify the delays. The Commission agrees.

Under §19(l), the penalties are in the nature of a late fee and are mandatory if the payment of benefits is late and the employer cannot show an adequate justification for the delay. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶20, 959 N.E.2d 772. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id*.

As of August 2019, Petitioner had been discharged at maximum medical improvement with permanent restrictions that Respondent would not accommodate; Respondent did not initiate vocational rehabilitation and instead Petitioner conducted a self-directed job search. While Respondent initially paid the associated maintenance benefits, Respondent's payment log demonstrates benefits were terminated on December 21, 2019. Resp.'s Ex. 2. Petitioner filed a penalties petition which reflects multiple demands for payment were made, yet Respondent provided no response and offered nothing to justify its refusal to pay maintenance benefits. Pet.'s

Ex. 10. It was not until six months later, on June 3, 2020, that Respondent issued another benefit payment; the Commission observes, however, this covered only December 30, 2019 through March 13, 2020. Resp.'s Ex. 2. Thereafter, another six weeks passed before Respondent issued the next benefit check on July 21, 2020; notably, this check paid maintenance benefits for the period June 3 through July 3, thereby leaving the benefits accrued from March 14, 2020 through June 2, 2020 unpaid. Another extended delay followed, with Respondent not issuing another benefit payment until October 9, 2020. Resp.'s Ex. 2.

The Commission finds that in December of 2019, without notice or explanation, Respondent began a pattern of repeatedly delaying payment for extended periods. Moreover, Respondent's payment log reflects multiple periods of accrued maintenance benefits remain unpaid. The Commission finds Respondent failed to prove its conduct was reasonable under the circumstances. The Commission imposes §19(l) penalties in the amount of $10,000.

III. Consideration of Patrick Conway's Vocational Opinions

Petitioner argues Patrick Conway does not have the requisite credentials to provide vocational opinions or services, and therefore his opinions should not be considered. The Commission disagrees. Initially, the Commission emphasizes that, as the Arbitrator did, we find Kathy Mueller's opinions are more credible than Conway's; as such, even if we agreed that Conway's credentials did not meet the statutory threshold for his opinions to be considered, it would not alter our ultimate decision, as more weight was given to Mueller's opinions. Moreover, we note the Act does not define what "appropriate certifications" are needed. The evidence reflects Conway was first certified in disability management services in 1992 (Resp.'s Ex. 11), and we find this a reasonable qualification. Finally, the Commission observes Petitioner did not object to Conway's labor market survey being admitted into evidence. T. 92.

IV. Credit

The parties disputed the amount of credit due to Respondent for temporary total disability and maintenance benefits previously paid. Arb.'s Ex. 1. A payment log was admitted into evidence as Respondent's Exhibit 2, and the Commission finds it establishes Respondent made payments totaling $25,851.16. As such, the Commission finds Respondent is entitled to a credit of $25,851.16 for temporary total disability and maintenance benefits.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $349.38 per week for a period of 28 6/7 weeks, representing February 10, 2019 through August 30, 2019, 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 maintenance benefits in the amount of $349.38 per week for a period of 51 3/7 weeks, representing August 31, 2019 through August 24, 2020, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $25,851.16 for temporary total disability and maintenance benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $565.06 per week for life, commencing on August 25, 2020, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(l) penalties in the amount of $10,000.00.

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 $16,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

December 16, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 10/27/21

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0603

FLINT, PEGGY A
Employee/Petitioner

Case# **19WC023932**

DIXON DIRECT LLC
Employer/Respondent

On 11/19/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0529 TUITE LAW
GREGORY E TUITE
119 N CHURCH ST
ROCKFORD, IL 61101

0532 HOLECEK & ASSOCIATES
KENNETH SMITH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Peggy A. Flint
Employee/Petitioner

v.

Dixon Direct, LLC
Employer/Respondent

Case # **19** WC **23932**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/13/2020**. 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. xx 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 xx Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. xx Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **2/9/2019**, 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 $**27.251.12**; the average weekly wage was $**524.06**.

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

Respondent shall be given a credit of $**13,385.49** for TTD, $**0** for TPD, $**15,315.05** for maintenance, and $**0** for other benefits, for a total credit of $**28,700.54**. ARB EX 1. RX 2.

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 $349.38/week for 28 6/7 weeks, commencing 2/10/19 through 8/30/19, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $349.38/week for 51-3/7 weeks, commencing 8/31/19 through 8/24/20, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $**565.06**/week for life, commencing **8/25/20**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Carolyn M. Doherty

Signature of Arbitrator

11/13/20

Date

NOV 19 2020

FINDINGS OF FACT

At trial, Petitioner alleges an accident date of 2/9/19 while working for Respondent Dixon Direct, LLC. Petitioner was 62 years old on 2/9/19 and had been working 30 years for Respondent on 2/9/19. Over the years, Petitioner has worked in bindery and cleaning, as well as a jogger and a box maker for Respondent. Petitioner's duties over the years have required her to lift up to 50 pounds and load machines with boxes moving the boxes on a skid between presses.

Petitioner sustained a prior work injury in 2016 suffering a shattered left elbow after being hit by a fork lift. Petitioner underwent elbow surgery and in February 2017 was returned to work full duty at first in cleaning and then to box making. Petitioner testified that she worked in box making from July 2017 through 2/9/19. Petitioner testified that she missed no further time from work or sustained any additional accident prior to the current alleged accident date of 2/9/19. Petitioner settled her 2017 workers' compensation case for 30 % loss of use of the left arm under Section 8(e) of the Act.

Petitioner testified that on 2/9/19, she was walking out of work at 11:30 am to start and warm her car. Petitioner testified that while walking down an aisle in the plant, someone called to her and she stopped quickly to look behind her and then tripped. Petitioner testified that she fell and struck her left elbow on the concrete floor. Petitioner testified that the bolt was raised approximately 3.5 inches off the floor. Petitioner further testified that she was very familiar with the aisle she tripped in because she walked that aisle every day several times per day.

Petitioner was shown her employee statement at RX 5 and agreed with its contents. Petitioner's statement reads " I was going out of building to start car. Walking by guard rail. Triped [sic] on bolts or raised concrete and fell down left elbow and area above elbow bones are shattered." When asked to explain "why" she was injured she reported "looking straight ahead not down (always walk with head up)." RX 5. RX 6 is the accident report completed by an investigator or supervisor. In response to "what equipment was involved" the supervisor wrote "guard rail support bracket, main aisle, just past pre press door." In response to what happened, the investigator wrote "walking down main aisle at 10:45 am just past pre press doors by bulletin board, Peggy turned back to look for someone and tripped over guard rail support bolt, fell down and landed on left elbow… fell down after tripping and landed on left elbow. … Peggy said she was not paying attention and walked into guard rail, tripping over bracket bolt." In response to "why" she was injured the supervisor wrote "tripped over guard rail support while walking down main aisle." RX 6. Petitioner acknowledge at trial that her statement at RX 5 does not indicate that her shoe lace was caught on the bolt but just that she tripped on the bolt. At trial, Petitioner testified that her steel toed boot laces were tied but were very long and a lace got caught on a bolt in the floor used to bolt down guard rails. She further testified that she wrote and acknowledge that the "wrong thing" was on her accident repot because she was in pain and very confused when she wrote the report.

Dave Obrock testified for Respondent is his capacity as the press room supervisor. Mr. Obrock has held that position for 13 years and was Petitioner's direct supervisor in February 2019. He was also Petitioner's supervisor when she had her 2016 work accident. He testified that Petitioner returned to full duty work in the press room following her 2016 accident. He testified that he was present at work in the press room along with Petitioner on 2/9/19 who was making boxes. Petitioner was scheduled to work from 7 am to 11 am and he allowed Petitioner to leave and warm her car at her request. He testified that employees normally only walk outside when on a break but that there was "nothing wrong" with Petitioner going out to warm her car and that other employees did the same.

He looked at the color photo at RX 7A and testified that it depicts a safety aisle. He testified that all pedestrians walk in that aisle for safety. He denied the railings depicted in RX 7A were put up after Petitioner's 2016 accident but did agree that safety aisles were put up elsewhere than the depicted location. He did agreed that they made the aisles wider, including the one in RX 7A, after Petitioner's 2016 accident involving the forklift.

Mr. Obrock testified that Petitioner did not mention tripping on a bolt or that she had a shoe lace caught on a bolt that stuck out 3 inches. He testified that Petitioner reported walking down the aisle and when someone called to her she turned around quickly not paying attention and tripped over the guard railing. Mr. Obrock further testified that the bolt mounting the floor plate into the cement on the right side of the photo at RX 7 was changed after Petitioner's February 2019 accident at issue. He testified the bolts were voluntarily changed and made flat as on the other side of the floor plate depicted in RX 7. T. 77-79.

With regard to the color photo at RX 7A, Petitioner testified that it depicts guard rails which were installed after her 2016 forklift accident and agrees that those railings were present by the time she returned to work in February 2017. Petitioner further testified that she was "at the middle railing" depicted in RX 7A when she fell on 2/9/19. Petitioner testified that the bolt on the right side of RX 7 was similar but not exact to the type of bolt involved in her fall. T. 49-51.

Finally, Mr. Obrock testified that Petitioner never returned to work after the 2019 accident but he does not know the reason. He testified that Petitioner was a good worker but that he was never asked to take her back.

On 2/9/19, Petitioner was taken to KSB Hospital in Dixon, Illinois. She received emergency care. The physician performed an examination and took x-rays. She was then referred to Dr. Hernandez, the physician who had performed surgery after her first injury. (PX 1). On February 11, 2019 Dr. Hernandez evaluated Ms. Flint and referred her to Ortho Illinois in Rockford.

Petitioner saw Dr. Zussman, an orthopedic surgeon on February 12, 2019. Dr. Zussman arranged for a CT scan of the left arm which took place on February 19, 2019. Dr. Zussman diagnosed Petitioner was a comminuted and displaced supracondylar humerus fracture with intraarticular extension. He noted that the prior left elbow fracture and hardware made the situation even more complex. He noted that her job required the use of bilateral elbows. Dr. Zussman noted that event with surgery, Petitioner would never have a normal elbow with normal function and would likely have residual elbow stiffness and an increased risk for developing post traumatic arthritis of the elbow which could cause elbow pain, stiffness and dysfunction. PX 2, p. 24-26.

Dr. Zussman and Dr. Foster performed surgery on February 20, 2019. (PX 2 p. 105). Dr. Zussman was assisted by Dr. Brian Foster to isolate and manage the ulnar nerve in the arm, elbow and forearm due to the fact that Dr. Zussman's surgery would be through a previously operated soft tissue envelope. (PX 2 p. 102). Dr. Foster performed a left ulnar nerve decompression in the arm, elbow and proximal forearm. (PX 2 p. 102). The cubital tunnel was thickened and scarred from her previous surgery. The hardware from the previous surgery was removed and the current fracture was amenable to fixation. Dr. Zussman removed all of the prior hardware and performed a new open reduction and internal fixation and olecranon osteotomy. Both Dr. Foster and Dr. Zussman participated in closure of the surgical site. (PX 2 p. 105-108).

Ms. Flint followed with Dr. Zussman after the surgery. She was initially limited to lifting a 16 ounce bottle with the left upper extremity. On April 5, 2019 Petitioner reported no current symptoms with everyday activities but symptoms develop with overuse. She was taking no pain medication and denied pain with rest or activity. PX

2, p. 18. Dr. Zussman initiated occupational therapy which was subsequently performed at KSB Hospital Physical Therapy. (PX 1). On May 3, 2019 Petitioner reported complaints of intermittent upper arm pain greatest with physical therapy. She denied elbow pain. She reported at rest pain 0/10, with activity 4/10 intermittent. Petitioner was not taking any pain medication. Dr. Zussman released Petitioner for light duty work stating "If appropriate light duty work is available we will let her return to work. Regardless, she should avoid at risk activities and stay below the pain threshold." Petitioner testified that she brought a slip into Human Resources but was not offered any light duty at that time.

Petitioner continued to progress and on July 5, 2019 Dr. Zussman noted that Respondent wanted Petitioner to return to work as a press maker which required lifting up to 60 pounds. Dr. Zussman indicated that Petitioner was working as a box maker when she was hurt in February 2019 and that she could return to work as a box maker with a ten pound restriction. Also, on July 5, 2019 Dr. Zussman recommended a Functional Capacity Evaluation. PX 2, p. 9-10.

An FCE was performed at Athletico on July 24, 2019 but was determined to be an invalid representation of her abilities. PX 2, p. 54. A second FCE was performed on August 20, 2019, again at Athletico. This determined that Petitioner could "function within the at least light physical demand level with the heaviest weight able to lift within the demand level is 20 pounds. She also demonstrated the ability to carry up to 30 pounds." PX 3, p. 2. The job demands match table in the FCE indicated the ability to left 20 pounds occasionally and 18 pounds frequently. She could carry 30 pounds occasionally and 20 pounds frequently. Petitioner was also limited to occasional pushing or pulling. PX 3, p. 2. The recommendations indicated that Petitioner could return to work as a box maker but could not return to work as a press worker in that her physical capabilities and tolerances did not meet the essential job function requirements of a "press helper". PX 2, 69. PX 3.

On August 30, 2019 Petitioner returned to Ortho Illinois and was seen by Dr. Robin Borchardt. (PX 2 p. 6). At that time, Petitioner reported 4/10 pain with activity and limited range of motion. It was noted that her restrictions were not accommodated at work. PX 2, p. 6. Dr. Borchardt indicated Petitioner was at MMI and that she would need permanent restrictions. Petitioner was released from care at that time. Dr. Borchardt completed a return to work form with restrictions indicating no lifting greater than 20 pounds floor to waist bilaterally, no lifting greater than 13 pounds overhead bilaterally and no lifting greater than 20 pounds waist to shoulder bilaterally. (PX 9). Petitioner testified that she brought the restrictions to Respondent. Petitioner testified that "They said they would contact me, the HR and Mike Rundle, were going to decide what they were going to do with me. I never heard anything more back from them."

Petitioner testified that her TTD was stopped as of 8/30/19. RX 2 indicates that TTD payments were made through 9/9/19 and that "Voc Rehab" payments were made thereafter through 3/13/20. RX 2. Petitioner testified that she started looking for work on her own after her TTD stopped and that while looking for a job through the time of trial in October 2020 she received some maintenance benefits. Petitioner testified those benefits were underpaid. RX 2.

Petitioner met with vocational rehab consultant Kathleen Mueller on November 18, 2019. PX 6. An initial vocational assessment was completed and Ms. Mueller indicated Petitioner could benefit from the assistance of a CRC to assist her with job readiness training, job seeking skills training, interviewing strategies, computer skills and to provide appropriate job leads. PX 6. As of the initial voc assessment full report dated 12/17/19, Petitioner's transferable skills analysis indicated good match jobs within her physical light duty restrictions to be folding, inserting and finishing machine operator and fair match jobs to include sorter, clerk work and assembler. PX 7. It was noted that the 63 year old Petitioner would require additional schooling and or training

for any of these positions. Ms. Mueller determined that Petitioner was a candidate for voc rehab services and that she has several barriers in regards to employment including her age, her singular work history of 22 years for same employer, lack of computer skills and no education beyond high school 45 years earlier. PX 7. P. 8.

The May 28, 2020 labor market research report conducted on the positions identified in the transferable skills analysis indicated 21 potential jobs in the Dixon area where Petitioner resides. 11 jobs were not viable as outside her skills or physical capabilities, 6 employers did not respond and 4 indicated they would consider Petitioner and were willing to interview without guarantee of hire. Those 4 jobs paid approximately $12.50 per hour. PX 8.

Petitioner testified that she continued to look for work and maintained job logs. The job logs cover the period of October 2019 through March 2020 and then from June 2020 through the present. PX 4, 5, 14 and 16. Petitioner contacted numerous employers for positions such as cashier, clerk , waitress and factory work in both her home town of Dixon and in the nearby Sterling, Il. The majority of her applications were filled out in person with a few completed on line. Petitioner testified that she "barely knows" how to use a computer but is able to use email and access online job search websites for leads. She has a resume. Petitioner testified that despite her efforts she could not find a job.

On June 9, 2020, Petitioner met with Patrick Conway of Genex services for a vocational evaluation requested by Respondent. RX 8. Mr. Conway is not a Certified Rehab Counselor and does not have a master's degree in rehab counseling. Rather, he has a bachelors of arts degree and a certificate as a Certified Disability Management Specialist since 1992. He has worked as a vocational case manager from 1989 through the present. RX 10 and RX 11. In his opinion, Petitioner is employable in an existing stable labor market based on her work history and medical information. The available wages were between $9.25 and $19.23 per hour. RX 8. RX 9. The labor market survey in June 2020 indicated available jobs as a customer service rep, security officer, inside sales rep for a lawn care company, teleservices, general assembler and a part time driver for an auto company. Petitioner's job experience was deemed to have met the job requirements for the assembly and machine operator positions. It appears those positions were offered through temp agencies or staffing companies. RX 9. Mr. Conway opined that work is available for Petitioner within her physical abilities. RX 9, 10. Petitioner testified that she was not offered any accommodated employment from Respondent and was never contacted to receive any vocational assistance from Respondent.

In August 2020, Ms. Mueller provided a Rehabilitation Plan for Petitioner and indicated that Petitioner would be provided with job placement services including job seeking training skills, direct job leads through an assigned Google account, computer skills training on how to look for and apply for jobs online and interview preparation. PX 13.

On August 25, 2020, Ms. Mueller responded to the labor market survey proffered by Mr. Conway and indicated that many of the identified jobs were with staffing agencies which are typically part time or temporary vs. full time positions. She also stated that the customer service jobs generally require computer applications which Petitioner does not have. The general assembler and security guard positions both require lifting outside of Petitioners restrictions in her opinion and the driver job was not full time and may lead to fluctuating income. PX 12. Lastly, she indicated that telemarketing is not considered "viable and stable" by Certified Rehab Counselors. Ms. Mueller commented on Mr. Conway's credentials noting that he was not a Certified Rehab counselor nor did he have a master's degree. She offered that services are provided in Illinois are generally provided by a credentialed consultant who has a Master's Degree and subsequent certification through the

Commission on Rehabilitation Counselor Certification. PX 12. At trial, Petitioner objected to the use of Mr. Conway as a vocational expert due to a lack of certification and appropriate educational degree.

Petitioner has not seen any doctor for her condition since her release from Dr. Borchardt in August 2019. He occasionally uses Tylenol for pain. She does what she can on a daily with her left arm. Petitioner is able to do laundry and house work but has pain in her left elbow when lifting milk gallons or heavy cans. She is unable to shovel snow and has difficulty opening jars and cans. Petitioner's left arm is her non dominant arm.

Lastly, Petitioner testified that she applied for early retirement benefits from social security and began receiving those benefits around October 2019. She receives $1088 per month. RX 4. She testified that she applied for early retirement in order to have some kind of income. She further testified that she was recently approved for SSDI benefits as well and received those benefits on one occasion at the time of trial. Petitioner was questioned on cross examination about her applications for Social Security retirement and Social Security disability benefits. She was also asked whether she had told Social Security she had stopped looking for work when she applied for the benefits. Petitioner responded that the only time she had stopped looking for work was when COVID kicked in she stopped for about 3 or 4 months. When specifically asked whether she had to tell Social Security that she was no longer looking for work, Petitioner stated that she did not tell Social Security and that she was not required to do so.

On cross exam, Petitioner testified that her job search logs do not include the exact jobs she applied to on her own but rather the location or area of the job. She testified that she did not apply to the jobs listed on her vocational reports as she was not given that information.

CONCLUSIONS OF LAW

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

ISSUE (C) ACCIDENT and (F) CAUSAL CONNECTION

Based on a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on 2/9/19. It is undisputed that Petitioner was at work as a box maker on 2/9/19 and that she was walking out of the factory to warm her car, an allowed activity, when she fell and struck her left elbow on the concrete floor. The Arbitrator finds that Petitioner was in the course of her employment when she fell by virtue of the fact that she was allowed to go outside to start and warm her car. The fact that Petitioner fell is not in dispute.

The Arbitrator further finds that Petitioner's fall arose out her employment as the fall involved the bolts and plates used to secure the railings to the concrete floor of the plant. The Arbitrator finds Petitioner credible in her testimony regarding the fall. Petitioner testified that bolt she tripped on was similar but not exact to the bolt depicted in RX 7. She stated the bolt she tripped over was higher off the ground than the depicted bolt. Mr. Obrock testified that the floor plate bolts were in fact changed after Petitioner's fall. The Arbitrator is not dissuaded in this finding of accident by discrepancies which exist in the testimony and accident reports regard the involvement of a shoe lace. The accident reports at RX 5 and RX 6 clearly indicate that Petitioner's trip over a bolt on a ground plate was the cause of her fall after having been distracted by a co-worker on 2/9/19. Based upon the totality of the evidence, the Arbitrator finds that Petitioner sustained an accidental injury arising out of and in the course of her employment with Dixon Direct on 2/9/19.

The Arbitrator further finds that her left elbow and arm injury is causally related to her accident on 2/9/19. In so finding, the Arbitrator notes that Petitioner had fully recovered from her 2016 left elbow injury and worked 2 years full duty without problem or complaint prior to her fall on 2/9/19. On the day of and immediately after her fall on 2/9/19, Petitioner consistently treated for a new and acute injury to her left elbow requiring surgery. Under the chain of events as buttressed by the medical records in evidence, the Arbitrator finds Petitioner's current condition of ill-being in her left elbow/arm to be causally related to the accident of 2/9/19.

ISSUE (K) TTD/maintenance/ (N) credit

Based on the Arbitrator's findings on the issue of accident and causal connection, the Arbitrator further finds that Petitioner was temporarily and totally disabled for a period of 28-6/7 weeks commencing 2/10/19 through 8/30/19 pursuant to Section 8(b) of the Act. Respondent shall receive credits for all TTD amounts paid and advanced. ARB EX 1. RX 2.

The Arbitrator further finds that Petitioner is entitled to maintenance thereafter for a period of 51-3/7 weeks while Petitioner conducted a self directed job search commencing 8/31/19 through 8/24/20 pursuant to Section 8(a) of the Act. This period specifically includes the period from April to June 2020 when Petitioner's job search efforts were impeded by the Covid-19 pandemic. Petitioner was unable to look for work during that time period due to events beyond her control and therefore shall receive continued maintenance benefits for that period. Respondent shall receive credits for maintenance amounts it paid and/or advanced during the awarded period of maintenance. ARB EX 1. RX 2.

In addition, the maintenance period may overlap, in part, with a period where Petitioner may have received some Social Security retirement benefit subsequent to October 2019. To the extent Respondent asserts that Respondent it is entitled to a credit of the maintenance amounts it paid on that basis, credit on that basis is denied. Petitioner testified that she did not want to retire early but was so forced "in order to have some kind of income." The Arbitrator finds that maintenance is owed from 8/31/19 through 8/24/20 pursuant to the Act and to the extent Respondent paid maintenance benefits during this time period Respondent shall receive credit for those amounts paid as allowed under the Act.

ISSUE (L) NATURE AND EXTENT

The Arbitrator finds that despite evidence in the record to potentially support an award under Section 8(d)(1) of the Act, such an award in this matter is not appropriate given the di minimus nature of such an award. Using Petitioner's AWW of $524.06 or $13.10 per hour and the potential for Petitioner to earn an average hourly wage of $12.50 per hour/$500.00 per week, the resulting wage differential is diminimus and inadequate.

Petitioner requests a finding of permanent total disability under an odd-lot theory. Under the facts of this case, the Arbitrator finds that Petitioner has sustained her burden to prove that she is permanently and totally disabled pursuant to Section 8(f) of the Act.

In so finding, the Arbitrator notes that Petitioner need not show she is totally physically incapacitated in order to receive a permanent total disability award. In this matter, Petitioner's disability is limited in nature such that she is not obviously unemployable. As such, it was her burden to establish the unavailability of employment to a person in her circumstances. The Arbitrator finds that Petitioner clearly established this unavailability through her diligent but unsuccessful attempts to find employment. Petitioner testified that she applied for jobs in her

area and within her physical restrictions as evidenced by her job search logs. Petitioner was not offered employment.

Moreover, the Arbitrator further finds that because of Petitioner's physical condition and restrictions, age, training, education, and singular 30 year work experience, no stable labor market exists for Petitioner. In so finding, the Arbitrator relies on the vocational evidence set forth by vocational expert Kathy Mueller. Petitioner offered three documents prepared by Ms. Kathy Mueller of Independent Rehab Services. Ms. Mueller is a Certified Rehabilitation Counselor and a Licensed Professional Counselor licensed by the State of Illinois. PX 15. She first met with Petitioner on November 18, 2019. Ms. Mueller prepared a preliminary report (PX 6) that discussed the impediments to return to gainful employment and the tools that Petitioner would need to make an effective job search. These tools include computer skills training in order to use and complete online application forms, how to prepare a resume, and how to respond to interview questions. Ms. Mueller prepared a detailed vocational assessment report on December 17, 2019. (PX 7). In it, Ms. Mueller reviewed Petitioner's personal and socio-economic information, her medical history, her current medical status, her education, and vocational history. The assessment included a Transferable Skills Analysis. While Ms. Mueller felt that Ms. Flint was a candidate for vocational rehabilitation, she believed that there were several barriers in regard to ultimate employment. She indicated those barriers to be Petitioner's age of 63; her singular 22 year work history with Respondent, her lack of any additional training since high school graduation 45 years earlier and her lack of computer skills.

Ms. Mueller also performed a labor market survey on 5/28/20 in an effort to determine whether there was a viable and stable labor market available to Petitioner. PX 8. Twenty-one potential employers were identified only four of which were identified as positions Petitioner could physically perform without guarantee of hiring. It was Ms. Mueller's opinion that "Ms. Flint has a very limited labor market available to her. This consultant's opinion is based on Ms. Flint overall physical limitations which would be identified in the light category of physical demands as well as the fact that she has not attended any formal educational or training programs in the last 46 years, her prior work history, and her lack of overall transferable skills."PX 8.

Respondent presented its own evidence in an attempt to show that Petitioner is employable within a stable labor market and that such a market exists. Petitioner was interviewed by Mr. Patrick Conway of Genex. Mr. Conway's CV is in evidence as RX 11. Mr. Conway has a Bachelor's degree but is not a Certified Rehabilitation Counselor. His work experience is that of a vocational case manager and he has a certification as a Certified Disability Management Specialist. Mr. Conway performed an interview of Ms. Flint and also performed a Labor Market Survey. That labor market survey indicated available jobs as a customer service rep, security officer, inside sales rep for a lawn care company, teleservices, general assembler and a part time driver for an auto company. Petitioner's job experience was deemed to have met the job requirements for the assembly and machine operator positions. RX 9. In Mr. Conway's opinion, Petitioner is employable in an existing stable labor market based on her work history and medical information. He opined that suitable work is available for Petitioner within her physical abilities. RX 9, 10.

On August 25, 2020, Ms. Mueller responded to the labor market survey proffered by Mr. Conway and indicated that many of the identified jobs were with staffing agencies which are typically part time or temporary rather than full time stable positions. She also stated that customer service jobs generally require computer applications and proficiency which Petitioner does not have. The general assembler and security guard positions both require lifting outside of Petitioner's restrictions in her opinion and the driver job was not full time and may lead to fluctuating income. PX 12. She indicated that telemarketing is not considered "viable and stable" by Certified Rehab Counselors. Lastly, in her August 25, 2020 report, Ms. Mueller states "It is this

consultant's opinion that the Labor Market Research conducted by Mr. Conway does not represent a viable and stable labor market."

Based on the foregoing, and on the record as a whole, the Arbitrator finds that Petitioner sufficiently met her initial burden to prove odd-lot thus shifting the burden to Respondent to show the existence of a stable labor market for Petitioner and that Petitioner is employable within that stable market. The Arbitrator places greater weight on the opinion of Ms. Mueller over that of Mr. Conway, in combination with the record in its entirety, and finds that Petitioner has sustained her burden to prove that she is entitled to permanent and total disability benefits pursuant to Section 8(f) of the Act as of August 25, 2020, the date of Ms. Mueller's last report.

Lastly, the Arbitrator notes that Petitioner agreed to allow Mr. Conway's reports to go into evidence at trial, but did not stipulate to his qualifications asserting that he did not have the appropriate certification to render opinions relating to vocational rehabilitation under the Act. The Arbitrator rejects this argument and finds that no objective evidence was presented as to the level of certification deemed "appropriate" under the Act by which to evaluate Mr. Conway's certification. Ms. Mueller's opinion on this is merely subjective and without bearing.

ISSUE (M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?

The Arbitrator finds that Respondent's conduct in this matter was not so unreasonable or vexatious so as to justify the imposition of penalties and fees under Sections 19(k) (l) or 16 of the Act. Petitioner's request is denied.

ISSUE (N) SHOULD RESPONDENT RECEIVE CREDIT FOR A PRIOR SETTLEMENT

Respondent seeks credit for a prior workers' compensation settlement where 30% loss of use of the left arm was awarded. (17 WC 003160). This settlement has no effect on an award of permanent total disability benefits and no credit is awarded Respondent.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC003213
Case Name	MAPP, STANLEY v. JACKSON PARK HOSPITAL
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0604
Number of Pages of Decision	20
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Gary Friedman
Respondent Attorney	Matthew Daley

DATE FILED: 12/17/2021

/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 Causation, Temporary disability, Medical Expenses	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STANLEY MAPP,

Petitioner,

vs. NO: 18 WC 03213

JACKSON PARK HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's lumbar spine condition of ill-being remains causally related to his undisputed accidental injury, entitlement to temporary disability benefits, entitlement to incurred medical expenses, and whether imposition of the Act's penalties and fees provisions are warranted, 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.

CORRECTION

The Commission corrects the "Findings" section of the Order to reflect the date of accident is December 14, 2017.

CONCLUSIONS OF LAW

I. Causal Connection

In finding Petitioner failed to prove his current lumbar spine condition remains causally related to the undisputed accidental injury on December 14, 2017, the Arbitrator made an adverse

credibility determination; specifically, the Arbitrator found Petitioner exaggerated his complaints and Petitioner's lack of credibility, coupled with the medical records, indicated an intervening accident occurred. The Commission views the evidence differently.

We begin our analysis with a review of the applicable legal standard. The appellate court has held that intervening accidents are evaluated under a "but for" standard:

> Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. (Citations). Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. (Citation). Thus, when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain. (Citations). "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411. As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the first employer remains liable. *Global Products*, 392 Ill. App. 3d at 412. *PAR Electric v. Illinois Workers' Compensation Commission*, 2018 IL App (3d) 170656WC, ¶ 63, 118 N.E.3d 681, 696 (Emphasis added).

This is a difficult burden of proof, as in order for an incident to rise to the level of an independent intervening accident, the respondent must prove the subsequent condition of ill-being would have occurred even if the claimant's condition had not already been weakened by the work accident. The Commission finds Respondent failed to make that showing, as the evidence establishes Petitioner would not have experienced the pain flare absent his low back already being in a weakened state after the work accident.

We first emphasize this is not an instance where the claimant has a pre-existing condition or a history of prior back problems. Rather, the uncontradicted evidence establishes Petitioner had no back pain or problems until the undisputed work accident; then, when lifting a 60-pound sack of wet linen, he had an immediate onset of pain at 8/10. Petitioner sought care the next day at Respondent's Employee Health Services, where he was diagnosed with a lower back strain, sent for physical therapy, and authorized off work. The record reflects that two weeks of physical therapy only improved his pain level to 7/10, and on January 2, 2018, the Employee Health Services physician referred Petitioner for an orthopedic consult. Pet.'s Ex. 11, Pet.'s Ex. 2, Resp.'s Ex. 2. Petitioner attended two more physical therapy sessions prior to that evaluation; as of January 3, Petitioner's pain level was noted to be 5/10. Pet.'s Ex. 11, Resp.'s Ex. 3. The next day, January 4, 2018, Petitioner was evaluated by Dr. Ivankovich, who directed Petitioner to remain off work while undergoing additional physical therapy and follow up in two weeks. Pet.'s Ex. 3, Resp.'s Ex. 2.

It is during the ensuing two weeks that the alleged intervening accident occurred. The Commission finds, however, that the records do not reveal any condition-altering event. We observe the physical therapy records reflect Petitioner's pain levels were consistent during that period:

- January 5, 2018, Jackson Park Hospital Rehabilitation – pain at lower back 5/10
- January 9, 2018, Jackson Park Hospital Rehabilitation – pain at lower back 5/10
- January 10, 2018, Jackson Park Hospital Rehabilitation – pain at lower back 4/10
- January 16, 2018, Jackson Park Hospital Rehabilitation – pain at lower back 4/10. Pet.'s Ex. 11, Resp's. Ex. 3.

On January 18, Dr. Ivankovich observed Petitioner was "somewhat improved since last visit" then referenced the groceries lifting incident: "Was doing very well with PT, re-injured back lifting groceries this week." Pet.'s Ex. 3, Resp.'s Ex. 4. Significantly, the doctor's note details Petitioner's recent pain levels: "back pain today [January 18] is moderate (5-6/10), back pain yesterday [January 17] was moderate (5-6/10), maximum back pain is severe (7-8/10) since last visit, minimum back pain is mild (3-4/10) since last visit, average back pain is moderate (5-6/10) since last visit." Pet.'s Ex. 3, Resp.'s Ex. 4. The Commission finds this demonstrates that the 7-8/10 pain flare Petitioner had when lifting groceries was short-lived, as his pain level had dropped to 5-6/10 by January 17, 2018. Dr. Ivankovich recommended Petitioner continue physical therapy and follow-up in one week; relevant to the issues herein, the doctor noted the following: "Patient was doing very well and I was ready to return patient to work, but this re-injury has definitely set the patient back…My plan remains to get him back to work as soon as his pain gets back to 4/10 or below." Pet.'s Ex. 3, Resp.'s Ex. 4.

Petitioner attended one more therapy session at Respondent's facility, this on January 23; the note reflects Petitioner's pain was 4/10, but he was being discharged because the approved physical therapy had been exhausted. Petitioner was re-evaluated by Dr. Ivankovich on January 25; the doctor noted that prior to the last visit, Petitioner had "re-injured his back lifting bags from the grocery store" and experienced pain at 8/10, but since then had continued with therapy and was reporting steady improvement. Pet.'s Ex. 3, Resp.'s Ex. 4. Dr. Ivankovich memorialized that Petitioner "is improved, but he still hasn't progressed to where he was prior to re-injury." Pet.'s Ex. 3, Resp.'s Ex. 4. Noting therapy was "improving his pain and function," Dr. Ivankovich ordered further therapy and directed Petitioner to follow up the next week "and we'll plan for him to return to work Monday, February 4, 2018." Pet.'s Ex. 3, Resp.'s Ex. 4.

As detailed above, further therapy at Respondent's facility was not provided; on January 30, Petitioner sought a second opinion from Dr. Murtaza at Illinois Orthopedic Network. Pet.'s Ex. 4. Dr. Murtaza's office note reflects Petitioner injured his low back while lifting 60 pounds of wet linen; he had since undergone approximately six weeks of physical therapy, "which has helped 70% with overall pain." Pet.'s Ex. 4. Dr. Murtaza recommended continuing physical therapy and ordered an MRI, which was benign, and evaluation with Dr. Chunduri. Through Illinois Orthopedic Network, Petitioner underwent conservative care with additional physical therapy and a course of steroids. As of April 12, 2018, Petitioner reported "excellent improvement" with the steroids, and "now only has occasional pain throughout his day around a 2 or 3/10." Pet.'s Ex. 4.

Dr. Chunduri directed that Petitioner complete the remaining week of therapy and released Petitioner to "return to regular duty April 23, 2018." Pet.'s Ex. 4.

The record establishes Petitioner suffered an undisputed lower back strain while lifting a 60-pound linen bag. His initial pain was severe, 8/10. After approximately four weeks of physical therapy, his symptoms persisted but his pain had gradually improved to 4/10. To be clear, ongoing 4/10 pain is not equivalent to Petitioner having returned to his pre-accident condition, nor does it mean Petitioner had fully recovered from his work injury. At some point between the 11th and 15th of January, Petitioner experienced an acute pain flare while carrying groceries; however, by January 17, his pain had improved to 5-6/10. The Commission finds the pain flare Petitioner experienced from lifting groceries would not have occurred "but for" the unresolved work-related lumbar spine strain.

Moreover, while the Arbitrator found Petitioner lacked credibility, the Commission disagrees. Petitioner insisted he did not re-injure his back, and the medical records corroborate his testimony: Petitioner suffered a lumbar spine strain as a result of the work injury; his pain was improving with therapy, but the strain had not resolved; one day, as he carried groceries upstairs, he had an acute pain flare; the next time Petitioner saw Dr. Ivankovich, he told the doctor about the incident but advised he continued to improve and his pain had returned to a moderate level. In the Commission's view, Petitioner's testimony reflects his disagreement with the characterization of a minor incident ("much of nothing" (T. 19); "I told him that I just had some discomfort taking the bags up. I didn't say reinjured. That wasn't my word." T. 34)) being elevated to a major event that purportedly completely altered his condition. See *R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870 (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.") What Petitioner experienced was a set-back in the ongoing treatment of his unresolved work-related lumbar spine strain, and the appellate court has held that such symptom flares are not independent intervening accidents. *See*, e.g., *Nabisco Brands v. Industrial Commission*, 266 Ill. App. 3d 1103, 1107 (1st Dist. 1994) ("The pain experienced by claimant as a result of the accident was intensified, not precipitated, by subsequent physical activity.")

As to the Arbitrator's finding that Dr. Ivankovich "specifically noted a full duty release would occur on February 4, 2018," the Commission finds this mischaracterizes the evidence. On January 18, 2018, Dr. Ivankovich memorialized his plan "remains to get him back to work as soon as his pain gets back to 4/10 or below." Pet.'s Ex. 3, Resp.'s Ex. 4. On January 25, Dr. Ivankovich ordered ongoing physical therapy and directed Petitioner "to return next week and we'll plan for him to return to work Monday, February 4, 2018." Pet.'s Ex. 3, Resp.'s Ex. 4. While the doctor certainly anticipated releasing Petitioner to work in some capacity, there is no express statement that it was to be a full duty return to work. Indeed, given that Petitioner's normal duties include lifting up to 60 pounds, as well as the fact that the doctor indicated his plan was to return Petitioner to work when Petitioner's ongoing pain had decreased to a certain level as opposed to when he expected Petitioner's symptoms would have fully resolved, the Commission finds it is reasonable to infer that Dr. Ivankovich intended to release Petitioner to light duty.

The Commission finds the temporary pain spike Petitioner experienced while carrying groceries would not have occurred "but for" the unresolved work-related lumbar strain. As such, there was no independent intervening accident which broke the chain of causation. The Commission finds Petitioner's condition of ill-being remains causally related to the undisputed work accident.

II. Temporary Disability

Petitioner alleged he was temporarily and totally disabled from December 15, 2017 through April 12, 2018. Arb.'s Ex. 1. Respondent, in turn, alleged Petitioner's entitlement to TTD benefits ended on January 18, 2018. Arb.'s Ex. 1. The Commission observes Petitioner was first authorized off work on December 15, 2017, and he remained off work per the Jackson Park Hospital and Illinois Orthopedic Network physicians through April 22, 2018. Pet.'s Ex. 4. Consistent with our determination that there was no intervening accident to break the chain of causation, we conclude Petitioner was off work as a consequence of his undisputed work accident and therefore proved entitlement to Temporary Total Disability benefits as alleged on the Request for Hearing. The Commission finds Petitioner entitled to Temporary Total Disability benefits of $264.57 per week for a period of 17 weeks, representing December 15, 2017 through April 12, 2018.

III. Medical

Petitioner offered into evidence multiple medical bill exhibits: Petitioner's Exhibit 5 (Illinois Orthopedic Network); Petitioner's Exhibit 7 (Mid-City Rehabilitation); Petitioner's Exhibit 9 (Premier Imaging); Petitioner's Exhibit 10 (Midwest Specialty Pharmacy); and Petitioner's Exhibit 12 (Jackson Park Hospital). The Commission finds the charges detailed therein were incurred for treatment that was reasonable, necessary, and related to the undisputed December 14, 2017 work accident.

IV. §19(l) and §19(k) penalties and §16 attorney's fees

The Commission finds that an award of penalties and fees is not warranted in this case. The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301, 412 N.E.2d 468, 470 (1980). The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772, 777-78. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*. Here, in refusing to pay additional benefits, Respondent relied on an intervening accident defense. While Respondent's position was ultimately unsuccessful, the Commission does not find it unreasonable for Respondent to have terminated benefits under those circumstances.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 18, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $264.57 per week for a period of 17 weeks, representing December 15, 2017 through April 12, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $2,721.33 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses set forth in Petitioner's Exhibits 5, 7, 9, 10 and 12, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $238.12 per week for a period of 20 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 4% loss of use of the person as a whole.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of 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 $24,800.00. 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.

December 17, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 10/27/21

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

21IWCC0604

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAPP, STANLEY Case# **18WC003213**
Employee/Petitioner

JACKSON PARK HOSPITAL
Employer/Respondent

On 2/18/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0579 FRIEDMAN & SOLMOR LTD
GARY B FRIEDMAN
200 N LASALLE ST SUITE 2750
CHICAGO, IL 60601

5146 ODELSON & STERK LTD
MATTHE J DALEY
3318 W 95TH ST
EVERGREEN PARK, IL 60805

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

STANLEY MAPP
Employee/Petitioner

v.

JACKSON PARK HOSPITAL
Employer/Respondent

Case # **18** WC **3213**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **7-16-19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **12-17-17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,636.72**; the average weekly wage was $**396.86**.

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 $**2,721.33** for TTD, $**0** for TPD, $**0** for maintenance, and $**1,500.00** for other benefits, for a total credit of $**4,221.33**.

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

ORDER

Petitioner has failed to meet their burden that the current cause of ill-being is related to the initial accident post February 4, 2018.

Respondent shall pay Petitioner temporary total disability benefits of $264.57/week for 6 4/7 weeks, commencing 12-15-17 through 2-4-18, as provided in Section 8(b) of the Act. Respondent shall receive credit for TTD it paid in the amount of $2,721.33.

Respondent shall pay reasonable and necessary medical services provided by Jackson Park Hospital, Dr. Ivankovich and Jackson Park Hospital Department of Physical Medicine and Rehabilitation.

Respondent shall pay the sum of $238.12/week for a period of 20 weeks, as the injuries sustained caused the permanent partial disability to Petitioner to the extent of 4% under Section 8(d)2 of the Act.

Penalties pursuant to 19(k), 19(l) and section 16 are denied.

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

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

Signature of Arbitrator

February 14, 2020
Date

FEB 18 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STANLEY MAPP, Petitioner V JACKSON PARK HOSPITAL, Respondent	NO. 18 WC 3213

STATEMENT OF FACTS

Stanley Mapp, the Petitioner, age 49, had been employed by the Respondent, Jackson Park Hospital, for approximately 10½ years up to the date of his employment accident and injury that occurred on December 14, 2017 (Tr. 11). During the 10½ years working for the Respondent, the Petitioner was engaged in "housekeeping" duties that was described as general maintenance of the hospital premises (Tr. 12). The Petitioner testified he never had a prior lower back injury nor has he had any prior medical care for his lower back (Tr. 12). Prior to his injury at work on December 14, 2017, the Petitioner testified he was feeling fine (Tr. 12). On December 14, 2017, at approximately 1:40 PM, the Petitioner was lifting a heavy bag of linen in ICU when he experienced pain and discomfort in his lower back (Tr. 12, 13, 31). The Petitioner further described his action at the time of his injury as lifting a bag that weighed approximately 60 pounds out of a barrel, and he further explained that the bag of linen was actually wet linen (Tr. 13-14). The Petitioner described the pain in his lower back that he experienced when lifting the bag of linen as a sharp pain like being stuck in the back by a knife (Tr. 14). Immediately after the occurrence, the Petitioner notified his supervisor, and he and his supervisor completed the hospital's "Work Related Injury-Illness Report" (Pet. ex. 1), the same day (12-14-17) (Tr. 14). The Petitioner did not continue working that day as his injury actually happened near the end of his shift (Tr. 15). The Petitioner testified he went home, and during that night, his lower back pain increased causing his inability to sleep (Tr. 15). The next day (12-15-17), the Petitioner returned to the hospital, and that is when his medical care and treatment for his lower back began (Tr. 15).

On December 15, 2017, the Petitioner reported to the Respondent's own "Employee Health Service" (Tr. 15-16). At his first visit to the Respondent's Employee Health Service, the Petitioner complained of lower back pain, and he described to the physician there that "he strained his lower back while lifting linen in ICU yesterday" (Tr. 16, Pet. ex. 2). The lower back pain was noted as 8/10 on his first visit to Respondent's Employee Health Service, and after a brief exam, he was prescribed Ibuprofen (600mg) and Flexeril (10mg) (Pet. ex. 2). The Petitioner continued to receive care and treatment at Respondent's Employee Health Service from December 15, 2017 to January 2, 2018 (Tr. 17 Pet. ex. 2)). The Petitioner also received physical therapy for his lower back at Respondent's own Department of Physical Medicine and Rehabilitation from December 21, 2017 to January 23, 2018 ((Tr. 17-32-33, Pet. ex. 2 & 11).

Having not made much progress with the physical therapy provided by the Respondent's own therapy facility and still experiencing significant lower back pain and discomfort, Respondent's Employee Health Service referred the Petitioner to an orthopedic surgeon who practiced in the hospital (Tr. 17-18). The Petitioner saw orthopedic surgeon, Daniel Ivankovich, from January 4, 2018 to January 25, 2018 (Tr. 18, Pet. ex. 3). When the Petitioner was first seen by Dr. Ivankovich in the Respondent's hospital, he told Dr. Ivankovich that he hurt his lower back while lifting linen in ICU, and he told the doctor that his lower back pain was not getting better with physical therapy (Tr. 18-19 Pet. ex.3). At the first visit with Dr. Ivankovich, the doctor noted Petitioner's lower back pain; noted that the Petitioner had been partaking in physical therapy and had been taking prescribed medication; and the doctor then recommended that the Petitioner continue doing physical therapy and continue taking the prescribed medication (Pet. ex.3). When next seen by Dr. Ivankovich on January 18, 2018, Dr. Ivankovich noted that the Petitioner had somewhat improved, but also noted that the Petitioner had re-injured his lower back lifting groceries (Tr. 19, Pet. ex. 3). Page 2 of Dr. Ivankovich's January 18, 2018 medical notes in the care plan section he states:

> Patient was doing very well, and I was ready to return patient to work, but this re-injury has definitely set the patient back. I would like to have patient continue to see PT department and evaluate in one week. My plan remains to get him back to work as soon as his pain gets back to 4/10 or below. RX. 4

The Petitioner denied that he re-injured his back carrying groceries at trial and disputes Dr. Ivankovich's records, but stated that he felt a little more lower back discomfort carrying groceries that weighed less than ten

pounds as he walked up the stairs where he lived (Tr. 19-21,33-34). The Petitioner, in further denying a new or re-injury, has stated that he really was not feeling that much difference in lower back pain carrying the groceries at the bottom of the stairs and when he reached the top of the stairs (Tr. 20-21,33-34). When last seen by Dr. Ivankovich on January 25, 2018, the Petitioner testified he was still in lower back pain, and he was not ready to go back to work at that time (Tr. 21, 34-35, Pet. ex. 3). Dr. Ivankovich noted that Petitioner's pain had improved to 6/10 but was still higher than before the grocery bag incident and wrote that the "plan for him is to return next week and then we'll plan for return to work Monday, February 4, 2018." PX 3

After treating with the doctors and therapists at the Respondent's hospital and still experiencing continued lower back pain and discomfort, the Petitioner sought a second opinion from another doctor at another facility (Tr. 22). The Petitioner saw Dr. Murtaza for a second opinion on January 30, 2018, and at that visit, he told the doctor of being hurt at work lifting heavy linen that weighted over sixty pounds (Tr. 22-23, PX 4). Petitioner did not give a history of re-injury to his back carrying groceries. (PX 4) Dr. Murtaza sent the Petitioner for a lumbar MRI (Tr. 23, PX 4). The Petitioner underwent the lumbar MRI at Premier Imaging on February 12, 2018 (Tr. 23, PX 4 & 8). Also at the direction of Dr. Murtaza, the Petitioner received additional physical therapy for his lower back at Mid City Rehabilitation from February 5, 2018 to April 16, 2018 (Tr. 23-24, PX 4 & 6). After receiving the results of the lumbar MRI and after undergoing some of the additional physical therapy recommended by Dr. Murtaza, the Petitioner was referred by Dr. Murtaza to a pain specialist (Dr. Chunduri) (Tr. 24, Pet. ex. 4).

When first seen by Dr. Chunduri on March 1, 2018, the Petitioner related to the doctor that he was injured at work lifting a heavy bag of linen; related all the care and treatment that he had received up to the present time; and he related that his lower back was still painful on a scale of 7/10 (Tr. 24-25, PX 4). After examining the Petitioner, Dr. Chunduri reviewed the results of Petitioner's lumbar MRI from Premier Imaging and noted: "L4-L5 4mm disc protrusion with some foraminal stenosis and L5-S1 3mm protrusion with moderate stenosis and moderate left foraminal stenosis (Tr. 25, PX 4 & 8). Dr. Chunduri's diagnosis was lumbago and lumbar disc herniation, and he recommended that the Petitioner try oral steroids and possibly undergo trigger point injections (Tr. 26, PX 4). Petitioner's last visit with Dr. Chunduri was on April 12, 2018 (Tr. 26-27, Pet. ex.4). At this last visit with the doctor, while he still was experiencing continued lower back pain noted by the doctor

on a scale of 2-3/10, the Petitioner had improved with the Medrol Dosepak recommended by Dr. Chunduri who wrote that the Petitioner was tto return to work (Tr. 27. PX 4).

Upon discharge by Dr. Chunduri, the Petitioner did not return to his job of "housekeeping duties" for the Respondent because he testified his lower back was still bothering him (Tr. 28). Instead, the Petitioner sought less strenuous work, and he undertook social service work with a social service company (Ready Chicago) (Tr. 28-29). The Petitioner is currently employed as a driver for Lyft (Tr. 46).

The Petitioner was off from work at the direction of his treating physicians as a result of his lower back injury sustained at work on December 14, 2017, from December 15, 2017 through April 12, 2018 (Tr. 29, PX 2, 3 & 4). While he has not received any further care or treatment since last seen by Dr. Chunduri in April, 2018, the Petitioner testified he continues to experience lower back pain up to the present time (Tr. 29). The Petitioner describes the continuing lower back pain on a scale 5-6/10, and it occurs at least three to four times per week, especially at night after work when he tries to sleep (Tr. 29-30). To try and alleviate or reduce his continued lower back pain, the Petitioner testified he currently uses a heating pad and takes Aleve (Tr. 30). The Petitioner testified has not had any subsequent accidents or injuries up to the present time (Tr. 30-31).

The Petitioner has incurred the following medical bills:

Illinois Orthopedic Network		$2.226.39 (Pet. ex. 5)
Mid City Rehabilitation		$9,497.37 (Pet. ex. 7)
Premier Imaging MRI		$1,590.89 (Pet. ex. 9)
Midwest Specialty Pharmacy		$1,803.45 (Pet. ex. 10)
Jackson Park Hospital (PT)		$4,516.40 (Pet. ex. 12)
	Total:	$19,634.50

CONCLUSIONS OF LAW

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or

she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

On the issue of (F): *Is the Petitioner's current condition of ill-being is causally connected to this injury*, the Arbitrator finds as follows:

The Arbitrator notes that the respondent does not dispute a work accident, but disputes liability post an intervening accident.

It is clear to the Arbitrator that the petitioner's current complaints of pain are subjective, excessive and trial day exaggerations. The Arbitrator does not find the petitioner to be a credible witness. The petitioner alleged the injury and sought treatment the following day. The initial treatment at Jackson Park Hospital by Dr. Ivankovich and the Physical Medicine and Therapy Department was reasonable and necessary.

The Arbitrator must determine based on the testimony and evidence submitted at trial, (1) whether an intervening accident occurred and (2) whether the petitioner was a credible witness.

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 testimony. 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). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d 213 (1980). 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).

The Arbitrator finds, after observing Petitioner testify at trial and reviewing the medical records, that Petitioner lacked credibility. As described below, the Petitioner's lack of credibility combined with a review of the medical records leads the Arbitrator to find that an intervening accident occurred.

The intervening accident is first noted in Dr. Ivankovich's medical note on January 18, 2018. (PX 3) The Arbitrator notes that on page 2 of Dr. Ivankovich's January 18, 2018 medical notes in the care plan section he states:

> Patient was doing very well, and I was ready to return patient to work, but this re-injury has definitely set the patient back. I would like to have patient continue to see PT department and evaluate in one week. My plan remains to get him back to work as soon as his pain gets back to 4/10 or below. (PX 3)

The Arbitrator notes that on January 16, 2018 the Petitioner informed his therapist that he had a 4/10 pain rating. (RX 3) Moreover, on January 23, 2018 the JPH Department of Physical Medicine and Rehabilitation note also shows a 4/10 pain scale. (RX 3)However, when examined by Dr. Ivankovich on January 25, 2018 the Petitioner describes an 8/10 pain scale during the same week he described a 4/10. On January 25, 2018, Dr. Ivankovich informed the Petitioner his plan was to release him full duty on February 4, 2018. (PX 3)

It was following the January 25, 2018 exam with Dr. Ivankovich that the petitioner decided to treat with another physician based on an alleged friend, Andre Louis' referral. (Tr. 36). While determining whether the intervening accident occurred, the Arbitrator must determine if the medical notes of Dr. Ivankovich are accurate. The Petitioner testified multiple times that he never informed Dr. Ivankovich that he was injured carrying groceries. (Tr. 33-34). Additionally, the Petitioner testified that it was not accurate that Dr. Ivankovich planned him to return to work on February 4, 2018 despite the record clearly indicating the same. (Tr. 34-35, PX 3)

The Arbitrator notes that the Petitioner has clearly disputed much of what Dr. Ivankovich memorialized in his notes relative to a full duty release and intervening accident. Specifically, the petitioner testified that Dr. Ivankovich fabricated the fact that the Petitioner re-injured his back. (Tr. 41). The Arbitrator finds that the Petitioner's testimony was in direct contradiction to the medical records on several occasions. When questioned on cross exam about his pain level being 6/10 on April 12, 2018 during an exam with Dr. Chunduri, the Petitioner was specifically asked that if the records reflect that, " he now only has an occasional pain throughout his day around a two or three and he feels he is ready to go back to work," the Petitioner testified that he does not remember telling Dr. Chunduri. (Tr. 41-42, PX 4). It is evident that when the Petitioner testified regarding a return to full duty work, he either states that Dr. Ivankovich is fabricating

the pain level or that he never told his own treating physician that he was ready to return to full duty. Based on the multiple instances of clear inconsistencies in the Petitioner's testimony, the Arbitrator finds that the testimony of the petitioner was not credible. As such, the Arbitrator will take the medical notes as accurate.

Therefore, the Arbitrator finds that an intervening accident occurred, resulting in a delay of a return to fully duty and breaking the chain of causation. Moreover, the second choice treating physicians did not have an accurate medical history, as the Petitioner never informed them of the re-injury lifting the groceries.

As such, the Arbitrator finds that an intervening accident occurred during the treatment with Dr. Ivankovich on approximately January 18, 2018. The causal chain was broken when the injury occurred lifting groceries. The breaking of the causal chain is supported by Dr. Ivankovich's records indicating that he was ready for a return to full duty work but for the accident. As such, any current cause of ill-being, post the treatment with Dr. Ivankovich after his final exam on January 25, 2018 is not related.

On the issue of (J): *Were the medical services that were provided to the petitioner reasonable and necessary; Has respondent paid all appropriate charges for all reasonable and necessary medical services*, the Arbitrator finds as follows:

The Arbitrator finds that the medical services provided to the Petitioner through Jackson Park Hospital and Dr. Ivankovich were reasonable and necessary. However, based on the finding in the prior section that the petitioner's testimony was not credible and that an intervening accident occurred breaking the causal chain, all treatment subsequent to January 18, 2018 is deemed not related, reasonable nor necessary.

The petitioner was ready to return to full duty work until he injured his back carrying groceries. Dr. Ivankovich specifically noted that a fully duty release would occur on February 4,

2018. (PX 3) The testimony of the Petitioner that he never hurt his back carrying groceries is in direct contradiction to the records which the Arbitrator relies heavily upon.

As such, the subsequent treatment by Dr. Chunduri and Dr. Murtaza was not related to the original accident. Moreover, the Petitioner was not truthful when relating how he injured his low back while treating with Dr. Chunduri and Dr. Murtaza.

Therefore, the bills submitted by the Petitioner marked as Petitioner's exhibits 5,7,9 and 10 are not the responsibility of the Respondent.

On the issue of (K): *What temporary benefits are in dispute*, The Arbitrator finds as follows:

After reviewing the record and based on the foregoing sections the Arbitrator finds that the Petitioner is entitled to TTD through to February 4, 2018 (to the date that Dr. Ivankovich planned the full duty release) - $264.57/week for 6 4/7 weeks.

On the issue of (L) *Permanency*, the Arbitrator finds as follows:

Pursuant to Section 8.1b, permanent partial disability shall be established and determined using the following five factors:

With regard to subsection (i), the Arbitrator notes that no AMA Impairment Rating permanent partial disability report and or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii), the occupation of the employee, the Arbitrator notes the record reveals Petitioner was employed doing "housekeeping" duties that was described as general maintenance of the Respondent's hospital premises, and that he is able to return to work in his prior capacity as a result of said accident. The Arbitrator notes that Petitioner did occasionally lift heavy weights when emptying soiled linens. However, the occupation of housekeeper is a light to medium duty occupation. Arbitrator gives some weight to this factor.

With regard to subsection (iii), the Arbitrator notes that Petitioner was 49 years old at the

time of the accident. Because of his age, the Arbitrator gives little weight to this factor.

With regard to subsection (iv) Petitioner's future earnings capacity, the Arbitrator notes there was no negative impact to Petitioner's ability to earn the same or greater hourly rate in the same or his subsequent employment for a different employer, the Arbitrator gives no weight to this factor.

With regard to subsection (v), evidence of disability corroborated by the treating medical records, the Arbitrator notes the continuing residual problems claimed to be experienced by the Petitioner but finds that the totality of Petitioner's testimony to be not credible and likely exaggerated. There is also an intervening accident that is causally related to any claims of residual back pain. Because the residual problems are verified by the medical records in evidence (Pet, ex, 2, 3, 4, 6, & 11), the Arbitrator therefore gives some weight to this factor.

The Arbitrator, after considering, the previous sections, clear medical history, testimony of the petitioner, finds that the petitioner suffered a strain injury to the low back in the amount of 4% of the person as a whole. As such, 20 weeks amounts $4,762.40.

On the issue of (M): *Penalties*, the Arbitrator finds as follows:

Petitioner reported to Dr. Ivankovich that he had reinjured his back carrying groceries and the contemporaneous medical records support that this in fact occurred when weighed against Petitioner's convenient and non-credible denials at trial regarding the same. Therefore, the Arbitrator finds that Respondent had a good faith basis for cutting off benefits and contesting medical care. No penalties are awarded.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC000565
Case Name	MATHEWS, HOWARD v. CITY OF CHICAGO
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0605
Number of Pages of Decision	12
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jennifer Robinson
Respondent Attorney	Lucy Huang

DATE FILED: 12/17/2021

/s/ Kathryn Doerries, Commissioner

Signature

21IWCC0605

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	
X Add on to sentence, Sec J page 5, Add under Sec J hold harmless, page 5, Correct scriveners' error, Replace word in Order Sec Par. 5, & Replace word Page 6, Sec (O) Mod. Ord sec Par. 3 Mod. Sec (N) Page 6	
☒ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HOWARD MATHEWS,

Petitioner,

vs. NO: 14 WC 0565

CITY OF CHICAGO,
DEPARMENT OF WATER MANAGEMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical, permanent partial disability, Other-temporary total disability, medical bills, medical bills credit allegedly due to Respondent, and admission of Respondent's exhibits into evidence, 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 the Arbitrator's decision in its entirety but modifies Section (J), page 5, of the Arbitrator's decision, adding to the first sentence of paragraph 1, "Sinai Medical Group" and "University of Chicago Physicians Group" so the sentence shall read as follows: "The Arbitrator finds the treatment provided by Holy Cross Hospital, Mercy Works, University of Chicago Medical Center, Mercy Hospital, Francisco St. James Hospital, Medicar Express Ambulance, Brentwood Rehabilitation, Omnicare Pharmacy, Sinai Medical Group, and University of Chicago Physicians Group, to be reasonable and necessary for the care and treatment of Petitioner."

The Commission, herein, modifies the Arbitrator's decision under Section (J) to add the following, "Respondent shall hold Petitioner harmless for medical bills for which Respondent is receiving credit."

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, under the Findings section to reflect the correct date of accident of December 31, 2013 (not December 31, 2015).

The Commission, herein, modifies the Order section, paragraph 4, striking the word "future" and replacing it with the word "prospective."

The Commission, herein, modifies the Arbitrator's decision on page 6, Section (O), striking the word "future" and replacing it with the word "prospective."

The Commission, herein, modifies the Order section, paragraph 3, to add, "Respondent is entitled to a credit of $1,694.17 for the medical charges paid under the City of Chicago's group health insurance pursuant to Section 8(j) of the Act."

The Commission, herein, modifies Section (N), page 6, to change the amount of credit due Respondent to $1,694.17, and, after the word "Act", adds the phrase, "as a result of the work-related injury."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2019 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.

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.

December 17, 2021

o-11/23/21
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
NOTICE OF ARBITRATOR DECISION

MATHEWS, HOWARD
Employee/Petitioner

Case# **14WC000565**

CITY OF CHICAGO
Employer/Respondent

On 3/10/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0696 RITTENBERG BUFFEN ET AL
JENNIFER ROBINSON
309 W WASHINGTON ST SUITE 900
CHICAGO, IL 60606

0010 CITY OF CHICAGO CORP COUNSEL
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Howard Mathews
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 14 WC **565**

Consolidated cases: _____

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

DISPUTED ISSUES

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

FINDINGS

On December 31, 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 $**70,408.00**; the average weekly wage was $**1,354**.

On the date of accident, Petitioner was **66** 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 $**87,304.96** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**87,304.96**.

Respondent is entitled to a credit of $**2,845.71** under Section 8(j) of the Act.

ORDER

Respondent shall pay directly to University of Chicago Medical Center, Mercy Hospital, Francisco St. James Hospital, Medicar Express Ambulance, Brentwood Rehabilitation, and Omnicare Pharmacy for the bills that are addressed in the attached decision pursuant to the fee schedule and Section 8(a) and 8.2 of the Act.

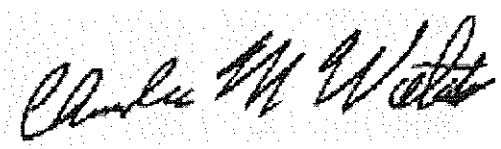
Petitioner will have and receive from the Respondent 125 weeks at a rate of $721.66 because he suffered a loss of 25% loss of a man as a whole.

Respondent is entitled to a credit of $2,845.71 for the medical charges that were paid under City of Chicago Group Insurance, under Section 8(j) of the Act.

Petitioner's request for future medical services is hereby denied.

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

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



Signature of Arbitrator

March 10, 2020
Date

MAR 10 2020

Howard Mathews v. City of Chicago
14 WC 565
Arbitrator Watts

STATEMENT OF FACTS

It is stipulated to by the parties that on December 31, 2013 that Howard Mathews (hereinafter referred to as "Petitioner") sustained an injury in the course and scope of his employment with the City of Chicago (hereinafter referred to as "Respondent"). His job title was motor truck driver for the Chicago Department of Water Management.

On December 31, 2013, while Petitioner was getting into his truck, he slipped and fell and injured his right shoulder. He sought medical treatment at Mercy Work on January 2, 2014. He was diagnosed with right shoulder strain. X-rays were performed, which showed no fracture and degenerative changes were noted (Px. 2) It was recommended that Petitioner take Tylenol and wear an arm sling. He was taken off work (Px.2)

On January 21, 2014, Petitioner underwent an MRI, which revealed "findings suggestive of recent shoulder dislocation with moderate joint effusion, bone contusions of the posterior humerus and a Hill-Sachs deformity; severe osteoarthritis changes of the glenohumeral joint with complete loss of the normal articular cartilage and labrum with resultant subchondral cyst formation; severe tendinitis of the supraspinatus and infraspinatus tendon with a large full-thickness tear or retraction seen and maybe punctate tears of distal supraspinatus; and extensive degenerative changes of the acromioclavicular joint with downward spurring providing a potential source of impingement on the supraspinatus tendon." (Px.2)

Petitioner then followed up with Dr. Shi on Jan. 30, 2014 at which time Dr. Shi read the MRI and radiology report. (Px.3). In his office note, Dr. Shi wrote:

> I told him there is nothing short of a shoulder replacement that will be definitive treatment for this given he has significant osteoarthritis on x-ray. . . . I suggested trying going forward with the corticosteroid injection under fluoroscopy and hopefully this will help with the symptoms. The patient was definitely open to the idea of having a shoulder replacement when I discussed it with him.

On February 7 2014, Petitioner presented at Dr. Lewis Shi's office with complaints of right shoulder pain. Dr. Shi reviewed the MRI and x-ray reports and diagnosed Petitioner with right shoulder osteoarthritis. The doctor recommended cortisone injections (Px.3).

On February 23, 2014, Petitioner underwent an epidural steroid injection (Px.3). Due to Petitioner's ongoing complaints with shoulder pain, a total shoulder arthroplasty was recommended (Px.3).

Petitioner remained off work and began a course of physical therapy. (Px.5) Petitioner followed up with Dr. Shi on April 8, 2014, and noted that physical therapy was helping to increase Petitioner's range of motion. (Px.3) On May 6, 2014, Petitioner saw Dr. Shi noted

Petitioner had worsening of right shoulder pain. (Px.3) Dr. Shi also documented his appeal of the utilization review non-certification for this additional physical therapy and how the therapy was necessary to help Petitioner's range of motion. (Px.3) Again, Dr. Shi kept Petitioner off work.

Petitioner returned to see Dr. Shi on June 10, 2016 and had x-rays of his shoulder. (Px.3). Dr. Shi noted and that Petitioner's right shoulder has been getting worse and he again was using the sling. (Px.3). At this visit, Dr. Shi also prescribed a second right shoulder injection to provide the Petitioner with relief while he waited for approval by workers' compensation for the surgery. (Px.3).

Consistent with Petitioner's testimony, Respondent did not approve the total right shoulder replacement until after an independent medical exam was conducted. After the IME, Respondent approved the right shoulder replacement.

On October 16, 2014, Petitioner underwent a right total shoulder replacement, which was performed by Dr. Shi (Px.3)

Petitioner performed post-operative physical therapy from November 7, 2014 to March 26, 2015. He further underwent additional physical therapy from April 1, 2015 to August 3, 2015. Petitioner was discharged from physical therapy on August 6, 2015 (Px.3).

On October 23, 2015, Petitioner was released back to work with the following restrictions: no heavy overhead lifting more than 20 pounds and no driving semi-trucks (Px.8)

Petitioner's department was able to accommodate his restrictions. Petitioner continued to work as a motor truck driver until when he retired on December 31, 2015.

On October 21, 2016, Petitioner attended a follow up visit with Dr. Shi. At this visit, Dr. Shi noted, "The patient is approximately 2 years out from his previous surgery. He states he is doing very well. He has no limitations as far as his function of his right shoulder goes." (Px.3 p. 714) Dr. Shi further noted, "He states he has no pain in his right shoulder at this time. He states he is able to perform daily activities of living with his right shoulder." (Px. 3 p.714) Petitioner further reported, "[H]e is very satisfied with surgery." (Px.3 p.714) Petitioner stated, "He has not had any physical therapy for at least a year and has forgotten most of the exercises, but is interested in re-learning them. He has no numbness in his right upper extremity. He has no other complaints and no changes in his medical history." (Px.3 p.714) X-rays of the right shoulder were performed, which revealed right shoulder arthroplasty with no hardware malalignment (Px.3 p.714). Dr. noted that Petitioner was doing very well and recommended following up on every other year basis (Px. 3 p.714) Petitioner testified that he planned to follow up with Dr. Shi in the future.

At the hearing, Petitioner testified that he still experiences right shoulder pain and difficulties with his activities of daily living. Today, the Petitioner continues to have ongoing complaints and disability due to his work-related right shoulder injury. He gets pain when he over-extends and

therefore tries to avoid activities that cause him pain. Petitioner testified that he rarely takes prescription pain pills left over from after his right shoulder replacement and performs his home exercises occasionally. Due to his problems and disabilities caused by his work-related right shoulder injury, he can no longer drive semi-trucks and has been precluded from ever working in an occupation as a semi-truck driver. Petitioner testified his pain and problems from his work-related right shoulder injury (pain and weakness at times in his right shoulder shifting gears and after driving a work truck for an hour or two) caused him to retire early.

Petitioner continues to have weakness and some limitations with his range of motion in his right shoulder. While he can lift light objects over his head, Petitioner cannot lift heavy objects over his head (and has restrictions from Dr. Shi to not lift overhead above 20lbs). Although he is right-handed and his right arm was always stronger, his right arm is no longer stronger than his left.

Petitioner testified he now has problems walking his dog. He cannot play ping pong which he used to play about twice a week. While he used to fish two to three time a month in summer, he can no longer do this as he cannot cast the line far enough. He also cannot bowl as he can no longer swing a 16lb ball. He used to bowl once or twice a month. Additionally, he now has difficulty playing football (while he used to be able to throw the ball a half block but now he can only throw it 30"). He also has difficulty playing softballs as he cannot throw the ball far. He also cannot wax a car with his right arm.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hegeler Zinc. Co. V. Industrial Board, 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause

connected with the employment, there is no right to recover. Board of Trustees v. Industrial Commission, 44 Ill. 2d 214 (1969).

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 testimony. 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). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980).

The Arbitrator finds, after observing Petitioner testify at trial and a review of the records, that Petitioner was mostly credible. Petitioner's testimony was consistent with the record on accident and the course of medical treatment. The one caveat is that the Arbitrator believes that Petitioner exaggerated his current disability which relates to the issue of the purported need for future medical care for this injury. The Arbitrator finds it hard to believe that a person who can still play softball and throw a football thirty feet is as disabled in other activities of daily living as Petitioner testified.

In regards to (F), "Is the Petitioner's current condition of ill-being related to the injury?", the Arbitrator finds:

The Arbitrator finds the Petitioner's injuries suffered are causally connected to the aforementioned work incident based upon Petitioner's testimony and medical records that supported that testimony.

In regards to (J), "Has the Respondent paid all appropriate charges for all reasonable and necessary medical expenses?", the Arbitrator finds:

Petitioner is alleging that there remains an outstanding balance to Holy Cross Hospital, Mercy Works, University of Chicago Medical Center, Mercy Hospital, Francisco St. James Hospital, Medicar Express Ambulance, Brentwood Rehabilitation, and Omnicare Pharmacy. Respondent does not allege that the charges from these medical providers are for treatment or for charges which are not necessary or reasonable. Rather, Respondent argues that they may have paid the bill and, if not, they should be directed to pay the bill. Respondent submitted into evidence a Payment Report documenting several payments have been made (Rx.1). Specifically, the Payment Report reflects that the medical bills from Holy Cross Hospital and Mercy Works have been paid. The Payment Report also shows that several bills from University of Chicago Medical Center and Francisco St. James Hospital have been paid (Rx.1). However, the Report shows that payments have not been made for the following dates of service: 01/14/14 ($507) , 01/30/14 ($406), 2/13/14($1,384, 2/25/14 ($406), 4/8/14 ($406), and 10/28/16 ($635) from University of Chicago Medical Center; 01/21/14 ($1,236) from Mercy Hospital; 11/02/16, 11/08/16, 11/16/16, 11/18/16, and 11/21/16 in the amount of $2,687.04 from Francisco St. James Hospital; 10/21/14 ($114)

from Medicar Express Ambulance; 10/21/14 – 10/27/14 ($4,434.73) from Brentwood Rehabilitation; and 10/21/14 – 10/27/14 ($1,643.40) from Omnicare Pharmacy. (Rx.1)

The Arbitrator finds the treatment provided by Holy Cross Hospital, Mercy Works, University of Chicago Medical Center, Mercy Hospital, Francisco St. James Hospital, Medicar Express Ambulance, Brentwood Rehabilitation, and Omnicare Pharmacy to be reasonable and necessary for the care and treatment of Petitioner. As such, Respondent shall pay directly to these medical providers pursuant to the fee schedule and Section 8(a) and 8.2 of the Act.

In regards to (L), "What is the nature and extent of Petitioner's injury?," the Arbitrator finds:

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported level of impairment: An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation: On the date of accident, Petitioner was a motor truck driver for the Department of Water Management. Petitioner was able to return to work to his position as a motor truck driver with the restrictions that were given by his doctor. Petitioner's Department was able to accommodate his restrictions. This must be given great weight.

3. Petitioner's age at time of injury: Petitioner was 66 years old at the time of injury. Accordingly, Petitioner is nearing the end of his work life. Petitioner actually retired, although he testified that he wanted to work longer. This is relevant and should receive some weight.

4. Petitioner's future earning capacity: Petitioner has no loss of earnings. Nothing in the record, including his testimony, suggests that his future earning capacity has been affected by the injury sustained. Petitioner was able to retire after returning to work in October 2015. Again, great weight must be placed on this factor.

5. Evidence of disability corroborated by medical records: Petitioner underwent a total shoulder replacement. The medical records support a finding that Petitioner is entitled to an award of permanency. However, the extent of the injury and Petitioner's current claims of disability are not entirely corroborated by the evidence. Dr. Shi's physical examination findings generally do not show any significant neurological deficits or abnormal findings. Petitioner's activities of daily living have not been as limited as one would expect given the complaints of symptoms and limitations. The medical evidence simply does not provide an apparent reason for the extent of the Petitioner's allegedly limited daily routine. Despite alleging very restricted daily activities, Petitioner has not reported receiving any specific help on a day-to-day basis and has failed to convincingly explain how certain basic daily needs and unavoidable tasks are accomplished. Petitioner testified he continues to play softball, although with difficulty throwing, and can throw a football with his injured shoulder. The Arbitrator finds that some of his alleged limitations are not consistent with the whole record, and the nature and extent of his injury is not as severe as Petitioner testified. Nonetheless, there was a substantial injury. This factor is given appropriate weight.

Therefore, as a result of the injury suffered, Petitioner will have and receive from the Respondent 125 weeks at a rate of $721.66 because he suffered a loss of 25% loss of a man as a whole.

In regards to (N), "Is Respondent due any credit?," the Arbitrator find:

Respondent is entitled to a credit of $2,845.71 for the medical charges that were paid under City of Chicago Group Insurance, under Section 8(j) of the Act (Rx.2). As noted above, the Arbitrator finds the treatment provided by Holy Cross Hospital, Mercy Works, University of Chicago Medical Center, Mercy Hospital, Francisco St. James Hospital, Medicar Express Ambulance, Brentwood Rehabilitation, and Omnicare Pharmacy to be reasonable and necessary for the care and treatment of Petitioner. As such, Respondent shall pay directly to these medical providers pursuant to the fee schedule and Section 8(a) and 8.2 of the Act.

In regards to (O), "Petitioner's request for future medical services" the Arbitrator finds:

As discussed above, the record reflects that Petitioner has been generally doing well after the surgery. Dr. Shi's treatment notes show that Petitioner reported that Petitioner was doing well after the surgery, and objective diagnostic tests showed normal findings. There is no evidence that Petitioner followed up with Dr. Shi after October 2016. A reasonable inference from the fact that there are no records for a follow-up visit with Dr. Shi is that Petitioner is generally doing well and that is the reason why he does not need to follow up with the doctor. Based on the review of the complete record, the Arbitrator finds that Petitioner's request for future medical services is unreasonable and unnecessary. As such, Petitioner's request for future medical services is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC003773
Case Name	BELER, MCKINDLA A v. INDIVIDUAL ADVOCACY GROUP
Consolidated Cases	15WC003714
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0606
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	
Respondent Attorney	Robert Cozzi

DATE FILED: 12/20/2021

/s/Christopher Harris, Commissioner

Signature

21IWCC0606

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

MCKINDLA BELER,

Petitioner,

vs. NO: 15 WC 3773

INDIVIDUAL ADVOCACY GROUP,

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 (TTD), maintenance benefits, permanent total disability (PTD), and permanent partial disability (PPD), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission modifies, in part, and affirms, in part, the Decision of the Arbitrator. The Commission also writes to correct the scrivener errors contained within the Decision.

The Petitioner filed two Applications for Adjustment of Claim for the same injury: 15 WC 3773 and 15 WC 3714. At the start of the February 27, 2020 arbitration hearing, the Petitioner acknowledged that the two filings were duplicative and agreed to dismiss case number 15 WC 3714. The Arbitrator, however, incorrectly filed his Decision under case 15 WC 3714, not 15 WC 3773. The Commission, therefore, strikes all references to case 15 WC 3714 in the Decision and replaces it with 15 WC 3773.

The Commission also corrects the scrivener's error contained within the order section of

the Decision. Per the order, Petitioner was awarded TTD benefits from January 12, 2015 through September 10, 2017, representing 34-2/7 weeks. In his analysis, the Arbitrator awarded TTD benefits from January 12, 2015 through September 10, 2015, the date Dr. Stiehl opined Petitioner could return to work full duty. Despite her disagreement with the award, the Petitioner acknowledged the scrivener's error and further acknowledged that the TTD end date should read September 10, 2015. Therefore, the Commission corrects the scrivener's error contained within order section to reflect the correct TTD period of January 12, 2015 through September 10, 2015.

In order to prove his entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 49, 390 Ill. Dec. 293, 28 N.E.3d 946. An employee is temporarily totally disabled from the time that 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. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 289 Ill. Dec. 794 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072.

The Commission finds that the Petitioner is entitled to TTD benefits from January 12, 2015 through July 21, 2016, representing 79-4/7 weeks of disability. Following the undisputed accident, Petitioner underwent left lateral malleolus open reduction and internal fixation on January 19, 2015. Thereafter, the Petitioner continued to complain of ankle issues and was routinely kept off work by Dr. Sheila Ayorinde. The Petitioner was then seen by Dr. Grambart on January 23, 2016 due to her ongoing ankle issues. She had tenderness with range of motion of the left ankle. Dr. Grambart diagnosed Petitioner with ankle impingement, painful hardware and Achilles pain attachment. Dr. Grambart discussed the possibility of a second surgery. Petitioner's off work restrictions were continued at that time. Dr. Grambart ultimately performed gastric recession, ankle arthroscopy with debridement and deep hardware removal of the left ankle on April 20, 2016. Petitioner's off work restrictions were continued following the surgery. Petitioner was seen by Dr. Grambart's Nurse Practitioner, Erica Shroyer on July 21, 2016. At that time, Petitioner reported doing well and rated her pain as a 0 out of 10. She was in a regular shoe. Examination revealed minimal swelling and good range of motion. She was advised to follow-up as needed. During Dr. Grambart's November 8, 2016 deposition, he testified that he did not see any specific work restrictions contained within the July 21, 2016 record. He was not aware that Petitioner had stopped physical therapy. As her pain was a 0 out of 10, however, Dr. Grambart stated that he was okay with her stopping therapy. He further stated that Petitioner could return to work if she was doing fine. At the time of his November 8, 2016 deposition, Dr. Grambart stated that the Petitioner had not returned for a follow-up visit.

The Commission finds that the Petitioner's left ankle condition stabilized as of July 21, 2016 and that she was capable of returning to full duty work on that date. The medical evidence

establishes that Petitioner was not experiencing any pain and she had good range of motion of her left ankle. Therefore, the Commission awards Petitioner TTD benefits from January 12, 2015 through July 21, 2016.

Based upon her injury, the Commission finds that the Petitioner sustained 35% loss of use of the left foot. The Commission has considered the five factors under Section 8.1b of the Act:

(i) Impairment Rating: Neither party submitted an impairment rating. As such, the Commission assigns no weight to this factor and will assess Petitioner's permanent disability based upon the remaining enumerated factors.

(ii) Occupation of Injured Employee: The Petitioner worked as a caregiver at the time of her left ankle injury. The Petitioner has not returned to her employment with the Respondent or any other employment since her accident. The Commission, however, finds that the credible evidence supports that the Petitioner was capable of returning to work with regard to her left ankle injury. As Petitioner sustained an injury to her left ankle and her job duties require her to be on her feet throughout the day, the Commission assigns moderate weight to this factor and finds this indicative of increased permanent disability.

(iii) Petitioner's Age: The Petitioner was 38 years old at the time of her injury. Petitioner has a longer work career remaining in which to experience the effects of her injury. The Commission assigns moderate weight to this factor and finds this indicative of increased permanent disability.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to a reduced earning capacity. The Commission finds that the Petitioner was capable of returning to her pre-injury occupation with regard to her left ankle injury. Therefore, the Commission assigns no weight to this factor.

(v) Evidence of Disability: The Petitioner sustained an undisputed fracture to her left ankle. As a result of the injury, the Petitioner underwent left lateral malleolus open reduction and internal fixation on January 19, 2015. She then underwent a gastric recession, ankle arthroscopy with debridement, and deep hardware removal of the left ankle on April 20, 2016. Petitioner has continued complaints of pain and stiffness. The record demonstrates that she has good range of motion of the left ankle. The Commission assigns significant weight to this factor and finds it indicative of increased permanent disability.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission awards Petitioner 35% loss of use of the left foot pursuant to Section 8(e) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the

Arbitrator filed September 4, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $403.92 per week for a period of 79-4/7 weeks, January 12, 2015 through July 21, 2016, 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 $363.53 per week for a period of 58.45 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 35% loss of use of the left foot.

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 $38,800.00. 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.

December 20, 2021

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

CAH/tdm
O: 12/16/21
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELER, McKINDLA
Employee/Petitioner

Case# **15WC003714**

INDIVIDUAL ADVOCACY GROUP
Employer/Respondent

On 9/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0000 BELER, MCKINDLA
526 S ELM AVE
SPRINGFIELD, IL 62703

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
77 W WASHINGTON ST SUITE 1601
CHICAGO, IL 60602

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

McKindla Beler
Employee/Petitioner

v.

Individual Advocacy Group.
Employer/Respondent

Case # **15** WC **003714**

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 **2/27/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/11/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,505.76**; the average weekly wage was **$605.88**.

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

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

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

Respondent shall be given a credit of **$14,714.22** for TTD, **$0** for TPD, **$0** for maintenance, and $ - 0 -for other benefits, for a total credit of $ **14,714.22** .

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

ORDER

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY OF $363.53/WEEK FOR 41.75 WEEKS BECAUSE THE INJURIES SUSTAINED CAUSED THE 25% LOSS OF USE OF THE LEFT FOOT AS PROVIDED UNDER SECTION 8(E) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $403.92/WEEK FOR 34 2/7 WEEKS COMMENCING JANUARY 12, 2015 THROUGH SEPTEMBER 10, 2017, AS PROVIDED UNDER SECTION 8(B)OF THE ACT.

THE PETITIONER'S CLAIM FOR MAINTENANCE 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.

Carl Lee — Signature of Arbitrator

9/2/20 — Date

SEP 4 - 2020

STATEMENT OF FACTS

The petitioner testified that she was employed as a caregiver for the respondent on January 11, 2015. On that date, she slipped and fell at work sustaining an injury to her left ankle and tailbone. She was taken to the emergency room where she was diagnosed with a fracture of her fibula of her left ankle. On January 19, 2015, Dr. Benjamin Stevens performed a left lateral malleolus open reduction with internal fixation. The operative note reflects that a perfect anatomical reduction was achieved. Post-operative x-rays showed satisfactory alignment. (Resp. Ex. 9) The petitioner thereafter underwent post-operative physical therapy. On June 2, 2015, Dr. Stevens noted that the petitioner was out of her boot and was walking but she did not believe she would be able to return to work. Both Dr. Stevens and the physical therapist recommended work hardening. (Resp. Ex. 9) At her visit with Dr. Stevens on July 16, 2015, he recommended that the petitioner attend work conditioning. The petitioner indicated that she was not prepared to consider work conditioning or returning to work. Furthermore, she indicated she planned to find another doctor to treat her. (Resp. Ex. 9)

The petitioner next chose to treat with Dr. Barry Mulshine of the Orthopedic Center of Illinois. He reviewed the x-rays which showed that the fracture had healed and was in anatomic position. The physical examination revealed minor swelling; reasonable range of motion; poor effort for strength testing; and no focal tenderness.

He agreed with Dr. Stevens' recommendation that the petitioner should go to work hardening. He further stated that she is "symptom-focused" and added that, "I suspect there are some issues with motivation as well." She did not return to see Dr. Mulshine. (Resp. Ex. 5)

The petitioner further testified that she was next seen by a podiatrist, Dr. Flieschi. He diagnosed her with plantar fasciitis and arthritis of the left ankle. She saw him only once. The petitioner next treated with Dr. Ayorinde, a primary care physician. She thereafter attended several weeks of therapy.

The petitioner was then examined at the request of her employer by her Dr. James B. Stiehl on September 10, 2015. His examination of her ankle revealed the following findings: no significant swelling; 20 degrees dorsal flexion and 50 degrees plantar flexion; 20 degrees foot inversions of 20 degrees and eversion of 15 degrees; global discomfort from the mid-calf to the mid-foot upon palpation; normal Cotton's test; and no evidence of talar tilt or instability. He diagnosed a lateral malleolar fracture of the left ankle which was causally related to the work injury. The fracture had healed and the ankle was normal. Her complaints were non-organic. His review of the physical therapy reports reflect that she was showing up late for physical therapy and not consistently performing the tasks she was asked to perform. He opined that she had reached maximum medical improvement and was able to return to full duty work. (Resp. Ex. 6)

The petitioner testified that she thereafter came under the care of the podiatrist, Dr. Grambart. On April 20, 2016, he removed the plate from her ankle. Dr. Grambart testified at his deposition on November 8, 2016 as follows. He began treating the petitioner on January 15, 2015 for problems related to her left ankle. (Resp. Ex. 4, pg. 5) He diagnosed painful hardware, impingement syndrome and Achilles' pain. (Resp. Ex. 4, pg. 7) He performed a procedure to remove the painful hardware on April 20, 2016. While performing this procedure, he also lengthened the Achilles tendon and cleaned up the impingement syndrome. (Resp. Ex. 4, pg. 10) The petitioner returned to the clinic on July 21, 2016. She was doing well. The pain was 0/10. She did not return following that visit. He released her to return to work full duty without follow up. (Resp. Ex. 4, pg. 15) He did not anticipate any future problems other than the fact that she has a flat foot which could give her problems down the road. However, that is a congenital condition independent of the accident. (Resp. Ex. 4, pg. 20)

With respect to the impingement syndrome, it can be caused by trauma or rheumatoid arthritis. He acknowledged that the petitioner had a history of rheumatoid arthritis. In his opinion, the impingement syndrome could have been caused by the rheumatoid arthritis. (Resp. Ex. 4, pg. 35) He acknowledged that the rheumatologist in his clinic, Dr. Rashid, examined the petitioner ten days after he

first examined her and noted that she was complaining of pain in both of her ankles, not just the one that had been fractured. (Resp. Ex. 4, pg. 38)

With respect to the petitioner's alleged tailbone injury, the records of Dr. Stevens of the Springfield Clinic, (Resp. Ex. 9) the records of physical therapy at St. John's Hospital and the Springfield Clinic (Pet. Ex. A and Resp. Ex. 6) and the records of Dr. Ayorinde (Resp. Ex. 2) reflect that the petitioner did not make any complaints regarding her tailbone throughout the entire year of 2015. The petitioner in her testimony admitted that she did not complain to any doctor of her tailbone hurting until February 9, 2016, almost thirteen months subsequent to the injury. She testified that she did not complain to any doctor that she had hurt her tailbone when she fell because she had been suffering from rheumatoid arthritis since 2009 and she thought that the pain was from her rheumatoid arthritis. She also had been diagnosed with fibromyalgia many years earlier. The records of her rheumatologist, Dr. Ratalunga, reflect that she had lower back pain in 2010 when her rheumatoid arthritis flared up. (Pet. Ex. 2)

The records of Dr. Ayorinde reflect that she complained of gluteal pain on February 9, 2016, well over a year following her injury. She did not claim that she injured her gluteal region in the accident but stated that she was treating with her rheumatologist for the problem. She next saw Dr. Ayorinde on April 12, 2016. She referred to buttocks pain but again did not relate it to her work injury. Likewise, at

her visit of July 15, 2016, she mentioned that her therapist reported her pain was coming from her sacroiliac joint but there was no mention of her work injury. (Resp. Ex. 2) The medical records reflect that the first time the petitioner claimed that back or other pain was related to her fall from work was when she was seen by a nurse practitioner, Christi Landue, on September 15, 2016 at the Memorial Health System. When she was next seen at that facility on October 28, 2016, she claimed that the back pain began when she was bending over cleaning a tub at home and felt a popping sensation. (Resp. Ex. 2)

The petitioner thereafter came under the care of orthopedic surgeon, Dr. Frank Bender, of the Orthopedic Center for Illinois for her back pain. When the petitioner was first seen by Dr. Bender, she provided a history of injuring her tailbone in November of 2015. He diagnosed coccyx pain. He recommended an injection. She underwent the injection on March 17, 2017. She returned to Dr. Bender on September 25, 2017. According to his note for that date, the petitioner reported that her attorney had sent her to Dr. Bender to fill out paperwork to justify modified duty. Dr. Bender indicated in his report that "I told her I thought she could return to work without restriction and she should tell her attorney I do not fill out that kind of paperwork." The petitioner never returned to see Dr. Bender. (Resp. Ex. 3)

The petitioner also treated with Dr. Todd Elmore for low back pain. When first seen by Dr. Elmore on June 1, 2016, she did not state that she injured her low

back when she fell at work in January 2015. There was no mention made of her work injury. She reported seeing a number of doctors for the problems but the bone scans, MRIs and other tests have failed to turn up anything. He indicated that he thought the problem may be related to her sacroiliac joint. She did not return again to Dr. Elmore until June 13, 2019, four-and-a-half years after her accident at work. She told Dr. Elmore at that time that she injured her tailbone when she fell in January of 2015. He did not render a specific diagnosis other than "tailbone injury." Based on her history, he stated that her tailbone problem was a result of her fall. (Pet. Ex. 0, 1 and 2) On December 19, 2018, her primary care physician, Dr. Camilleri, provided her with a note indicating that her ankle and tailbone problems are permanent and she is unable to work. (Pet. Ex. T)

The petitioner underwent a functional capacity evaluation in February of 2017 which indicated that as a result of the problems with her ankle and her tailbone, she could work with certain restrictions. The report did not specifically indicate which problem was producing the need for the restrictions. (Pet. Ex. D) In October, November and December, 2018, the petitioner sought employment at 78 employers and was unable to find employment. The job search notes (Pet. Ex. P) indicate that she did not present in person to any of the employers. At the present time, the petitioner notices swelling in her ankle as well as pain while she is walking and sitting. She did not testify as to any medications she was taking for pain.

The petitioner was examined again by Dr. James B. Stiehl on July 19, 2017. He reviewed the medical records of treatment subsequent to his previous examination of September 10, 2015. His examination of the left ankle revealed normal motion; negative instability testing; normal anterior Drawer; normal ligamental laxity; tenderness to palpation; and a slight limp. Examination of the lumbar spine revealed tenderness in the left coccyx. He diagnosed a left lateral malleolar fracture. He opined that the petitioner's tailbone condition was not causally related to the accident. Furthermore, the findings were minimal. In his opinion, she had reached maximum medical improvement and was capable of full duty work. (Resp. Ex. 7)

CONCLUSIONS OF LAW

With respect to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?" the Arbitrator concludes the following:

Based on the opinions of Dr. James B. Stiehl, the Arbitrator concludes that the petitioner's left malleolar ankle fracture was caused by the work injury of January 11, 2015. However, the Arbitrator finds that the petitioner's Achilles tendon problem and impingement syndrome are not related to the work injury based on the testimony of Dr. Grambart. The Arbitrator further finds that the petitioner's tailbone problem is not causally related to the work injury. The Arbitrator bases his opinion on the following factors. The petitioner admitted she did not complain to any

medical personnel regarding her tailbone, low back or buttocks until February of 2016, thirteen months following the work injury. When she first complained to Dr. Ayorinde on February 9, 2016, she did not indicate that she had injured the tailbone or low back when she fell in January of 2015. She next complained to Dr. Elmore regarding her tailbone in June of 2016, again, she did not claim that it was injured when she fell in January of 2015 but dated the onset of the problem to June, 2015. When she underwent physical therapy in September and October of 2015, she provided conflicting histories as to whether she injured the tailbone in the work-related injury or if she injured it at home while cleaning the bathtub. When she first saw Dr. Bender, she advised him that she injured her tailbone in November of 2015, not as a result of the work-related injury of January, 2015. The Arbitrator adopts the opinion of Dr. James Stiehl who examined the petitioner on two occasions and reviewed the records of treatment. He concluded that the petitioner's tailbone problems are unrelated to the work injury. His opinion is supported by the medical records offered by the parties into evidence.

With respect to issue (K) "What temporary benefits are in dispute?" the Arbitrator concludes the following:

The Arbitrator finds that the petitioner was temporarily totally disabled from January 12, 2015 through September 10, 2015, a period of 34 2/7 weeks. The Arbitrator bases his decision on the fact that her surgeon, Dr. Benjamin Stevens, and Dr. Barry Mulshine, recommended in July of 2015 that the petitioner should undergo

work conditioning. The petitioner refused to undergo work conditioning. Dr. Mulshine opined that the petitioner was too symptom-focused and ere was an issue with motivation. Dr. James Stiehl thereafter examined the petitioner on September 17, 2015 and opined she could return to full duty work. He based his opinion on an essentially negative examination. After Dr. Grambart removed the hardware from her ankle in April of 2016 and also surgically addressed other issues that were unrelated to the work injury, he indicated that the petitioner was capable of returning to full duty work on July 21, 2016.

With respect to the issue of maintenance, the Arbitrator finds that the petitioner was found to be capable of performing full duty work by Drs. Stiehl, Grambart and Bender. Therefore, the petitioner's claim for maintenance is denied.

With respect to issue (L) "What is the nature and extent of the injury?" the Arbitrator concludes the following:

The petitioner sustained a left malleolar fracture to her left ankle as a result of the work injury. She underwent surgery consisting of an open reduction with internal fixation. The hardware was subsequently removed. The petitioner underwent multiple orthopedic examinations with respect to the left ankle. Although the petitioner was found to have tenderness in the ankle region, she enjoyed full range of motion and other orthopedic testing was negative. The petitioner treated with or was seen by an orthopedic doctor for her ankle after Dr. Stiehl examined her

in September, 2015. The Arbitrator finds that the petitioner sustained a complete loss of use of the left foot to the extent of 25%.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005252
Case Name	ROUSSIN, DENNIS R v. MADISON COMMUNITY UNIT SCHOOL DISTRICT #12
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0607
Number of Pages of Decision	18
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jennifer Wagner
Respondent Attorney	Matthew Terry

DATE FILED: 12/20/2021

/s/Stephen Mathis, Commissioner

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DENNIS R. ROUSSIN,

Petitioner,

vs. NO: 19 WC 005252

MADISON COMMUNITY UNIT
SCHOOL DISTRICT #12,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability (TTD), medical expenses, and prospective medical care, and being advised of the facts and applicable law, hereby reverses the Decision of the Arbitrator for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total disability, prospective medical expenses, and compensation for permanent partial disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds that Petitioner sustained a work-related accident on February 21, 2017. His right shoulder condition is causally related to his work accident. Having found accident and causal connection, the Commission finds Petitioner is entitled to the 62 weeks of TTD that have already been paid commencing February 22, 2017 through October 3, 2017 and January 24, 2018 through August 21, 2018 (RX 2). Respondent is entitled to a credit of $30,924.98 for TTD benefits previously paid. The Commission finds that all medical care and treatment rendered to Petitioner was reasonable and necessary and that Respondent shall pay medical expenses pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit of $77,817.56 for the medical

expenses that have been paid, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Petitioner is entitled to prospective medical care and treatment for his right shoulder as recommended by Dr. Farley.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1) Mr. Roussin was employed with Madison Community Unit School District # 12 as a full-time custodian on February 21, 2017. On that date he was on duty cleaning the cafeteria when he slipped and fell on spilled juice and fell directly on his right shoulder.

2) Mr. Roussin admitted into evidence and testified to the following job history:

a. In 2007 Petitioner was employed as a service technician at Thermal Industries. The position required a lot of overhead lifting. T 19. He left that employment in 2014. In 2014 he was unemployed for 9 months. Petitioner then worked for a temporary service from Labor Day until the end of 2015. T 22. In 2016 Mr. Roussin was hired by Respondent as a full- time custodian.

b. Petitioner's duties for Respondent included sweeping, mopping, moving furniture, lawn maintenance, light plumbing, and overhead work. During the summer he painted a couple of classrooms by himself. He emptied trash that weighed 60-70 lbs. and required lifting the can and placing it in the dumpster. He worked alone on his shift until February 17, 2017.

3) Mr. Roussin has a history of right shoulder pain that dates back to July 17, 2007 when he sustained a work-related accident in his prior employment. He was lifting a glass trapezoid that weighed 120-140 lbs. and strained his right shoulder. PX3. An MRI performed on October 30, 2007 revealed a focal, partial articular surface tear with tendinosis, and acromioclavicular joint arthropathy with mass effect on the supraspinatus tendon. RX5.

4) In 2007 Petitioner came under the care of Dr. Kostman, an orthopedic surgeon. At that time Dr. Kostman was contracted to Concentra. He treated Petitioner conservatively with cortisone injections to the right shoulder. On December 18, 2007, Dr. Kostman discussed treatment options with Petitioner that included continued conservative therapy or arthroscopic surgery. RX6. Right shoulder surgery was not performed. Petitioner testified that he was scheduled for right shoulder surgery but that it was cancelled by Dr. Kostman. T 29. Dr. Kostman

was subsequently retained by Respondent in the present case as a Section 12 expert witness.

5) Petitioner testified that he had regained full-strength in his right shoulder and continued working full-duty at Thermal Industries through 2014. T 29. He admits he has had symptoms of arthritis in his right shoulder from his 2007 work accident until the 2017 fall at work. T 49. He does not dispute that he had ongoing problems with his right shoulder in the interim for which he consulted his primary care physician Dr. Riordan. T 54.

6) Prior to the February 2017 work-injury he was able to reach his right arm above his head without assistance from his left hand. His right arm movement was unrestricted. T 32. Petitioner admitted on cross examination that he saw Dr. Riordan on December 28, 2015 and that his records note decreased range of motion on examination, and inability to resist pressure in his right arm. T 57.

7) Petitioner began work for Respondent as a substitute custodian in early 2015. He was then hired full-time by Respondent. He was able to work full-duty from December 2015 until his February 21, 2017 work accident. T 65. He pursued a hobby as a drummer since 13 years of age. He has no other hobbies. T 62.

8) On February 21, 2017 Petitioner was working at Madison School doing cafeteria duty. He slipped on spilled apricot juice and fell directly on his right shoulder. He reported the injury and was sent to Gateway Medical Center on February 22, 2017. Petitioner testified that immediately after the fall he did not feel pain because his shoulder felt the way it always did. The pain increased by the end of his shift. T 59.

9) The records from Gateway Medical Center reflect that he reported that he slipped and fell at work and that the onset of right shoulder pain was sudden and continuous. An x-ray was performed that revealed no fracture. Acromioclavicular hypertrophy was reported. Examination of the right shoulder demonstrated decreased range of motion. PX2.

10) Mr. Roussin was seen by Dr. Milne on March 6, 2017. He presented with complaints of constant pain with any use of his right shoulder. Petitioner was known to Dr. Milne as he performed a left subscapularis repair in 2014. Petitioner reported to Dr. Milne that he had an old work injury to his right shoulder in 2005 (sic). Dr. Milne diagnosed a right full thickness rotator cuff tear involving the subscapularis with right impingement syndrome and acromioclavicular arthrosis. Dr. Milne recommended arthroscopic surgery and imposed a 5 lb. lifting restriction pending surgery. PX3.

11) Dr. Milne performed right shoulder surgery on April 5, 2017. The undersurface of the rotator cuff showed a full thickness tear, the biceps tendon was found to be subluxing from the groove and the anterior superior labrum showed fraying and tearing. Petitioner had post-operative follow up and physical therapy. Dr. Milne released him to restricted duty work with a 40 lb. lifting restriction on August 14, 2017. PX3.

12) Petitioner returned to Dr. Milne on September 12, 2017 and reported that he did not feel ready to return to full duty employment where he is expected to lift up to 70 lbs. Dr. Milne ordered a course of work hardening. On October 3, 2017 Petitioner reported to Dr. Milne that he was still having difficulty raising his right arm overhead. He was returned to full duty work. Petitioner saw Dr. Milne on October 31, 2017 and told Dr. Milne that his right shoulder was getting worse. Dr. Milne ordered an MRI arthrogram but allowed him to continue working without restrictions.

13) An MRI arthrogram was performed on November 21, 2017 which revealed evidence of a repeat full thickness tear at the insertion of the supraspinatus measuring 3.2 cm. in the AP dimension with 3.1 cm. of retraction. Dr. Milne recommended repeat surgery.

14) Dr. Milne performed a second right shoulder surgery on January 24, 2018. He underwent physical therapy and was on work restrictions of no overhead lifting or reaching. PX3.

15) On June 12, 2018 Petitioner saw Dr. Milne and reported he still had a "sticking point" in his right shoulder and required active assistance when raising his arm from 45 to 90 degrees. Dr. Milne ordered another MRI which was performed on July 10, 2018.

16) The MRI report of July 10, 2018 was read by the radiologist as demonstrating a partial thickness undersurface tear with fraying and undersurface irregularity, and suspected superior bundle subscapularis and small focal longitudinal interstitial tendon wear, but no convincing labral tear was identified. PX3.

17) Dr. Milne determined that the rotator cuff was intact and increased the frequency of physical therapy. On August 21, 2018 he returned Petitioner to full duty work. On September 18, 2018 Dr. Milne charted that Petitioner was at MMI and released him from care.

18) Petitioner returned for further orthopedic follow up on June 19, 2019. Dr. Milne had retired during the interim. Petitioner was seen by his partner Dr. Farley. Petitioner reported that he had done okay on his initial return to full duty

employment but he still had some pain and weakness that became worse over the course of the spring. Dr. Farley ordered an MRI which was performed on July 1, 2019. PX7.

19) The MRI performed on July 1, 2019 reported that undersurface tears of the infraspinatus, supraspinatus and subscapularis were seen but that that no through and through components were identified. PX7.

20) Mr. Roussin returned to Dr. Farley to review the radiology results on July 3, 2019. Dr. Farley's clinical note states that he reviewed the July 1, 2019 MRI images in comparison to the July 2018 MRI and that failure of the second right shoulder cuff repair performed by Dr. Milne was evident even in the MRI images of July 10, 2018. Dr. Farley recommended further revision rotator cuff repair. His note reflects concern about the predictability of success with further surgery, but Petitioner's symptoms necessitate the recommendation. Further revision was not scheduled as Mr. Roussin had upcoming eye surgery. Dr. Farley released Petitioner without restrictions pending further rotator cuff revision.

21) Mr. Roussin underwent a Section 12 examination by Dr. Kostman at the request of Respondent on January 29, 2020.

22) Dr. Farley was deposed on March 5, 2020 and his deposition testimony was received into evidence. Dr. Farley is board certified in orthopedics. He has followed Petitioner commencing June 19, 2019 as a treating physician following the retirement of Dr. Milne. He testified consistent with his medical records and opined that the medical care and treatment rendered Mr. Roussin by Dr. Milne following his February 21, 2017 work-related injury was reasonable and necessary. (PX1)

23) Dr. Fraley opined that Petitioner is not at MMI and that if he does not undergo the recommended surgery that he will remain permanently disabled and will not regain full functionality. Dr. Farley testified that Petitioner's right shoulder simply failed to heal following the first two surgeries with Dr. Milne. (PX1).

24) Dr. Kostman was deposed on June 3, 2020 and his testimony was received into evidence. Dr. Kostman testified that he was retained by Respondent to examine Petitioner, and that he generated a report dated January 29, 2020 related to the Section 12 examination. (RX5)

25) Dr. Kostman expressed the opinion that the April 5, 2017 right shoulder surgery performed by Dr. Milne was necessary to relieve Petitioner's physiological condition, but that the need for surgery was not causally connected to the February 21, 2017 work accident. In Dr. Kostman's opinion Petitioner's history

of right shoulder injury in 2007 and his activities as a drummer placed him at risk for continued rotator cuff pathology. Dr. Kostman acknowledges that Petitioner needs the further surgery recommended by Dr. Farley but that the need for surgery is not causally connected to the February 21, 2017 fall at work. (RX5)

26) On cross-examination Dr. Kostman admitted to being associated with Concentra in 2007 and that he was the physician who evaluated Petitioner's right shoulder injury while he was employed at Thermal Industries. He admitted that there was no indication that Petitioner had been unable to work between 2007 and February 21, 2017. Dr. Kostman admitted that he had no information to dispute that Petitioner sustained a fall onto his right shoulder on February 21, 2017, nor does he have any basis to dispute that Petitioner was unable to perform his job duties after that fall.

CONCLUSIONS OF LAW

It for the Commission to determine whether Petitioner sustained a work-related accident on February 21, 2017 and whether his current condition of ill-being is causally connected to that event. Petitioner's testimony concerning the fall he sustained while on cafeteria duty on February 21, 2017 is undisputed. Petitioner reported his injury promptly and sought medical treatment at Gateway Medical Center on February 22, 2017. The history Petitioner gave following the injury to his medical providers has been entirely consistent. The Commission agrees with the Arbitrator's finding that Petitioner sustained a work-related accident on February 21, 2017.

It is undisputed that Petitioner was working as a custodian at full-duty for Respondent at the time he fell directly onto his right shoulder on the date of the accident. Petitioner did have remote history of a right shoulder injury dating back to his prior employment in 2007. Petitioner did consult his primary care provider intermittently during the years from 2007 through 2016 for complaints related to his right shoulder. An MRI performed on November 6, 2007 revealed that Petitioner had a partial thickness right rotator cuff tear.

Petitioner testified that he was able to fully perform his all of his work duties for Respondent prior to February 21, 2017 and that those duties included overhead activities. The records of Gateway Medical Center reflect that the onset of Petitioner's right shoulder pain was sudden and continuous following his fall at work. Petitioner further testified that by the time he arrived at Gateway Medical Center he was unable to move his shoulder properly and that he was experiencing increasing pain. He was unable to touch the small of his back with his right hand, extend his right arm, or lift his right arm over his head without assistance from his left arm. An MRI performed following the work accident showed a complete tear of the rotator cuff.

Petitioner subsequently underwent two surgeries by Dr. Milne on his right shoulder. Petitioner continued to experience problems with his right shoulder and continued to seek orthopedic care. He consulted with Dr. Farley on June 9, 2019 and had another MRI performed on

July 1, 2019. Dr. Farley has recommended further right shoulder surgery without which Petitioner will remain disabled and will not regain full functionality of his right shoulder.

Respondent's Section 12 examiner Dr. Kostman agreed that the medical treatment rendered to date has been reasonable and necessary. He acknowledged that the prospective care recommended by Dr. Farley is medically indicated. Dr. Kostman, however has opined that the February 21, 2017 work accident was not a cause of or factor in the permanent aggravation of Petitioner's right shoulder pathology. After having fully reviewed the facts and law, the Commission views the evidence differently and reverses the Arbitrator's Decision on the issue of causal connection.

In order to establish causal connection under the Act, a Petitioner must prove that some act or phase of employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial Comm'n.* 359 Ill.App.3d. 582, 592, 834 N.E.2d 583, 296 Ill. Dec. 26 (2005). However, a work- related injury "need not be the sole causative factor, nor even the primary causative factor, so long as it was causative in the resulting condition of ill-being." *Sisbro v. Industrial Comm'n.* 207 Ill. 2d. 193, 205, 797 N.E. 665, 278 Ill.Dec.70 (2003). Thus, even if the employee has a pre-existing condition which makes him more vulnerable to injury, recovery will not be denied as long as it can be shown that his employment was also a causative factor. *Id.* Accordingly, an employee may recover under the Act, if he shows that he suffered a work-related accident that aggravated or accelerated a pre-existing condition. *Id.*

It is undisputed that Petitioner sustained a fall at work on February 21, 2017. Petitioner testified that prior to the fall that he was able to work full-duty as a custodian for Respondent. He was able to perform normal movement with his right shoulder on the morning of February 21, 2017 prior to the fall in the cafeteria. Subsequent to the accident he had pain and loss of range of motion that drove him to seek emergency medical care. Petitioner amply testified as to the change in his physical condition immediately following the accident. Respondent presented no evidence to contradict this testimony. Following the accident, Petitioner was subsequently diagnosed with a full-thickness tear of the rotator cuff that required two surgeries with Dr. Milne.

The Arbitrator noted that Petitioner presented no medical opinion to establish causal connection. "Medical testimony is not necessarily required, however, to establish causal connection and disability." *Westinghouse Electric Co. v. Industrial Comm'n.* 64 Ill. 2d.244, 250 (1976); *see also Union Starch & Refining Co. v. Industrial Comm'n.* 37 Ill.2d 139, 144 (1967).

Petitioner has presented evidence of a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability that the Commission finds sufficient to prove a causal nexus between the accident and his right shoulder injury under *International Harvester v. Industrial Comm'n.* 93 Ill.2d. 59 irrespective of the opinion offered by Dr. Kostman concerning causal connection. For all of the forgoing reasons the Commission finds that Petitioner's current condition of ill-being is causally related to the work accident of February 21, 2017.

Dr. Farley has testified that Petitioner is not at MMI and that prospective medical care in the form of further surgical revision is required. Respondent's Section 12 examiner Dr. Kostman agrees that the prospective surgical revision is medically indicated. Without this prospective medical care Petitioner will remain permanently disabled. Dr. Kostman has not expressed any opinion disputing the necessity or reasonableness of any of Petitioner's prior medical treatment.

The Commission finds the Petitioner is entitled to the 62 weeks of TTD that has already been paid commencing February 22, 2017 through October 3, 2017 and January 24, 2018 through August 21, 2018. Respondent is entitled to a credit of $30,924.98 for TTD benefits previously paid. Petitioner is entitled to reasonable and necessary medical expenses, subject to the medical fee schedule, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit of $77,817.56 for the medical expenses that have been paid, and Respondent shall hold Petitioner harmless for any claims by any providers of services for which Respondent is receiving this credit as provided in Section 8(j) of the Act. Petitioner is entitled to prospective medical care and treatment of his right shoulder as recommended by Dr. Farley.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 9, 2020, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 498.79 for a period of 62 weeks commencing February 22, 2017 through October 3, 2017, and January 24, 2018 through August 21, 2018, that being the period of temporary total incapacity to work under Section 8(b) of the Act.

IT IS FURTHER ODERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 77, 817.56, subject to the medical fee schedule, for the reasonable and necessary medical expenses that have been incurred pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Farley.

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 of $ 30,924.98 for 62 weeks of TTD benefits previously paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $77,817.56 for the medical benefits that have been paid, and Respondent shall hold Petitioner harmless for any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

December 20, 2021:

o- 10/27/21 SJM/mb
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0607

ROUSSIN, DENNIS R
Employee/Petitioner

Case# **19WC005252**

MADISON COMMUNITY UNIT SCHOOL DISTRICT #12
Employer/Respondent

On 11/9/2020, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4493 GOLDENBERG HELLER & ANTOGNOLI
JENNIFER M WAGNER
2227 S STATE ROUTE 157
EDWARDSVILLE, IL 62025

2396 KNAPP OHL & GREEN
MATTHEW M TERRY
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Dennis R. Roussin
Employee/Petitioner

v.

Madison Community Unit School District #12
Employer/Respondent

Case # 19 WC 05252

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on September 4, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, February 21, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $38,905.23; the average weekly wage was $748.18.

On the date of accident, Petitioner was 58 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $30,924.98 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $30,924.98.

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

ORDER

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

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)f

October 31, 2020
Date

NOV 9 - 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on February 21, 2017. According to the Application, "Petitioner slipped on apricot juice spilled on floor" and sustained an injury to his "Right Shoulder and Right Hip" (Arbitrator's Exhibit 3). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in 2016 and worked as a custodian. Petitioner's job duties included trash removal, cleaning, moving furniture, buffing/stripping floors, plumbing and electrical maintenance/repairs and painting. Petitioner usually worked alone. On February 21, 2017, Petitioner was cleaning the cafeteria and he stepped on apricot juice on the floor which caused him to fall. Petitioner testified that when he fell, he landed on his right shoulder.

Petitioner previously sustained an injury to his right shoulder in 2007 while employed by Thermal Industries. Petitioner worked for Thermal Industries as a service technician. His job duties consisted of driving a truck, loading/unloading, installing/repairing decking, patios, windows, etc. On July 17, 2007, while on a service call, Petitioner lifted a piece of glass and felt a loss of strength in his right shoulder.

Medical records regarding the treatment Petitioner received were received into evidence at trial. Petitioner was initially seen by Dr. Tracy Riordan, his family physician, on August 15, and August 29, 2007, for right shoulder pain. Dr. Riordan diagnosed Petitioner with a right shoulder sprain/strain and recommended he be seen by an orthopedic surgeon (Respondent's Exhibit 4). At trial, Petitioner denied having been seen by Dr. Riordan for his 2007 right shoulder injury.

On October 30, 2007, an MRI was performed on Petitioner's right shoulder. According to the radiologist, the MRI revealed a partial articular surface tear and tendinosis of the supraspinatus (Respondent's Exhibit 5).

On November 6, 2007, Petitioner was evaluated by Dr. W. Christopher Kostman, an orthopedic surgeon. Dr. Kostman reviewed the report of the MRI and opined Petitioner had sustained a partial thickness rotator cuff tear. Dr. Kostman subsequently saw Petitioner on November 13, 2007, and administered an injection into his right shoulder (Respondent's Exhibit 6).

Dr. Kostman again saw Petitioner on November 27, 2007, and reviewed the MRI film. He opined it revealed a partial thickness tear of the supraspinatus as well as rotator cuff tendinitis. He administered another injection into Petitioner's right shoulder. Dr. Kostman saw Petitioner on December 18, 2007, and discussed treatment options with Petitioner which included arthroscopic surgery (Respondent's Exhibit 6). However, Petitioner did not undergo right shoulder surgery at that time.

At trial, Petitioner initially testified he continued to have right shoulder symptoms after 2007. However, Petitioner later testified the problems with his right shoulder had resolved after approximately two months and he had full strength back.

Petitioner continued to seek treatment from Dr. Riordan and was seen by her on June 23, 2008, November 16, 2011, March 29, 2012, November 12, 2014, and December 28, 2015, for right shoulder symptoms. On December 9, 2011, Petitioner contacted Dr. Riordan's office by telephone and requested that she provide him with therapeutic exercises in regard to his right shoulder (Respondent's Exhibit 4).

When Petitioner was seen by Dr. Riordan on December 28, 2015, he advised he had injured his right shoulder about one and one-half months prior. Dr. Riordan noted a diminished range of motion and ordered an MRI scan (Respondent's Exhibit 4). When questioned about this visit with Dr. Riordan, Petitioner initially denied it ever occurred, but then later said he did not remember it.

Petitioner did not undergo the MRI, but was again seen by Dr. Riordan on October 4, 2016, because of right shoulder complaints and difficulties while lifting. Dr. Riordan noted Petitioner had not undergone the MRI, but would see him again around February 4, 2017 (Respondent's Exhibit 4).

Following the accident of February 21, 2017, Petitioner was seen in the ER of Gateway Regional Medical Center. Petitioner gave a history of slipping on apricot juice and injuring his right shoulder, low back and right hip. Petitioner was diagnosed with right shoulder pain (Petitioner's Exhibit 2).

Petitioner was subsequently treated by Dr. Michael Milne, an orthopedic surgeon, who initially saw Petitioner on March 6, 2017. Petitioner informed Dr. Milne that approximately one year prior, he slipped on ice and fell on his right shoulder while at work and that about two weeks ago, he again fell landing on his right shoulder. Dr. Milne subsequently performed arthroscopic surgery on Petitioner's right shoulder on April 5, 2017. The procedure consisted of subacromial decompression, distal clavicle resection, rotator cuff repair, biceps tenotomy and glenohumeral debridement (Petitioner's Exhibit 4).

Following surgery, Dr. Milne ordered physical therapy as well as additional diagnostic tests. Dr. Milne ultimately performed another arthroscopic surgery on Petitioner's right shoulder on January 24, 2018. Again, following surgery, Dr. Milne ordered physical therapy and further diagnostic studies. Dr. Milne's records did not contain an opinion/statement regarding causality (Petitioner's Exhibit 4).

Dr. Milne saw Petitioner on July 17, 2018, and reviewed an MRI arthrogram which was performed on July 10, 2018. He opined it revealed Petitioner's right rotator cuff was intact. He ordered more physical therapy. Dr. Milne again saw Petitioner on August 21, 2018, and authorized Petitioner to return to work without restrictions (Respondent's Exhibit 8).

On September 18, 2018, Petitioner was seen by Drew Vandas, a Physician Assistant, associated with Dr. Timothy Farley, an orthopedic surgeon who was associated with Dr. Milne, who had recently retired. PA Vandas opined Petitioner's right shoulder was stable (Respondent's Exhibit 8).

On June 19, 2019, Petitioner was evaluated by Dr. Farley. Petitioner informed Dr. Farley of the accident of February 21, 2017, and that he was able to return to work. Petitioner advised he still experienced pain and weakness which had become worse during the spring. Dr. Farley reviewed the MRI which was previously performed on July 10, 2018, and opined it revealed a full thickness tear. He recommended Petitioner undergo another MRI (Petitioner's Exhibit 7).

The MRI was performed on July 1, 2019. According to the radiologist, the MRI revealed undersurface tears of the infraspinatus, supraspinatus and subscapularis tendons (Petitioner's Exhibit 8).

Dr. Farley saw Petitioner on July 3, 2019, and reviewed the MRI. He opined it revealed a full thickness tear and recommended Petitioner undergo a revision rotator cuff repair with double row technique. Dr. Farley did not provide an opinion in regard to causality in his medical records (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. W. Christopher Kostman (the same orthopedic surgeon who previously treated Petitioner in 2007) on January 29, 2020. In connection with his examination of Petitioner, Dr. Kostman reviewed medical records provided to him by Respondent. When examined by Dr. Kostman, Petitioner advised he had previously sustained a right shoulder injury in 2006 [2007] while employed by "Thermodynamics" [Thermal Industries], but that his symptoms resolved the following month and he had no difficulties with his right shoulder until he sustained the injury on February 21, 2017. Petitioner also advised Dr. Kostman he had worked as a professional drummer until June, 2019, but he stopped because of his right shoulder symptoms (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Kostman's report summarized/abstracted a significant amount of medical records for treatment Petitioner received both before and after the accident of February 21, 2017. He agreed with Dr. Farley's recommendation Petitioner undergo another right shoulder surgery. In regard to causality, Dr. Kostman opined there was not a causal relationship between Petitioner's right shoulder condition and the accident of February 21, 2017. This was based, in part, on Petitioner's denial of having right shoulder symptoms or seeking medical treatment for a period of time prior to the accident of February 21, 2017, but Dr. Kostman noted this was contrary to the medical records he reviewed. Dr. Kostman specifically noted the record of December 28, 2015, in which Petitioner said he had a one and one-half month history of right shoulder pain. He also opined Petitioner's activities as a professional drummer put him at risk for rotator cuff pathology (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Farley was deposed on May 5, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Farley's testimony regarding his evaluation of Petitioner's right shoulder condition and the treatment recommendation he provided was

consistent with his medical records. In regard to causality, the following question and answer exchange occurred during his deposition testimony:

> Q. Doctor, do you believe that Dr. Milne, prior to Mr. Roussin's right shoulder from his 2017 incident, the two surgeries that he had, et cetera---was that treatment reasonable and necessary to treat Mr. Roussin's right shoulder condition as it existed from February 2017?
>
> A. I believe so, yes.
> (Petitioner's Exhibit 1; pp 15-16).

Dr. Kostman was deposed on June 3, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kostman's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, in regard to causality, Dr. Kostman testified the incident of February 21, 2017, did not cause or aggravate Petitioner's right shoulder condition. This was based on Petitioner's prior right shoulder condition for which he had sought medical treatment and his activities as a professional drummer (Respondent's Exhibit 1; pp 15-17).

At trial, Petitioner testified he has continued to work since the time of his release in August, 2018, up to and including the present. In regard to his drumming activities, Petitioner testified his drumming technique is not extremely forceful. Petitioner testified he stopped drumming in June, 2019, because of the limited range of motion of his right shoulder. Petitioner wants to proceed with the surgery as recommended by Dr. Farley.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of his employment by Respondent on February 21, 2017.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding the circumstances of the accident of February 21, 2017, was unrebutted and corroborated by the medical records.

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

The Arbitrator concludes Petitioner's current condition of ill-being in regard to his right shoulder is not causally related to the accident of February 21, 2017.

In support of this conclusion the Arbitrator notes the following:

Dr. Milne was Petitioner's primary treating physician and performed two arthroscopic surgeries on Petitioner's right shoulder. However, there was nothing in Dr. Milne's medical records in which he opined as to causality.

Dr. Farley treated Petitioner after Dr. Milne retired. However, there was nothing in Dr. Farley's medical records in which he opined as to causality.

As noted herein, when Dr. Farley was deposed, his testimony did not specifically address whether there was a causal relationship between Petitioner's right shoulder condition and the accident of February 21, 2017. Dr. Farley only opined that the surgeries Petitioner had undergone were reasonable and necessary.

Respondent's Section 12 examiner, Dr. Kostman, testified there was not a causal relationship between Petitioner's right shoulder condition and the accident of February 21, 2017.

Based on the preceding, the Arbitrator finds there was no expert medical opinion finding a causal relationship between Petitioner's right shoulder condition and the accident of February 21, 2017.

Further, the Arbitrator finds Petitioner's credibility to be questionable. Petitioner's testimony that following the prior 2007 accident that his right shoulder symptoms resolved shortly thereafter and he did not seek medical treatment was contrary to numerous medical records. Petitioner, in fact, sought treatment from Dr. Riordan for his right shoulder on October 4, 2016, and was scheduled to be seen by her on February 4, 2017, shortly before he sustained the accident.

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

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC011755
Case Name	TAYLOR, SHERRIE v. DOLLAR GENERAL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0608
Number of Pages of Decision	18
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jennifer Wagner
Respondent Attorney	PETER SINK

DATE FILED: 12/20/2021

/s/Stephen Mathis, Commissioner

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHERRIE TAYLOR,

Petitioner,

vs. NO: 20 WC 011755

DOLLAR GENERAL,

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

The Commission strikes the sentence on page 9 of the Arbitrator's decision that states, "The Arbitrator finds that Petitioner's present condition of ill-being may be causally related to the work accident of February 13, 2020," and instead finds as stated below. The Commission finds that Petitioner's current condition of ill-being is causally connected as of the date of the February 25, 2021 arbitration hearing.

The October 20, 2020 note from Dr. Graves indicates Petitioner had persistent axial back pain and severe paraspinal muscle spasm on the right, in addition to some numbness and tingling that radiated down her right knee. On December 1, 2020, Dr. Graves noted similar symptoms,

and additionally, on exam of the lumbar spine, he made a new finding of "severe tenderness to palpation over the paraspinal region exacerbated with extension" and "a painful palpable mass over the right paraspinal region slightly superior to the SI joint." At Dr. Graves' recommendation, Petitioner underwent a soft tissue MRI of the pelvis to evaluate the palpable mass. On January 7, 2021, Dr. Graves reviewed the MRI of the pelvis and noted it showed "a small area in subcutaneous fat directly overlying her painful point which may be an area of lipoma or fat necrosis." Dr. Graves opined that Petitioner had tenderness directly overlaying the mass and he performed a field block injection the same day. Dr. Graves noted Petitioner had 100% pain relief for a short amount of time and that she would think about whether to have the mass surgically excised by him or via a plastic surgeon. This is the last note in the record by Dr. Graves.

The Commission finds there is a question as to whether Petitioner's condition remains causally connected due to the finding of a "a painful palpable mass over the right paraspinal region slightly superior to the SI joint characterized as a "tiny lipoma or fat necrosis" by Dr. Graves after Petitioner underwent the MRI of the pelvis to evaluate the mass. The Commission finds that Dr. Graves indicated she could have the mass removed and that Petitioner testified she experienced significant pain relief after Dr. Graves administered an injection at the site of the mass.

Accordingly, the Commission awards reasonable and necessary medical care rendered through February 25, 2021, and prospective medical care in the form of the removal of the tiny lipoma or fat necrosis recommended by Dr. Graves.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 22,2021 is hereby modified as stated above, and otherwise affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that a ruling on TTD is reserved pending the diagnosis and prognosis from the prospective medical care.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay to Petitioner for all reasonable and necessary medical care rendered through February 25, 2021 pursuant to Sections 8(a) and 8.2 of the Act, subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical care in the form of the removal of the tiny lipoma or fat necrosis as recommended by Dr. Graves.

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.

December 20, 2021

o- 10/27/21
SJM/mb
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0608

TAYLOR, SHERRIE
Employee/Petitioner

Case# **20WC011755**

DOLLAR GENERAL
Employer/Respondent

On 3/22/2021, 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 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4493 GOLDENBERG HELLER & ANTOGNOLI
JENNIFER M WAGNER
2227 S STATE ROUTE 157
EDWARDSVILLE, IL 62025

1886 LEAHY EISENBERG & FRAENKEL
DANA DJOKIC
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

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)

Sherrie Taylor
Employee/Petitioner

v.

Dollar General
Employer/Respondent

Case # 20 WC 011755

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 **February 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **February 13, 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 **$41,503.80**; the average weekly wage was **$798.15**.

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

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

Respondent shall be given a credit of **$14,622.03** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$8,235.38** for other benefits, for a total credit of **$22,857.41**.

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

ORDER

TTD ruling reserved.

Respondent shall authorize and pay for treatment as recommended by Dr. Christopher Graves, subject to the medical fee schedule.

Respondent shall pay for all medical treatment incurred to August 21, 2020, subject to the fee schedule.

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

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

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

Edward Lee — Signature of Arbitrator

3/16/21 — Date

ICArbDec19(b)

MAR 22 2021

Sherrie Taylor v. Dollar General
Case No. 20 WC 011755

FINDINGS OF FACT

The Arbitrator finds the following facts with regard to all issues:

The parties do not dispute the following: that on February 13, 2020, Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act; that on February 13, 2020, Petitioner was employed by Respondent as a store manager and that an employer-employee relationship existed between the parties; and that on February 13, 2020, Petitioner suffered a work-related accident and gave timely notice of the accident to Respondent. The parties also do not dispute that, at the time of injury, Petitioner was 44 years of age, married with no dependent children, and had an average weekly wage of $798.15.

Testimony of Petitioner

Petitioner testified live at trial. She testified that on February 13, 2020, she was working at the Dollar General store in Virden, Illinois as a manager. She had been working as a manager at that location for about 1 ½ years. Petitioner testified that, as a manager, she had numerous responsibilities, including scheduling, making bank deposits, making sure the money as correct, unloading trucks, overseeing thirteen employees, sweeping and mopping, and climbing ladders.

Petitioner testified that she made bank deposits every morning prior to the store opening at 8:00. The bank, Prairie State Bank and Trust, was a short distance down the road.

Petitioner testified that she had been at the store the prior evening, and that it had begun snowing and icing. She testified that the night before, no later than 6:30 P.M., she put salt on the sidewalks and put in an "e-ticket" to have someone put salt in the parking lot. Petitioner explained that an "e-ticket" is the submission of a form through a computer system to alert

Dollar General that some sort of work needs to be performed. However, when Petitioner arrived at the store on the morning of February 13, 2020, the parking lot had not been treated.

Petitioner testified that on February 13, 2020, she arrived at the store between 6:45 and 7:00 A.M. She testified that she went into the store, turned off the alarm, opened cash drawers and made sure the money count was correct, logged information into a computer, and prepared to go to the bank. She testified that she exited the store, locked the door, and as she was walking down the ramp, she slid and landed on the right side of her back.

Petitioner testified that she immediately had discomfort and pain in her right lower back after the fall, and that she heard something pop in her back. She testified that she got up, went to her car, and went to the bank to complete the deposit. Petitioner testified that when she returned from the bank, she texted other store managers warning them to be careful, and that she sent a message to her district manager.

Petitioner testified that she had to wait at the store for relief assistance, and she then left early and went to her doctor's office, Litchfield Family Practice. She testified that during this time, her pain increased to 10/10. Petitioner testified that Litchfield Family Practice took her off work and prescribed hydrocodone and Flexeril. Petitioner testified that the medication took the edge off her pain, but that was all, bringing it down to approximately 8/10.

Petitioner testified that she returned to Litchfield Family Practice the following week, and that she still had pain in her lower back of 7/10, with burning in between her shoulders. She testified that her doctor kept her off work and prescribed physical therapy. Petitioner testified that she attended physical therapy at Litchfield St. Francis Hospital, but that sometimes she perceived physical therapy to be making her worse instead of better. She testified that she attended physical therapy through the end of June 2020, and by that time, her lower back pain

was 3-5/10 on a good day and 7-8/10 on a bad day. Petitioner testified that her pain was always in her right lower back, and it was always located in the same place.

Petitioner testified that she remains off work through off-work slips issued by Litchfield Family Practice. She testified that no one from that office has released her to return to work.

Petitioner testified that she decided to seek treatment with Dr. Graves, a spine surgeon. Petitioner testified that prior to seeing Dr. Graves, there had not been a day when she did not have pain in her right lower back since the accident of February 13, 2020, and she testified that the exact location of the pain had never changed.

Petitioner testified that she first saw Dr. Graves on October 20, 2020. She testified that he ordered a soft-tissue MRI. Petitioner testified that it was her understanding that the soft-tissue MRI revealed a knot in her right lower back, formed from muscle and fatty tissue following her fall. Petitioner testified that she can feel the knot in her back if she touches it, and that the knot is located in the exact area of her pain.

Petitioner testified that on January 7, 2021, Dr. Graves administered an injection that completely alleviated her right lower back pain for 2 ½ hours. Petitioner reiterated that the injection provided 100% relief of her symptoms, and that this was the first time that she had experienced complete relief since the accident.

Petitioner testified that it is her understanding that the knot can be removed. She testified that she can either have a plastic surgeon do it, or Dr. Graves could do it, but that he does not specialize in that type of surgery. Petitioner testified that Dr. Fisher from Litchfield Family Practice continues to keep her off work.

Petitioner testified that she continues to experience pain in her right lower back every day. At the time of the hearing, she testified that her pain was 6/10. She testified that she still

takes pain medication, and that she attempts stretches to relieve her pain, but that stretching does not effect relief.

Petitioner testified that her pain impacts her ability to clean her house, such that if she sits down to dust, she needs assistance getting back up. She testified that she is unable to lift a 10 pound box from the floor; instead, such a box would need to be at waist level. Petitioner testified that she cannot walk her dogs, and that she is unable to do yard work or mow. Petitioner testified that she is unable to go on family outings and is unable to ride a motorcycle with her husband. Specifically, in regard to motorcycle riding, Petitioner testified it would be unsafe for her to attempt because if she has a muscle spasm, it will throw both of them. Petitioner further testified that riding in cars more than 40-45 minutes causes muscle spasms. She testified that it took her 30-35 minutes to get to the hearing site, and that the ride aggravated her back a little bit.

Petitioner testified that she desires to have the medical treatment recommended by Dr. Graves. She testified that she has an appointment with him on March 7 to decide who should take out the knot.

On cross-examination, Petitioner explained that she had not taken hydrocodone or Flexeril since she sustained whiplash in a car accident in 2014. She also testified that she had previously had a pinched nerve in her back in 2011 after jumping on a trampoline with her children, but that she had not been jumping on trampolines in 2020.

Petitioner clarified that she did not attribute the burning in her shoulders to the work accident. Instead, she believed that was from being tense.

Medical Records

Litchfield Family Practice

Medical records from Litchfield Family Practice were admitted into evidence. The records reflect that Petitioner presented on February 13, 2020, reporting that she had sustained a fall on ice and heard a "pop" in her back. She also related a burning sensation between her shoulders, which she attributed to being tense. Petitioner had a positive straight leg raise test on that day, and she was taken off work. She was prescribed hydrocodone and Flexeril. Petitioner returned the following week, with substantially the same complaints.

Moving forward, the records reflect that Petitioner was prescribed physical therapy in March 2020 and remained off work. Petitioner reported that her back was swollen on March 4, 2020, and she was prescribed Prednisone.

Petitioner returned on March 18, 2020, and reported that she had been attending physical therapy. She was noted to have tenderness to palpation of her right paraspinal muscles, to the point that she became tearful. The muscles were noted to be extremely tight. At that point, Petitioner could not sit or stand for more than 15 minutes due to the pain. She remained off work.

Petitioner returned on April 1, 2020, and the provider spoke to physical therapy, which reported that Petitioner was not progressing as expected. Petitioner reported that she usually was worse after physical therapy. A lumbar MRI was ordered on this date.

Petitioner visited Litchfield Family Practice on April 15, April 29, May 27, and June 10. 2020. Each time, tightness in the right paraspinal muscles was noted. Petitioner continued to exhibit reduced range of motion and painful movements. Litchfield Family Practice noted on April 29 that Petitioner remained off work due to lack of treatment, which was directed toward a

failure of Respondent to authorize care. On May 27, it was noted that Petitioner continued to suffer from muscle spasms and tenderness. Gabapentin was added on this date, and it was noted that Petitioner's condition would not improve without further work-up. On June 10, it was noted that continued physical therapy was not providing a benefit to Petitioner, and that she was still waiting for approval for an MRI. Litchfield Family Practice also requested workers' compensation approval for a visit to a spine surgeon.

Petitioner presented to Litchfield Family Practice again on July 30, 2020. She continued to have right paraspinal muscle spasms, painful movements, reduced range of motion, and a positive straight leg raise test. The provider noted that Petitioner needed to see a spine surgeon, and that she was to remain off work until she did. It was noted on this date that Petitioner could not lift more than ten pounds.

Petitioner presented again to Litchfield Family Practice on September 21, 2020. The provider noted, "Taking 3 months to initiate a referral is not acceptable" (directed to Respondent). It was noted again that Petitioner needed referral to a spine surgeon. She was again noted to have right paraspinal and right SI joint muscle spasms. Litchfield Family Practice issued another off work slip on this date, which read, "Sherrie **MAY NOT** return to work until evaluated by spine surgeon. This request was made >3 months and patient still has not been approved for the referral. Please expedite ASAP as patient continues to suffer daily in pain and is unable to work" (emphasis in original).

Litchfield Family Practice took Petitioner off work on the date of the accident on February 13, 2020, and Petitioner remained off work on the recommendation of that office, with periodic new off-work slips issued. Subsequent off-work slips were generated on November 24, 2020, reflecting that Petitioner was undergoing work-up with Dr. Graves; and on February 8,

2021, reflecting that petitioner was undergoing treatment at that time with Dr. Graves. Litchfield Family Practice has never cleared Petitioner to return to work.

St. Francis Hospital

Petitioner obtained X-rays of her lumbar spine on February 20, 2020, which showed mild osteoarthritis. She attended physical therapy beginning on March 12, 2020, with periodic treatment continuing to April 2020. After a pause, physical therapy was then re-initiated on June 3, 2020, continuing to the end of June. The therapist noted that Petitioner had made minimal progress at the end of this period. Review of the records shows that Petitioner's pain ranged from a low of 2/10 to a high of reported 10/10, with an average of 4-5/10 for the duration of her treatment.

Petitioner obtained an MRI of her lumbar spine on June 24, 2020. The MRI report does not reveal any disc pathology or stenosis.

Orthopedic Center of Illinois-Dr. Graves

Petitioner reported to Dr. Graves on October 20, 2020 for an initial consultation. The note reflects that Petitioner reported a fall on ice at Dollar General on February 13, 2020, with immediate onset of pain that had persisted constantly. It was noted that Petitioner was not suffering from back problems prior to the fall. Petitioner's pain was, on average, 5-7/10. It was noted that Petitioner believed that physical therapy had made her pain worse. Dr. Graves noted severe tenderness to palpation over the paraspinal region that was exacerbated by extension. Dr. Graves reviewed the June 2020 MRI, and ordered a CT scan to evaluate for facet fracture or another source of instability.

Petitioner returned to Dr. Graves on December 1, 2020. Dr. Graves reviewed the CT scan and did not find any structural abnormality. Petitioner continued to exhibit severe

tenderness to palpation in the paraspinal region, and Dr. Graves noted specifically a painful, palpable mass over the right paraspinal region, slightly superior to the SI joint. Dr. Graves noted that it would be appropriate to order a soft-tissue MRI of the pelvis to better evaluate the area of the mass.

Petitioner returned to Dr. Graves on January 7, 2021. The soft-tissue MRI was read as showing a small area in subcutaneous fat **directly overlying** Petitioner's painful point, which was thought to be a lipoma or fat necrosis. Dr. Graves performed a "field block" in the office, which resulted in 100% symptom relief for a short period of time. Dr. Graves indicated that excision of the area was warranted, and Petitioner was to decide whether she wanted Dr. Graves or a plastic surgeon to perform this procedure.

IME Report

Respondent submitted an IME report from Dr. Mirkin, dated August 3, 2020. He opined that Petitioner suffered a lumbar contusion in the accident of February 13, 2020, and that a course of physical therapy was appropriate. The report notes that Dr. Mirkin was not in possession of the June 2020 MRI, but noted that if the MRI (or presumably any MRI) were to reveal something, he would like to see it. Aside from that, Dr. Mirkin stated multiple times that he believed Petitioner showed symptom magnification, with no explanation as to the basis of those findings. Dr. Mirkin was engaged prior to the soft-tissue MRI scan being taken and prior to Dr. Graves's involvement in the case, and so expressed no opinion on those findings. Respondent did not present any IME opinion with regard to the mass that has been located in Petitioner's right lower back that overlies her site of pain.

Conclusions of Law:

The Arbitrator therefore concludes as follows:

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

The Arbitrator finds that Petitioner's present condition of ill-being may be causally related to the work accident of February 13, 2020. Petitioner testified that she had not experienced back pain prior to the accident since suffering whiplash in a car accident in 2014, and Respondent presented no medical records or evidence contradicting that testimony. The medical records admitted into evidence reflect that Petitioner sought treatment on the date of the accident and sought treatment from her primary doctor on a regular basis thereafter. Her complaints of pain from February through September 2020 to her primary doctor, and continuing forward with her treatment under Dr. Graves from October 2020 to the present, are consistent in their estimation of severity and impact on her life. Her complaints of pain are also consistently limited to one particular area of her back. Moreover, all of Petitioner's testimony was consistent with the notations in the medical records.

The Litchfield Family Practice providers noted severe muscle spasms on each and every visit that Petitioner had, including at her visits in July and September of 2020, up to the time that her care was transferred to Dr. Graves. The St. Francis physical therapy records also reflect consistent reports of pain, localized to the right lower back. At the visit of October 20, 2020, Dr. Graves noted what he referred to as "severe" tenderness to palpation of Petitioner's paraspinal muscles. The subsequent work-up with Dr. Graves, including the use of a soft-tissue MRI of Petitioner's pelvis (rather than a lumbar spine MRI) has revealed a physical manifestation that may be correlated with Petitioner's pain complaints. This is evidenced by the relief that Petitioner experienced when Dr. Graves performed a field block injection in the area of the mass.

Dr. Mirkin's opinion is given moderate weight. Dr. Mirkin made no allowance for the physical findings made by the Litchfield Family Practice providers, nor did he account for their medical determination that Petitioner should remain off work. This Arbitrator notes that Dr. Mirkin did not detect any muscle spasm during his exam, when the Litchfield Family Practice providers recorded detection of muscle spasm both before and after Dr. Mirkin's exam. He did not review either the first or the second MRI scan. He did not have the records from Dr. Graves and has not generated any opinion on the lipoma-like mass that has been discovered in Petitioner's back.

A final finding pertaining to causal connection will be made after the Petitioner's prospective medical has been rendered.

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:

Consistent with the Arbitrator's conclusions set forth above, the Arbitrator finds Petitioner's care and treatment to August 21, 2021 to be reasonable, necessary, and causally related to the work accident of February 13, 2020. Respondent shall pay all reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for the $8,235.38 in medical benefits that have been paid.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

In conjunction with the Arbitrator's conclusions set forth above, the Arbitrator finds that Petitioner is in need of further medical care related to the work accident of February 13, 2020. Specifically, Petitioner is in need of the care recommended by Dr. Graves. The Arbitrator finds

February 13, 2020. The Arbitrator concludes that Respondent shall pay for prospective medical treatment as recommended by Dr. Graves.

WITH RESPECT TO ISSUE (L), WHAT TEMPORARY DISABILITY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator is deferring a ruling on the Petitioner's entitlement to additional TTD pending the diagnosis and prognosis from the prospective medical award.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC025629
Case Name	BORST, BRIAN v. DOW CHEMICAL
Consolidated Cases	15WC018638
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0609
Number of Pages of Decision	48
Decision Issued By	Kathryn Doerries, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	John Eliasik
Respondent Attorney	Paul W. Pasche

DATE FILED: 12/20/2021

/s/Kathryn Doerries, Commissioner

Signature

DISSENT

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0609

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRIAN BORST,

Petitioner,

vs.

NO: 12 WC 025629
(consol 15 WC 018637
voluntarily dismissed 12/10/15
and 15 WC 018638)

DOW CHEMICAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, date of accident, causal connection, notice, temporary total disability, medical expenses, permanent partial disability, and other-credit due to Respondent for benefits paid and under Section 8(j), and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claims for compensation, for the reasons stated below.

Procedural History

Respondent and Petitioner filed Petitions for Review on June 30, 2020 and July 8, 2020, respectively. Respondent filed a Motion to Dismiss Petitioner's Petition for Review on August 31, 2020, arguing Petitioner failed to timely file their Petition for Review. Commissioner Doerries granted Respondent's Motion to Dismiss Petitioner's Petition for Review on October 2, 2020.

Applications for Adjustment of Claim

Respondent introduced the three Applications for Adjustment of Claim that Petitioner filed alleging repetitive trauma claims with different manifestation dates for the same body part. 12 WC 25629, filed on July 25, 2012, alleges an accident date on June 7, 2012. (RX10) 15 WC

18637, filed June 9, 2015, alleges an accident date on July 10, 2012 and was voluntarily dismissed on December 10, 2015. (RX11) 15 WC 18638, filed June 9, 2015, alleges an accident date on April 27, 2012. (RX12) All indicated the nature of the injury was repetitive trauma.

At the hearing on October 14, 2016, the parties were asked by the Arbitrator for preliminary matters or motions that needed to be addressed before beginning testimony. The Petitioner's attorney noted the Petitioner had filed additional applications for adjustment of claims alleging different dates of accident: "And after there was a motion by Respondent to dismiss those two additional applications we came to an agreement to in fact dismiss those other applications and then to add the additional accident dates to the original application which was done." (RX39, pp. 9-10)

The Commission notes that the court file contains a record of the dismissal for case 15 WC 18627, however, no record of the dismissal for case number 15 WC 18638 is in the court file. Therefore, the Commission has issued a Decision in that case which mirrors the Decision entered in case number 12 WC 25629.

The Arbitrator found that June 7, 2012, the date Petitioner "discovered the fact of his injury and its relation to his work for Respondent was when he discussed it with Dr. Ahuja" his treating surgeon, was an appropriate manifestation date. (ArbDec. p. 17) We disagree based upon the fact that the doctor's notes do not reflect any such discussion and Dr. Ahuja testified that he never had such a discussion with Petitioner until after his surgery, in July 2012. Further, the Arbitrator found that the date Petitioner last worked for Respondent, April 27, 2012 was also an appropriate manifestation date. However, at that juncture, Petitioner had been released to full duty by Drs. Jablonski, Fehling and Ahuja. Petitioner admitted at trial he did not know the reason the date had been chosen and at that time Petitioner did not claim any work injury. In fact, Petitioner and Dr. Ahuja filled out and signed three "Employee Health Certification" forms on May 7, May 11 and May 24, 2012, stating that the low back pain began on "11-1-11" and the injury/illness was not "related to work." (PX1)

Petitioner alleged a third manifestation date at the time of trial, July 10, 2012, despite voluntarily dismissing that Application for Adjustment of Claim in December 2015. The Commission notes that Petitioner vehemently denied that this was the first time he discussed the possibility that his condition could be a worker's compensation matter with his surgeon, Dr. Ahuja. The Commission finds, however, that Dr. Ahuja's treating records are devoid of any reference or connection between Petitioner's job activities and his pain until after Petitioner solicited an opinion from doctor sometime after his third surgery.

Further, the Commission disagrees with the Arbitrator's assessment of Petitioner's credibility. The Arbitrator found Petitioner is "mostly credible" but the Commission finds that Petitioner's testimony was deliberate and not "forgetful" as the Arbitrator surmised but instead, that Petitioner deliberately inflated the physical demands of his job and in many instances, his testimony did not comport with the medical records, nor with the job demands described by his peers. Based upon a thorough review of the evidence in the record and, in part, due to Petitioner's lack of credibility, we disagree with the Arbitrator's finding that the alternate manifestation dates are supported by the evidence on the record and find that Petitioner failed to prove accident and

causation based upon the following.

Findings of Fact

Testimony
Job Descriptions

Petitioner was employed as a maintenance (mechanic) technician for Respondent between 1996-2012 (T. 13-14) Petitioner testified that at some point he worked in every one of the approximately twenty buildings located on three-four acres at Respondent's Ringwood, Illinois plant campus which, in total, was on 50 acres. (T. 13-15)

Petitioner testified that his job consisted of a daily meeting, getting his job assignments, collecting tools, equipment, and personnel, and going to the assigned building to perform the work order. (T. 17) Petitioner testified that he would receive two to three written orders per day. (T. 94 – 95, RX4) Petitioner's work varied each day and from hour to hour. (T. 17-18, 87-88) Some of the job duties were very light duty. (T. 88) For instance, he repaired small pumps weighing less than 15 - 20 pounds and the parts he worked on weighed a lot less than 15 pounds. (T. 90-91) He hardly ever ended up repairing the same thing. (T. 18-19) One to two days per month he would work on reactor kettles which sometimes required him to wear a breathing apparatus with air tanks weighing about 60 pounds, but sometimes required an air hose with no tanks. (T. 19-20) He repaired various-sized agitator blades in kettle tanks. (T. 18, 20)

Rarely, one to two times per year, Petitioner would work inside kettles that required him to hunch over. (T. 21) Sometimes Petitioner would bring tools and equipment to or from the work site in a bucket on a two-wheel cart, and twice per month he would move 400-500 pounds of tools and equipment in a four-wheel cart. (T. 22, 23) If he needed help, he had help pushing the carts, and sometimes a forklift was used. (T. 22-23) On an average day, he would only push a cart that weighed 100 pounds. (T. 24) Once a week, Petitioner moved a pump weighing between 50 and 250 pounds from the floor to a cart. (T. 24 – 26) Once every three months, Petitioner would use rigging with ropes and chains to remove blades weighing between 10 and 200 pounds from a kettle. (T. 26-27)

Petitioner testified that if the agitator blades were bent, dirty or damaged, he would have to take them off and replace them or re-torque the bolts to tighten them back up. (T. 26-27) Petitioner testified the blades can weigh from 10 to 200 pounds. Petitioner testified sometimes he had to repair the shafts. He stated once in the kettle they have to take all the blades off the hub, remove the hub and pull the shaft out with a crane through the roof; that is done every 6 months. Some of the agitator blades and shafts have 1" bolts, although the size of the bolts do vary. The procedure of fixing the shafts require torqueing the bolts. They do not use pneumatic or electronic tools due to explosion hazards so he had to use hand tools and get the bolts as tight as he could. Besides removing the blades, agitator blades, shaft and hub, he had to perform preventive maintenance. Petitioner testified he was also one of the main welders and sometimes he would work in the shop fixing a shaft. (T. 27-30)

Once per week, Petitioner would change the oil in a gear box using a bucket that was brought out on a cart. (T. 30) Occasionally he would repair seals by removing a stub shaft and seal together, hooking it to a hoist, and using a cart to bring it to the fabrication shop, rebuild, repair, or replace it. (T. 30-31) When Petitioner worked as a welder in the fabrication shop, he worked on a table or on the floor using welders, cutting torches, or grinders. (T. 31) When he worked on the table, it was at a height where he did not have to bend over when welding. (T. 31-32)

In addition to his other job duties, Petitioner was also with the haz-mat, space rescue and fire teams. Petitioner testified that about 75% of his job required him to bend at the waist and 70% of the time his job required him to do lifting. In Petitioner's layperson opinion, his job was in the heavy physical demand level. His job duties had essentially been the same from when he started at Respondent until his last day. Petitioner testified that at some point during his job he developed a problem with his low back. (T. 32-34)

Petitioner admitted that he used a lift cart to lift objects from the floor to the table or to the proper height to work on them. (T. 91-93, RX 5)

Petitioner prepared a document entitled "My day to day work activity" for review by Dr. Ahuja sometime between June 2012 and August 2014. (T. 16-17, 84-85) This document mentioned that Petitioner would push the tool cart to the job site and either repair the piece of equipment or remove the piece and bring it back to the shop for repairs. (PX13, RX18) The document also described the procedure for pump repairing, welding, performing repairs on reactors, installation and repair of piping and bottom valves. (PX13, RX18) Petitioner admitted this document did not include everything he did for his job duties. (T. 87)

Petitioner identified a job description that was prepared by Respondent and he agreed the highlighted portions fairly and accurately described the physical requirements of his job. (T. 66-67, 98; PX 16) Petitioner had first seen the document when he was hired. (T. 98) Petitioner offered into evidence three job descriptions prepared by Respondent. (04/18/18 T. 19-21; PX 14, 15, 16) These job descriptions included additional duties including field service on electrical controls, repairing vehicles, responding to plant emergencies, and reading and preparation of paperwork. *Id.* The highlighted physical requirements included: the abilities to walk, sit, stand, talk, or hear; the frequent demands to reach with hands and arms, and to use hands to finger, handle or feel; and the occasional demands to climb, balance, stoop, kneel, crouch, crawl, and occasionally lift or move up to 100 pounds. (PX 14) The demands also required the ability to reach all work areas in the plant (i.e., climb ladders, negotiate catwalks, handle heights to 50 feet), to lift, twist, and turn up to 50 pounds. *Id.* In addition, the highlighted sections included the following functions: to move 500 lb. drums using the appropriate equipment; to physically enter reactors for maintenance purposes; to manually lift and handle a nominal weight of 25 kgs. (55 lbs.); and to manually torque fasteners to 100 pounds. (PX 16)

Respondent produced three witnesses to verify Petitioner's job duties. The witnesses confirmed Petitioner's job duties varied. Gerard Burns ("Burns") testified he worked for Respondent for 23 years, including as an electrician apprentice from 2009 to 2011, and then

as maintenance activity coordinator beginning June 2012. (T. 122)

In 2011 and 2012 Burns' duties included maintenance work on all equipment. (T. 122) Burns worked with Petitioner about 25% to 30% of the time, including on pipe work and seal replacements. (T. 123-124) After 2012, Burns' work as maintenance activity coordinator included distributing work orders, like the ones identified by Petitioner. (T. 127, RX 6) Burns identified Petitioner's job description (PX 13) as accurate, but incomplete. (T. 131-132) Petitioner's job included light work such as "round inspections," involving checking oil and seal fluid levels, and medium level work including smaller pump rebuilds. (T. 133) Burns described Petitioner's work as a maintenance mechanic as "constantly changing" and "varied." (T. 124, 140) There was no particular job or physical activity that a maintenance technician would perform over and over again except sitting at a desk closing work orders and working on a computer. Burns testified "That's the only real repetitive job we have." (T. 141)

Burns identified a short video depicting maintenance work activity at the plant. (RX37) He noted a mechanic going to replace a pipe. Burns believed he had filmed that video sometime in 2012. He noted the mechanic putting on a face shield on the hard hat and safety equipment and getting ready to break open a line which was plugged with glue. He testified it represented work orders/jobs a maintenance person would receive. He indicated there is usually a plugged pipe once per week on average. (T.141-144)

Burns estimated maintenance technicians worked about 15% at the heavy physical demand level, and about 65% of the work required the technician to torque a pipe or bolt. (T. 149-150) Prior to 2011, a technician would work approximately 45% of the time while kneeling or crouching. (T. 150) About 10% of the maintenance work involved items weighing 300-500 pounds. (T. 151) About 50% of the time, the tools and equipment in a lift cart would be in the 100-200 pound range. (T. 151)

Richard Oldland ("Oldland") testified via deposition. Oldland worked for Respondent from 2005 to 2014, and he was operations manager from 2010 until 2014. (RX2, 6) His duties included training and assisting maintenance technicians. (RX2, 5) He originally worked at a North Carolina plant and came to the Ringwood, Illinois plant in March 2012. (RX2, pp. 5-6) The duties of maintenance technicians were the same in each plant. (RX2, p. 6) Oldland reviewed Respondent's job description (PX16) and agreed it was accurate. (RX2, p. 12) He also reviewed Petitioner's job description and testified the weights and durations were not reasonable. (RX2, p. 13, 36, 37) Specifically, he disagreed that a cart weighing 400-500 pounds would be able to be pushed around the plant by a single person, due to the presence of steep inclines. (RX2, pp. 13, 36) Oldland also noted that maintenance technicians would stop working prior to 3:00 PM to return their tools so they could leave right at 3:00. (RX2, p. 14) Due to the morning meetings, the safety permit process, and setting up the work, the maintenance technician would not typically begin actual maintenance work until 8:15 or 8:30 AM. (RX2, p. 15) In an average day, a technician would perform maintenance work about six hours out of the eight-hour shift. (RX2, pp. 15-16, 37) The actual job orders varied in nature between light, medium, and heavy levels of work. (RX2, p. 18) The nature and types of jobs were different and changed daily. (RX2, pp. 20, 50) Oldland did not believe Petitioner's job

as a maintenance technician was repetitive in nature. *Id.*

Oldland testified that on April 27, 2012, Petitioner reported to him his back was bothering him, it was something similar to a surgery he had 8- 12 years before, and he was going to have another surgery immediately. (RX 2, pp. 21, 29) Petitioner did not report any work injury or accident, and stated he always knew he would need to have another back surgery and that this was a natural progression and it was timefor him to have it fixed. (RX 2, pp. 22, 32 - 33, 4I – 42) Oldland completed a supervisor report on July 17, 2012, shortly after being informed Petitioner had made a workers' compensation claim. (RX 2, pp. 23, 25, 39 40; RX 8) In the report, Oldland recounted his conversation with the Petitioner. (RX 2, p. 41; RX 8) Oldland testified that he did not consider Petitioner's low back condition to be work-related, due to the conversation he had with Petitioner in April. (RX 2, p. 41) Oldland also testified Respondent had a zero- tolerance policy that employees were to immediately report work injuries or they would be disciplined. (RX 2, pp. 21 – 22)

Lisa Cashbaugh-Sanchez ("Sanchez") testified via deposition. Sanchez worked for Respondent as operations leader in Ringwood from November 2009 until February 2012. (RX3, p. 3) Sanchez was in charge of the maintenance department and worked closely with maintenance technicians, including Petitioner. (RX3, p. 4-7) Sanchez reviewed Respondent's job description (PX 16) and testified it was accurate for an annual description but unlikely for a worker to have to perform all those jobs in one day. She also took exception to two descriptions-there were no drums at the plant weighing 500 pounds and for the drums Respondent had, the workers were required to use lifting devices. Also, any job requiring the technician to manually torque would have been done with a torque wrench requiring a maximum of 10 pounds of manual force. (RX3, pp. 12 – 13) Sanchez reviewed Petitioner's job description and noted it excluded lighter duties, including pulling release valves weighing ten pounds, lubrication of machines, re-gasking heat exchangers, line labeling, and one to two hours of daily paperwork, all of which Petitioner did. (RX3, pp. 19 - 20, 22-23) Sanchez stated that Respondent had safety requirements including that no individual was to lift over 50 pounds without assistance. (RX3, pp. 33, 48 49) Sanchez stated maintenance technicians would work on different tasks each day. (RX3, p. 36) Sanchez confirmed the injury reporting policy and testified Petitioner never reported a work injuryto her. (RX3, pp. 34-35) Sanchez testified the policy applied whether a worker was claiming a specific accident or an aggravation caused by work. (RX 3, p. 43)

Medical

Petitioner testified his back problems dated back to 2003. (T. 34) On cross-examination, Petitioner admitted he underwent a lumbar microdiscectomy in 1995, as referenced by Dr. Ahuja. (T. 68; PX1). The Commission records also show Petitioner settled a workers' compensation claim against Modine Corporation in Case No. 96 WC 33537, in which he alleged a low back injury occurring August 18, 1995. Petitioner admitted he did not know exactly when his low back problems started. (T .68-69) On December 9, 2003, Petitioner underwent an MRI of the lumbar spine that showed mild to moderate disk bulging on the left at L-4 and a moderate bulge at L4-5 without evidence of recurrent herniation. (T. 34; PX 1) Petitioner did not file a workers' compensation claim at that time. (T. 34) Petitioner's back pain continued and worsened through

2005, when he received an epidural steroid injection, a TLSO brace, and ultimately underwent a second back surgery, fusions at L4-5 and L5-S1, by Dr. Ahuja on February 1, 2005. (T. 35-36, 69; PX 1; RX 14) Subsequently, Petitioner was returned to full duty with no restrictions or issues as of July 10, 2005. (T. 36 37; PX 1) On August 25, 2005, a lumbar x-ray showed a stable fusion at L4-5, but disk space narrowing at L3-4. (PX 1; RX21) Dr. Ahuja continued to allow Petitioner to work full duty and he released Petitioner to return on an as-needed basis. *Id.*

Petitioner testified he had no back problems from 2005 until 2012, when he returned to Dr. Ahuja. (T. 37 – 38) However, the records of Aurora Health showed Petitioner had a lumbar x-ray on November 16, 2009. (PX 6)

Petitioner also testified that he underwent a yearly physical examination as part of his job as maintenance technician. Before returning to Dr. Ahuja in January 2012, Petitioner underwent a physical. Petitioner testified that he may have indicated he was having a low back problems for the annual physical; he did not recall specifically, but in the 6-9 month period before returning to the doctor he was having increased back pain. (T. 39-41) On May 10, 2011, Petitioner saw Dr. Fehling, his new primary care physician, and reported low back pain with his legs giving out. (T 71-72; RX 19) Petitioner claimed these incidents only occurred at work and he had no issues at home. *Id*. Petitioner did not recall talking about digging 10 post holes and shoveling mulch for hours on end at home with no problem but he had no reason to argue that if it was documented in the records. (T. 72) Dr. Fehling referred Petitioner to Dr. Ahuja, but Petitioner did not see Dr. Ahuja until 2012. (RX 19) At his annual physical for Respondent on October 26,2011, Petitioner reported to Dr. Jablowski he had low back pain and weakness of the legs, and that he was "seeing Dr. Ahuja." (T. 70; RX20)

Petitioner consulted Dr. Ahuja January 20, 2012. He reported back and right leg pain for the prior nine months. (T. 38, 41; PX1) Dr. Ahuja recommended an MRI which was performed on January 26, 2012 at Aurora Healthcare. Dr. Ahuja recommended ESI's and prescribed oral steroid medication. The MRI showed: post-operative changes consistent with L4-5 fusion, left foraminal disk/osteophyte complex that may have been contacting the left L5 nerve root, and a small left protrusion at L3-4 that may have been contacting the L3 nerve root. (T. 41-42; PX 1)

The CT scan showed the cage at L4-5 appeared bent, but this was unchanged since the prior study of August 25, 2005; in addition, it showed degenerative disk disease at L3-4. (PX l) On January 30, 2012, Dr. Ahuja diagnosed "adjacent segment disease" status post prior lumbar fusion, and he ordered lumbar epidural steroid injections and medications. (T. 42; PX 1) Petitioner admitted he did not discuss that the back problems might be related to Petitioner's work. (T. 73, 75)

Petitioner next saw Dr. Ahuja on February 10, 2012. (T. 43) At that time, Respondent sent its job description to Dr. Ahuja and requested specific restrictions in order to accommodate them. (T. 43; PX1, PX16, RX13). According to Dr. Ahuja, the Petitioner did not require any physical restrictions. (T. 43, PX 1) On February 11, 2012 and February 24, 2012, Dr. Ahuja performed the first two injections. (PX 1) On March 8, 2012, Dr. Jablonski medically cleared Petitioner to return to work. (RX 20) At the next follow-up with Dr. Ahuja on March 16, 2012, Petitioner continued to work in a full duty capacity. (T. 75-76; PXl, RX 27) Again, no mention

was made by Petitioner that the condition could have been work-related. (T. 76-77, PX 1) Dr. Ahuja recommended a third epidural steroid injection, and he made no mention of surgery. (PXl) Dr. Ahuja noted: "He has not had any limitations in place for his work thus far." (PX1) Petitioner underwent the third injection on April 6, 2012. (T. 43-; PX1)

Dr. Ahuja reviewed Petitioner's job description and released Petitioner to return to work with no restrictions. Petitioner continued to treat with Dr. Ahuja during that time until April 26, 2012. (T. 44) On April 27, 2012, Dr. Ahuja took Petitioner off work. (T. 44) Petitioner was asked on cross-examination if he knew why his second Application for Adjustment of Claim (Case No. 15 WC 18637) indicated an accident date of April 27, 2012 and he answered, "no." (T. 107)

Petitioner saw Dr. Ahuja May 11, 2012, and reported his leg pain was constant and symptoms were worse with prolonged sitting. Petitioner advised he felt the pain was getting progressively worse and he wanted to know his options. (T. 77-80)

Petitioner testified despite the medications and injections, his back was getting worse and he advised Dr. Ahuja. Petitioner testified that at that visit Dr. Ahuja discussed performing another lumbar surgery, specifically a fusion at L3-4, L5-S1, and evaluate the prior fusion at L4-5. (T. 44-47)

Petitioner saw Dr. Ahuja on June 7, 2012. Petitioner testified that he asked Dr. Ahuja if he thought his condition was because of his job duties. (T.47-48) Petitioner reported to Dr. Ahuja that his pain was getting progressively worse, even though he was not working at that time. (T80-81; PX1; RX29). Petitioner testified repeatedly that this was the visit where he discussed with Dr. Ahuja whether the back pain was due to work. (T. 47-48, 80-82) Dr. Ahuja's office visit notes on June 7, 2012, have no mention of that conversation nor documentation of a discussion regarding causation. (PX1) Petitioner testified that if Dr. Ahuja's records made no mention of a discussion of that nature, Petitioner would dispute the accuracy of those records. Petitioner testified that it was June when they had the conversation. He did not know why Dr. Ahuja would have testified that he had that conversation for the first time after surgery at the July 10, 2012 visit. (T. 48-49) Petitioner disagreed with Dr Ahuja's testimony that on July 10, 2012, there was a discussion whether or not Petitioner's back condition was related to his work duties. (T. 81-82)

Petitioner underwent his third low back surgery on June 11, 2012, when Dr. Ahuja performed a redo right and left L4 and LS hemilaminectomies and fusions at L3-4 and LS-Sl. (T. 47, PXl) The nurse notes on July 2, 2012, document that Petitioner called with a post-operative report and, "States he is not claiming this as workers' compensation, has lawyer and wants to ensure that it is in notes that symptoms related to his long standing activities at work. Will review at next office visit. Patient does not have WC case number yet." (PX1)

Dr. Ahuja testified that he had a conversation with Petitioner at his first post-operative office visit on July 12, 2012 regarding Petitioner pursuing a workers' compensation claim and his opinion regarding causation. (PX18, 26) In the office note, Dr. Ahuja mentioned Petitioner asked him about workers' compensation, and Dr. Ahuja recommended a causation evaluation by Dr. Alloi. (PX l; RX 30) Dr. Ahuja's note contained no opinion about causation. (PX l; RX 30)

According to the testimony of Dr. Ahuja, this visit on July 10, 2012 was the first discussion with Petitioner about whether the condition was work-related. (PX 18, pp. 22, 26) Dr. Ahuja recommended a causation evaluation by Dr. Alloi. (PX l; RX 30) Dr. Ahuja's note contained no opinion about causation. (PX l; RX 30) By contrast, Petitioner denied the discussion occurred on this date. (T. 48-49) When Petitioner was asked what occurred on July 10, 2012, to trigger that as a date of accident on his second Application for Adjustment of Claim, he stated, "I have no idea." (T. 106-107; RX 11)

Dr. Ahuja noted Petitioner had "been off work for 4 weeks, and his disability started June 4, 2012." (PX 1; RX 29)

On July 26, 2012, Petitioner filed his first Application for Adjustment of Claim (Case 12 WC 25629), alleging an accident date of June 7, 2012. (RX10) At hearing, Petitioner was asked why the date June 7, 2012 was listed on his Application. (T. 104) In response, he answered, "I don't recollect." (T. 104) Petitioner stated he was claiming a repetitive trauma injury on that date, as a result of "doing my job at work, heavy lifting, pushing, stooping, bending." (T. 105) Petitioner was unsure of when he informed the employer of his alleged June 7, 2012 date of injury but stated he informed a clerk in the office. (T. 105-106)

On July 11, 2012, Petitioner completed a Dow Employees Occupational Illness Injury Report. (T. 107, RX 6) He listed the date of injury as June 7, 2012. (RX 6) For the description of injury he listed that he was having back problems related to his job duties, being a repetitive injury. (RX 6) When asked at hearing what this meant, he explained heavy lifting, excessive lifting, bending, crawling, stooping, and crouching. (T. 109-110) The report stated Petitioner first reported the incident to his supervisor on July 11, 2012. (RX6)

Petitioner testified he did not tell anyone at work about the condition being work-related before he discussed it with Dr. Ahuja. (T. 116-118)

On September 5, 2012, Petitioner completed an Aurora Healthcare Patient's Statement of Injury/Illness. (T. 111; RX 7) Petitioner could not recall why he completed this form but confirmed it was his handwriting on the document. (T. 111) In the report, Petitioner listed the injury as "lifting kneeling," but he provided no date for the injury date. (T. 111-112; RX 7) The Petitioner also wrote in the report he had similar symptoms to this in the past. (Tl. 112; RX 7) In this report, Petitioner stated he told his employer of this injury on June 4, 2012. (T. 112-113; RX 7)

Lumbar x-rays on September 5, 2012, showed a stable fusion. (PX1) At the office visit on that date, Dr Ahuja noted Petitioner thought he would be able to return to work. (PX1) Dr. Ahuja recommended continued physical therapy, but he released Petitioner to return to light to medium work with lifting up to20 pounds frequently and 35 pounds occasionally. (PX l)

Petitioner was involved in a motor vehicle accident on September 21, 2012. after which he sought medical attention at Aurora Healthcare. (T. 50-51)

Petitioner was released to return to work with restrictions at the follow-up appointment

post motor vehicle accident. Petitioner took the work restrictions to Respondent. Respondent could not accommodate the work restrictions. Petitioner remained off work. Petitioner returned to Dr. Ahuja around December 4, 2012. (T. 51-53)

On cross-examination, Petitioner agreed Dr. Ahuja then recommended another CT and a cervical MRI, brain MRI, and EMG and ESIs that were performed in summer 2013. Petitioner testified after the series of ESI's he was getting worse; they provided no improvement. Dr. Ahuja then changed his medication to Amitriptyline. (T. 53-55)

On cross-examination, Petitioner agreed he had a lumbar micro-discectomy, low back surgery in 1995. He agreed he had back problems for at least 20 years; he did not recall exactly when the problems began. He agreed at some point his condition worsened that required the surgery in 2005 by Dr. Ahuja. Petitioner had returned to full duty after that surgery and his back problems increased approximately nine months before his third surgery. (T. 68-69)

Petitioner underwent a general physical exam for Respondent on October 26, 2011 and testified that the record indicated he had recurrent back problems for the last year worsening in the prior 2 weeks. He agreed at that time his back was starting to act up again and even prior to that exam in October 2011. (T. 70-71)

Petitioner testified that he was interested in pursuing a workers' compensation claim because Petitioner did not think he would be able to return to work with Respondent because he must be able to lift more than 50 pounds and crawl into small spaces; he did not recall the specific conversation. He did not recall being given a referral to Dr. Alloi to determine his return to work status and a causation evaluation and diagnosis evaluation. Petitioner did not recall if he ever went to Dr. Alloi to get an opinion. (T. 80-83)

Medical Records

Dr. Ahuja's January 16, 2012, records noted he placed Petitioner on restrictions, no lifting more than 40 pounds with frequent position changes. He noted Petitioner's job description with needing the ability to reach all work areas and lift, twist, turn 50 pounds. (PX 1)

Dr. Ahuja's office visit notes dated January 20, 2012 noted complaints of back pain with lumbar radiculopathy. Dr. Ahuja noted Petitioner's prior lumbar fusion February 1, 2005. His impression then was "status post posterior fusion L4-5, who has recurrent LBP" and he prescribed an MRI, CT, and Medrol dose pack. (RX23)

Dr. Ahuja authored a letter to Dr. Fehling dated January 30, 2012. He noted Petitioner presented for further evaluation of low back pain and radiculopathy and noted Petitioner's prior fusion. Dr. Ahuja noted Petitioner was then feeling worse with a lot of discomfort in his back and sharp pain at the top of his right buttock with right leg weakness, and bilateral groin pain when laying down. His diagnosis was post prior fusion, now developing adjacent segment disease. (RX26)

Dr. Ahuja authored a letter to Dr. Fehling dated March 16, 2012. He again noted Petitioner

was post fusion from 2005 with recent recurrent LBP. Dr. Ahuja noted the MRI showed disc prominence and narrowing left L3-4 nerve root and some spondylosis at the fusion level causing narrowing. He noted the trial of conservative care, which included 2 ESI's, which had improved symptoms for a week. Petitioner's pain was rated 3-9/10, with some numbness and tingling. (RX27)

Dr. Ahuja authored a letter to Dr. Fehling dated May 11, 2012. Dr. Ahuja again noted Petitioner's history of post fusion 2005, with recent recurrent LBP. He again noted the MRI showing disc prominence and narrowing left L3-4 nerve root and some spondylosis at fusion level causing narrowing. Petitioner's pain level was rated as 9/10 with pain worse with prolonged sitting; symptoms also worsened with over activity and some numbness and tingling. Dr. Ahuja diagnosed Petitioner's condition as post prior fusion, and noted Petitioner then developing adjacent segment disease. Dr. Ahuja noted Petitioner had reasonable improvement with conservative care with ESI's providing about one week of improvement of symptoms. Dr. Ahuja noted Petitioner felt like he was getting progressively worse and wants options. (RX28)

Dr. Ahuja authored a letter to Dr. Fehling dated June 7, 2012. Dr. Ahuja again noted Petitioner's history of post fusion 2005, with recent recurrent LBP. He noted Petitioner was nervous about surgery. Petitioner's pain level was rated as 4/10. Dr. Ahuja noted Petitioner had been sitting 70 minutes in car and had LBP and radiation. Petitioner again reported he felt like he was getting progressively worse. Dr. Ahuja then recommended posterior decompression and transforaminal fusion at L3-4, L5-S1 with evaluation of prior fusion at L4-5. (RX29)

Dr. Ahuja authored a letter to Dr. Fehling dated July 10, 2012. He noted Petitioner's post-operative evaluation; surgery June 12, 2012. Dr. Ahuja noted Petitioner did not feel he can return to his job as he must be able to lift, carry 50 pounds and crawl in small spaces. (RX30)

The medical records of Neurosurgery & Endovascular Associates/Dr. Ahuja contained nurse/patient's notes. On July 2, 2012, the entry documented Petitioner called and reported doing "okay" post-surgery. Petitioner reported he was "now claiming this as work comp-has lawyer and wants to ensure that it is in the notes that his symptoms are related to his long-standing activities at work-will review at next office visit-pt does not have WC case # yet." (PX 1)

Dr. Ahuja authored a letter to Dr. Fehling dated September 6, 2012. Dr. Ahuja noted Petitioner's ongoing LBP complaints, numbness and tingling in the left leg. However, symptoms improved some since surgery. Petitioner did not think he could return to work. Dr. Ahuja further noted Petitioner had filed a workers' compensation claim on July 17, 2012. (RX31)

Dr. Ahuja's September 14, 2012, patient/nurse notes reflect that someone from his office spoke with Petitioner's wife regarding the situation and his wife noted Petitioner had always worked at the same place and he did not realize at the time of his prior surgeries that there was ever a possibility of "work comp." Petitioner's wife reported he had done a lot of heavy work his whole life up to his work restrictions –"per Dr. Ahuja Petitioner likely increased his back injury by his work." (PX 1)

On December 4, 2012, Dr Ahuja authored a response letter to Petitioner's attorney. Dr.

Ahuja noted Petitioner was status post micro-discectomy performed by another surgical service in the past. On February 1, 2005 Petitioner underwent a posterior lumbar interbody fusion L4-5. Dr. Ahuja noted Petitioner has had low back pain and lumbar radicular symptoms which were aggravated by his current work situation. Dr. Ahuja indicated, "The date of his work situation is June 6, 2012, because on that day in our office we discussed that he had this situation, and prior to this, he had not recognized the ongoing stresses at Dow likely increasing his lumbar disc disease beyond that would be reasonably expected. He certainly had problems for a lengthy period of time and although it is not possible to determine what symptoms were at the time of his initial surgery, his long term work as a maintenance technician is a contributory cause of the progression of his disease." (PX 1)

Dr. Ahuja's Testimony

At request of Petitioner, Dr. Ahuja testified by way of evidence deposition May 12, 2015. He first saw Petitioner January 7, 2005, on referral from Dr. Blue. At that time Petitioner was complaining of significant right leg pain and images showed evidence of disc herniations. They discussed Petitioner's low back pain and his prior micro discectomy from 10 years before. Dr. Ahuja performed a fusion at L4-5 on February 1, 2005. (PX18, 7-9)

Dr. Ahuja released Petitioner to return to work with restrictions on April 27, 2005. He anticipated no restrictions would be necessary by July 10, 2005. Petitioner was given work conditioning and returned to work June 1, 2005. Dr. Ahuja testified Petitioner ultimately had a good result from the fusion surgery. Petitioner reached MMI and was released to return to full duty work on August 25, 2005. (PX18, 9-12)

Dr. Ahuja next saw Petitioner on January 20, 2012. Petitioner was still working full duty and overall doing well. Petitioner gave no indication of having sought medical treatment from the release in 2005 until 2012. In 2012, Dr. Fehling, Petitioner's primary care physician (PCP) sent Petitioner back to him. Dr. Ahuja noted that Petitioner had continued complaining of significant recurring LBP and leg pain and Dr. Ahuja was concerned about additional disc disease. (PX18, 12-14)

Dr. Ahuja saw Petitioner January 30, 2012, after review of a January 26, 2012 MRI and CT scan. It appeared Petitioner had developed disc disease at L3-4, some residual disease or movement at L4-5 that could contribute to osteophyte formation on the left, foraminal stenosis. Petitioner clearly had foraminal stenosis consistent with the pain. He was aware in the meantime Petitioner had been sent to Centegra Occupational Medicine by Respondent. He identified Petitioner's deposition Exhibit 3 as the report in his chart from Centegra. Centegra PA inquired about restrictions and requested the CT scan and MRI scan. Dr. Ahuja testified that Centegra provided a description of the Petitioner's job duties. Dr. Ahuja testified he would have reviewed those job duties at the time. The essential physical functions noted he had to manually move 500-pound drums using the appropriate equipment and must be able to physically enter reactors for maintenance and manually lift and handle 55-pound drums, and manually torque fasteners to 100 feet per. (PX18. 14-17)

Dr. Ahuja authored a letter/report to Dr. Fehling dated March 16, 2012. At that time, he

placed no restrictions on Petitioner. (PX18, 17-18)

Dr. Ahuja received a fax from Petitioner on May 7, 2012. It noted Petitioner reporting his legs aching all the time and sharp pain walking at work. Petitioner had noted working Thursday but could not sit or walk for periods of time and did not work on Friday or the current week until he could see the doctor. Petitioner had requested an Employee's Health Certification form indicating he was unable to work at that time be completed. (PX18, 18-19)

Dr. Ahuja noted on May 11, 2012, Petitioner reported continued low back pain, rating his pain level as 9/10. He reported both legs were feeling numb, and the pain feeling like in the bone radiating to his feet. Petitioner reported symptoms worse with prolonged sitting and more pain standing straight up and with coughing and sneezing. Petitioner felt the pain getting progressively worse. Petitioner had discomfort walking, especially toe to heel and Petitioner had decreased pin prick in the right lower extremity at the L4-5 distribution and left lateral thigh. Dr. Ahuja stated based on Petitioner development of more disease at the level above and below the fusion and the significance in nature and continued progression, they talked about extending the fusion above and below the prior fusion. (PX18, 19-20)

Dr. Ahuja next saw Petitioner June 7, 2012, with the same history, findings and recommendations. He sent Petitioner for psychological clearance for surgery. Dr. Ahuja performed surgery and identified Petitioner's deposition exhibit 4 as the operative report. He stated surgery went well and he saw Petitioner post-surgery on July 10, 2012 and Petitioner reported doing well. They had discussed Petitioner's work and need to lift greater than 50 pounds and crawl into small spaces. (PX18, 20-22)

Dr. Ahuja next saw Petitioner September 6, 2012, and Petitioner continued to have some numbness and tingling in the left leg however, he was improving since the surgery. At that point he was about 90% improved, sitting and walking were progressing, and Petitioner was not wearing the brace. At that point he felt Petitioner could return to work lifting to 25-30 pounds infrequently. (PX18, 22-23)

Dr. Ahuja next saw Petitioner November 1, 2012. Petitioner had reported being involved in a motor vehicle accident on September 21, 2012, when he was T-boned Petitioner felt he was back to baseline 2-3 days after the motor vehicle accident . Petitioner reported a pain rating of 5/10 with some difficulty sitting, but overall improving. Plain x-rays performed after the motor vehicle accident showed stable post-operative changes, good alignment. He recommended Petitioner return to work December 3, 2012 with lifting up to 40 pounds. (PX18, 23-24)

Dr. Ahuja saw Petitioner on December 4, 2012, and Petitioner stated he was deteriorating since surgery. Petitioner did not believe he was severely injured in the motor vehicle accident, but he was deteriorating. Dr. Ahuja stated overall Petitioner's condition had worsened after getting better initially from surgery. Dr. Ahuja viewed deposition exhibit 5 and identified it as a narrative report he prepared in response to Petitioner's attorney's letter dated September 26, 2012. Petitioner reported ongoing stress with working for Respondent and Dr. Ahuja testified that increased the lumbar disc disease beyond that would be reasonably expected. Dr. Ahuja further testified Petitioner's job condition would be a component of the continued progression of the disease for

above and below the (prior) fusion and that would be a contributing factor in Petitioner needing the three-level fusion. (PX18, 24-25)

At that time, Dr. Ahuja noted an EMG showed acute and chronic changes L5-S1. (DepX6) He noted the lumbar CT showed post-operative changes and artifact at L3-S1. There was some documentation of foraminal narrowing, but metal artifact limited a good evaluation. (PX18, 26-29)

Dr. Ahuja agreed that in the middle of the report he stated the date of work situation is related to June 6, 2012, as on that day, in his office, they discussed that he had the situation prior and was not recognizing the ongoing stress at Respondent likely increased the disc disease in the lumbar spine beyond what would be reasonably expected. However, Dr. Ahuja testified that there was no discussion of Petitioner's work duties on June 6, 2012. (PX 18, p. 26) On July 10, 2012, Petitioner had requested a letter stating his condition could be work related. He believed the discussion as to causal connection was July 10, 2012. (PX18, 25-26)

Dr. Ahuja saw Petitioner December 18, 2012, with continued symptoms. Petitioner returned on April 1, 2013, and reported sacral pain, continued numbness and decreased sensation in the leg. Petitioner reported physical therapy wore him out, but any activity tired him and he needed to lie down. On May 13, 2013, Petitioner reported it was day by day and he still complained of back pain. Dr. Ahuja viewed the CT scan of May 7, 2013 that showed left paracentral disc protrusion L2-3 which narrowed the spinal canal, and also showed the fusion L3-S1. (PX18, 29-31)

Dr. Ahuja administered three ESI's, June 4, 2013, June 11, 2013 and on June 27, 2013. On June 27, 2013 Petitioner reported not noticing any essential improvement overall from the prior 2 ESI's. (PX18, 31-32)

Dr. Ahuja testified that on July 29, 2013, he and Petitioner discussed his additional segmental disease and Petitioner noted his leg bothering him 2-3 times per week, but the low back was significantly bothering him. Petitioner returned on September 11, 2013, and reported his legs were improving and the pain was located generally in the low back (2-7/10). Petitioner had limited function and symptoms were easily exacerbated. (PX18, 32-34)

Dr. Ahuja saw Petitioner December 4, 2013 and his condition was essentially the same. He next saw Petitioner February 19, 2014, and Petitioner reported an increase in symptoms with low back pain, bilateral leg pain and buttock pain. A new MRI showed a consistent bulge at L2-3 still present. He reviewed the MRI at the May 22, 2014 visit. At that time he was concerned about pseudo arthritis and he recommended a bone scan which was performed at St. Luke's on June 30, 2014. (PX18, 34-38)

Dr. Ahuja saw Petitioner August 11, 2014, and he recommended fusion surgery as he had suggested prior and recommended adding L2-3 to fusion. He was concerned about pseudo arthritis and loosening of screws and the EMG showed some acute changes at L5-S1. He testified he does not prefer to do 4 level fusion surgery, but he knew Petitioner had significant ligament hypertrophy changes at L2-3. (PX18, 38-40)

Dr. Ahuja viewed deposition exhibit eight, the summary dated August 27, 2014, after Petitioner underwent a four level fusion. He next saw Petitioner August 9, 2014, and Petitioner complained of low back his pain radiating to left buttock, groin, and chronic low back pain. The medical record indicated Petitioner's back pain was tolerable and overall moving on. (PX18, 40-43)

Dr. Ahuja next saw Petitioner November 13, 2014. Petitioner had some pain, stiffness in low back, his symptoms were exacerbated by sitting or supine position, left leg worse, starting to have more chronic pain. It was then 3 months post-surgery and symptoms were within realm. A CT scan was performed on November 7, 2014 which showed good incomplete osseous fusion L3-4, good osseous fusion L4-5, new changes L2-3, and an incomplete fusion L5-S1. He stated L5-S1 is the highest level of stress and you worry if it becomes solid fusion or not. Some people, whether they have a solid fusion or not, can have back pain. It was still in the process of fusing. (PX18, 43-44)

Dr. Ahuja next saw Petitioner on February 27, 2015. Petitioner described pain, aching and burning He rated his pain level as 3/10, and a maximum of 8/10. He was still having symptoms exacerbated by back movement, low back pain, sleeping poorly, but progressing. Petitioner was having some incremental improvement. An FCE was done in Madison, Wisconsin at his request (DepX9 from February 17, 2015). Dr. Ahuja noted that FCE found Petitioner severely incapacitated and limited to less than sedentary due to the multiple fusions and subsequent severe pain, balance and strength issues. He was still hopeful but cautious as to improvement. He indicated then it was reasonable to say Petitioner was at MMI; they usually try to give a patient one year from surgery. He felt Petitioner's FCE limitations then were more or less permanent. (PX18, 44-49))

Dr. Ahuja agreed at some point Petitioner wrote a job description of work activities (PX18, DepX10). He viewed it and had reviewed it prior. He indicated Petitioner's job description was consistent with that from Respondent. He stated at the time he saw Petitioner he clearly had a herniated disc, but he could not state the work duties caused an acute event of herniation; but Petitioner needed the surgery. Dr. Ahuja stated that looking at the work, the condition with chronic exposure, work condition is a component of his progression of the disease at L4-5 that led to the subsequent fusion at L4-5, leading to chronic exposure leading to further degeneration at the levels above and below that fusion and eventually leading to L2-3 disease. He stated in that way, a chronic exposure and continued work had contributed to and is a component of his progression of lumbar disease leading to the 3 fusion surgeries. (PX18, 49-51)

Dr. Ahuja viewed DepX11, report of March 27, 2013. He read Dr. Itkin's opinion regarding Petitioner's condition that it could not be determined if it was aggravated by Petitioner's extensive physical labor. He would say they are work related. He viewed DepX12, the September 2, 2014 report of Dr. Itkin indicating his opinion had not changed. He read Dr. Itkin's opinion stating there was no basis for Dr. Ahuja's causal opinion and Dr. Itkin did not see any objective basis to support the opinion from the records. Dr. Itkin had noted there was no evidence to suggest Petitioner suffered a work accident June 7, 2012, and Dr. Itkin stated no evidence to suggest any particular activity he performed working there accelerated or exacerbated in any material fashion Petitioner's

underlying degenerative lumbosacral pathology. Dr. Ahuja stated in his opinion the activities at work were related and they exacerbated Petitioner's underlying pathology. Dr. Ahuja stated looking at the progression of the disease there is basis. He stated Petitioner had the lumbar disc herniation, underwent the fusion, did well for a while and then symptoms just progressed further and faster, that was essentially what happens. He stated looking at the job description, the work Petitioner was doing, the stresses, accelerated Petitioner's pathology. (PX18, 51-54)

On cross examination, Dr. Ahuja admitted that Petitioner suffered from a type of progressive degenerative lumbar spine disease that was present for many years. (PX 18, 55) Dr. Ahuja confirmed he had no idea what caused the need for the initial microdiscectomy in 1996. (PX 18, 56) Also, Dr. Ahuja had not reviewed any medical records to address the nature of that condition from 1995. (PX 18, 56) Dr. Ahuja also admitted that the natural progression of the Petitioner's disease is something that gets worse with time. (PX 18, 56-57) Dr. Ahuja conceded that when he saw Petitioner again in January 2012, he did not have any details as to why Petitioner had recurrent pain within the last nine months. (PX 18, 61-62) More specifically, there were no specific work activities that were mentioned causing a worsening of symptoms by the Petitioner to Dr. Ahuja. (PX 18, p. 62) Dr. Ahuja admitted there was no causation opinion regarding work was made until December 4, 2012. (PX 18, 60, 66, 71, 72, 89) In fact, Dr. Ahuja also agreed that even when Petitioner was off of work, his condition still worsened. (PX 18, p. 66-67)

Dr. Itkin's Testimony

At request of Respondent, Dr. Itkin testified by way of evidence deposition October 29, 2015. Dr. Itkin is a board-certified neurologist and a fellow of the Academy of Electrodiagnostic Medicine. fellowship trained in electrodiagnostics. He is a clinical assistant professor at the University of Illinois. He testified he probably has had about 5,000 patients and he has been in practice about 23 years. He does medical-legal consulting and IME's. He spends less than 5% of his practice on medical-legal issues. (RX1, 4-10)

Dr. Itkin examined Petitioner twice and prepared 6 reports dated March 27, 2013, November 18, 2013, April 10, 2014, September 2, 2014, May 2, 2015, and July 7, 2015. (RX1, 10-13)

Dr. Itkin first examined Petitioner on March 27, 2013. At the evidence deposition, Petitioner's counsel objected to any testimony regarding Dr. Itkin's independent medical evaluation of Petitioner for two reasons. Petitioner objected to Dr. Itkin's testimony because the report Petitioner's attorney reviewed indicated Dr. Itkin's opinions were based on part on a video he viewed and attorney for Petitioner was not provided the video. The Arbitrator sustained the objection citing *Ghere v. Industrial Comm'n (Howell Asphalt),* 278 Ill. App. 3d 840, 663 N.E.2d 1046, 1996 Ill. App. LEXIS 171, 215 Ill. Dec. 532. Petitioner's counsel further objected to Dr. Itkin's testimony stating Respondent's counsel did not provide a copy of correspondence sent to Dr. Itkin. The Arbitrator overruled this objection citing relevance. (RX 1, 14)

The Commission notes Petitioner's counsel had Dr. Itkin's report more than 48 hours

before the evidence deposition. As the Commission has *de novo* review of the evidence, the Commission reverses the Arbitrator's ruling on Petitioner's *Ghere* objection to Dr. Itkin's testimony.

Dr. Itkin obtained a history from Petitioner noting a history of chronic lower back problems stemming from the mid-1990s. Petitioner recalled receiving procedures as early as 1997. Petitioner reported low back pain subsequently. Dr. Itkin testified Petitioner reported being treated conservatively from 2000 to 2002. Petitioner reported low back pain radiating to his right leg and underwent a fusion surgery at L4-5 in 2005. Petitioner reported his back was relatively stable until 2008 or so. In about 2010, without provocation or injuries, the right leg started giving out and the pain worsened in his back and radiated into his leg. Petitioner reported to Dr. Itkin that in 2011, his leg started tingling with any flexion of his body, which he was required to do at work. Petitioner started receiving more aggressive treatment at that time including epidural steroid injections. In December 2011, Petitioner returned Dr. Ahuja who performed in surgery in 2005. (RX 1, 17-19)

Dr. Itkin noted Dr. Ahuja tried conservative treatment which did not help. He noted subsequently in June 2012, Petitioner underwent multiple level fusion surgery to the low back. He testified, "And it's important to know that before his surgery, the right leg was giving out." (RX 1, 19) Symptoms had improved after surgery, but Petitioner still had significant low back pain which was excruciating and exacerbated by movement per Petitioner. (RX 1, 19)

Dr. Itkin stated Petitioner reported to him that he could not sit for more than five minutes. Petitioner complained of bilateral leg pain at night and his legs needed to move or they hurt. Petitioner reported significant pain in the back, buttocks and tailbone. (RX 1, 19-20)

Dr. Itkin testified they discussed what he was doing at work in general terms and told him what his daily routine was at work. Petitioner did not describe specifically how he was injured. (T.20-21) (RX 1)

Dr. Itkin reviewed medical records noting in his report a summary of what he reviewed. Dr. Itkin reviewed some of Dr. Ahuja's notes which included notes from procedures performed in 2005 and prior procedures. He stated Petitioner's history was very extensive and progressive, so he needed to review radiographic data. As to the forensic question, he did not see any evidence Dr. Ahuja had any information regarding the work Petitioner was doing. Dr. Itkin testified that other than the letter to Petitioner's attorney dated December 4, 2012 , he found no specific causal opinion from Dr. Ahuja contained in his treating records. (RX 1, 21-23)

Dr. Itkin stated Petitioner had a very extensive degenerative lumbosacral disease spanning almost half his life. He noted Petitioner had multiple lumbosacral surgeries required because of the progressive degenerative processes. In his report he could not address the safety of Petitioner returning to work with or without restrictions without an objective functional analysis being performed. Dr. Itkin diagnosed Petitioner's condition as failed back syndrome and discogenic pain.

Dr. Itkin performed a sensory examination which revealed some changes which were not substantiated by objective anatomical analysis. He felt Petitioner had significant symptom

amplification. It was inconsistent with his exam and exams by Dr. Ahuja as recorded in his medical records. (RX 1, 23-25) He concluded Petitioner was an unreliable historian for his sensory exam. (RX 1, 25)

Dr. Itkin reviewed Dr. Ahuja's notes and his opinion and stated he disagreed with the causal connection opinion. He noted Dr. Ahuja had less information than he did regarding what Petitioner did at work. Although he had more information and evidence regarding Petitioner's work, at that first visit Dr. Itkin testified, he was unable to arrive at a precise conclusion of a correlation with the information he had ta that time. His objection to Dr. Ahuja's opinion was based on Dr. Ahuja's had less information than he (Dr. Itkin) did.

In 2013, he could not answer if Petitioner's work as a laborer exacerbated the problems with his lower back. He stated Petitioner started having symptoms in his late 20s by history. He could not offer opinion if extensive physical labor exacerbated the degenerative condition over time. He had noted in his report that the evidence was inconclusive and could not be qualified either way if the work worsened/aggravated the condition. He did not know how many times Petitioner performed each task, repetitively, duration/length, force used. He stated it was clear Petitioner's job was not sedentary/light, possibly it could have worsened/aggravated the pre-existing condition but could not offer an opinion conclusively or to a reasonable degree of medical certainty. He testified he felt Dr. Ahuja's causal relationship opinions were weak. (RX 1, 25-30)

Dr. Itkin subsequently reviewed additional medical records and generated his November 18, 2013 report which he described as a technical opinion on the ATI Physical Therapy report dated October 23, 2013. (RX 1, 30-31)

Dr. Itkin examined Petitioner for a second time on April 10, 2014, and generated a four-page report. Petitioner reported his symptoms had not changed and he felt the right leg was giving out more and both legs hurt. Petitioner also complained of left shoulder pain. He had reviewed additional medical records including the October 23, 2013 FCE and the December 4, 2013 Dr. Ahuja records, which restricted Petitioner to light duty work 6 hours per day. On neurologic exam, Dr. Itkin noted symptom magnification but otherwise the exam was unchanged. His opinion remained unchanged but he noted Petitioner was progressively getting worse, even with the job restrictions. Dr. Itkin's noted his degenerative problems had not changed and his work, as described could not be implicated in any way that he could explain. (RX 1, 34)

Dr. Itkin reviewed additional records and wrote another addendum report dated September 2, 2014. He reviewed the Employee Occupational Injury-Illness Report from Dow Chemical of July 7, 2012, medical from Aurora Health, Patient Statement of Injury of September 5, 2012, Dr. Ahuja's August 25, 2005 records, Centegra Health Systems records, and Dr. Ahuja's subsequent records from 2012. He stated these records further substantiated and confirmed his opinion that regarding causality between Petitioner's progressive lumbosacral disease and his work duties. Based on his review of the records, he concluded that there was no particular accident and he did not find any cause in Petitioner's work activity. He testified, "The cause is progressive degenerative lumbosacral disease, which is a biological cause." (RX1m 34-37)

Dr. Itkin reviewed the Employee Occupational Illness-Injury report of July 11, 2012 signed

by Petitioner. He noted Petitioner reported "…having back problems that are related to my job duties, being a repetitive injury." (RX 1, 38) He stated that did not help him understand the cause of the alleged injury. (RX 1, 37-38)

Dr. Itkin was directed to his September 2, 2014, report where he noted Dr. Fehling's May 10, 2011 record. He found Dr. Fehling's review of systems an unusual entry. Petitioner then reported basically both legs giving out all the time at work, but it did not happen at home. Dr. Fehling's record stated he can dig ten hole posts, shovel mulch for hours on end without any problem and could bend and stretch and move around without any trouble. That records indicated symptoms mainly happen at work. Dr. Itkin stated if you are going to have a problem with a spinal disease, "you will have it at home, at work and probably even on the moon." (RX1, 38-40)

Dr. Itkin reviewed job descriptions including one written by Petitioner and reviewed videos. Based on his review, he stated Mr. Borst does not perform repetitive jobs. He further stated as a basis of his opinion: "I read the report, I read his job duties. He wrote it down, he told me what he does, he wrote down what he does, how much he does of that. These are very objective facts here. We know what he did as a maintenance tech for Dow." When asked what makes Petitioner's job not a repetitive job, Dr. Itkin testified, "He does different things on different days. He does different jobs on different days. They're not repetitive." (RX 1, 45)

Dr. Itkin reviewed additional records of May 2, 2015, and noted Dr. Ahuja had performed a multi-level fusion surgery as well as other procedures and discectomies on August 27, 2014. He noted Petitioner still had significant pain after all the way to 2015. Dr. Ahuja performed another surgery and Petitioner was still getting worse progressively he noted. Dr. Itkin testified this further confirmed the underlying process that was going on. (RX1, 46)

Dr. Itkin authored his final report on July 7, 2015, after reviewing additional records, including Dr. Ahuja's deposition, the FCE from ATI, and Petitioner's notes regarding day-to-day work activity where Mr. Borst explicitly described what he did at work. He again noted Petitioner was getting worse. Dr. Itkin stated after reviewing Dr. Ahuja's deposition his opinions remained the same. He again indicated he saw no evidence of repetitive trauma; there was not a specific repetitive job task. He stated Dr. Ahuja agreed Petitioner had multiple work duties. (RX 1, 46-51)

After reviewing the February 17, 2016, FCE report, Dr. Itkin reiterated his opinion that there was no evidence Petitioner's work at Dow materially affected his progressive degenerative lumbosacral pathology. (RX1, 48-50) Dr. Itkin opined Petitioner's rate of progression of his spine disability did not change as a result of work activities. (RX l, p. 87)

Conclusions of Law

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 144 Ill. Dec. 794, 797, 556 N.E.2d 261, 264 (Ill. App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill. Dec. 634, 510 N.E.2d 502 (1987). The Petitioner must prove a precise, identifiable date when the accidental injury

manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Bellwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 106 Ill. Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Id.* at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill. Dec. 620, 507 N.E.2d 533 (1987). An employee alleging repetitive trauma "must still show that the injury is work related and not the result of a normal degenerative aging process." *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. ¶ 31

Further, 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. *Hansel & Gretel Day Care v. Industrial Commission*, 158 Ill. Dec. 851, 858, 574 N.E.2d 1244, 1251 (Ill. App. 3 Dist. 1991); citing *Board of Education v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969).

The Commission finds that the Petitioner failed to sustain his burden of proving a repetitive trauma for any of the alleged manifestation dates. The Commission finds that Petitioner's condition was the result of his pre-existing condition and degenerative aging process and that his varied job duties were not a causative factor. As the *Nunn* court held, "Cases involving aggravation of a preexisting condition primarily concern medical questions and not legal questions. (*Berry v. Industrial Com*. (1984), 99 Ill. 2d 401, 459 N.E.2d 963, quoting *Long* [***14] *v. Industrial Com*. (1979), 76 Ill. 2d 561, 394 N.E.2d 1192.) This is especially true in repetitive trauma cases. (See *Johnson v.* [**507] [****639] *Industrial Com*. (1982), 89 Ill. 2d 438, 433 N.E.2d 649.) In a repetitive trauma case, 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*. (1987), 115 Ill. 2d 524, 505 N.E.2d 1026.) *Nunn v. Industrial Com*m'n., 157 Ill. App. 3d 470, 478, 510 N.E.2d 502, 506-507, 1987 Ill. App. LEXIS 2728, *13-14, 109 Ill. Dec. 634, 638-639

Based on the above, and the record taken as a whole, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of evidence that he suffered accidental injuries arising out of and in the course of his employment on April 27, 2012, June 7, 2012 and/or July 10, 2012, and likewise failed to prove that his current condition of ill-being is causally related to his employment. More to the point, the Commission is not convinced that Petitioner's job duties were sufficiently repetitive or performed in such a manner as to cause and/or aggravate his low back condition. In support of this determination, the Commission relies on the testimony of Petitioner, as well as Respondent's witnesses, Mr. Burns, Mr. Oldland, and Ms. Cashbaugh-Sanchez, as to the variety of duties and changes in positions and rest breaks. The Commission further relies on the job descriptions entered into evidence and prepared by both Petitioner and Respondent (PX13, PX14, PX 16, PX17, RX17, & RX18) indicating the various and varied activities Petitioner performed on a daily basis.

The Commission finds Dr. Ahuja's causation opinion is not supported by the record. Dr. Ahuja testified that multiple 55 pound lifting and going in small areas caused Petitioner's

condition. (PX18, 103-104) However, this testimony is refuted by Petitioner's testimony and written job description as well as Respondent's witnesses and job descriptions admitted into evidence which document the varied nature of the work that also includes paperwork, computer entry, light and medium work duties. Dr. Ahuja's opinion was solicited by Petitioner after Petitioner's third surgery in July 2012. He provided the opinion only after referring Petitioner to another practitioner for a causal opinion. Then in December 2012, he provided a retrospective causal opinion at the behest of Petitioner. "An expert opinion is only as valid as the reasons for the opinion." (Internal quotation marks omitted.) *Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587, 355 Ill. Dec. 705*

The basis of his opinion is disputed by Petitioner' own testimony. Further, Dr. Ahuja's treating medical records, specifically records of January 20, 2012, where he specifically references, "I am concerned for adjacent segment disease", January 30, 2012, March 16, 2012, May 11, 2012, June 4, 2012, July 10, 2012, September 6, 2012, November 1, 2012, are notably devoid of any reference to Petitioner's work activities as being a cause of his low back complaints. In fact, not until December 4, 2012, does Dr. Ahuja opine on causation in response to correspondence from Petitioner's attorney. Further, contrary to testimony of Dr. Ahuja and Petitioner, there was nothing in medical records until December 4, 2012 as to any causal opinion. In forming his causation opinion, Dr. Ahuja relies on two specific job duties, however, those specific job duties are never mentioned by Petitioner in Dr. Ahuja's records as activities that caused Petitioner's worsening of symptoms. Prior records from July 2, 2012, and September 14, 2012, only indicated Petitioner's wife was considering or realized a possibility of a workers' compensation claim, but no causal opinion was given by Dr. Ahuja at that time. The Commission finds the contemporaneous medical records more reliable than the solicited causation opinion of Dr. Ahuja. Thus his opinion is unpersuasive.

In further support of this determination, the Commission relies on the opinions of §12 examining physician Dr. Itkin, as it is more persuasive and supported by the evidence. Dr. Itkin had a better forensic understanding as to the nature of Petitioner's variety of job duties compared to the treating surgeon Dr. Ahuja. Dr. Itkin performed a comprehensive review of Petitioner's medical records gleaning an understanding of the progressive nature of Petitioner's condition. Further, Dr. Itkin reviewed the job descriptions, Petitioner's own description of his job duties, the video and the medical records and determined Petitioner's job duties were not repetitive and the cause of his low back condition. Dr. Itkin further noted on his examinations evidence of symptom magnification. He noted that Dr. Ahuja had, until July 2, 2012, solely related Petitioner's condition back to the 2005 surgery.

The Commission further takes notice of the Dow Confidential Worker's Compensation Supervisors Statement dated July 17, 2012 prepared by Rich Oldland. The report noted that Petitioner did not consider it work related. Petitioner had communicated to Mr. Oldland that Petitioner had a similar injury 8-10 years prior for which he had an operation. When they discussed discomfort, Petitioner indicated this was a natural progression of the same injury/ affliction and he now needed the same operation in different area. Mr. Oldland noted, at no time did Petitioner express concern that the condition was an acute on chronic issue. (RX 2)

Based on the above, and the record taken as a whole, the Commission reverses the decision

of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the evidence that he suffered accidental injuries arising out of and in the course of his employment by the Respondent on or about June 7, 2012, July 10, 2012, or April 27, 2012, and likewise failed to prove that his current condition of ill-being relative to his lower back is causally related to his employment. All other issues are rendered moot.

Accordingly, the Arbitrator's decision is hereby reversed and Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated May 28, 2020 is vacated and Petitioner's claim for compensation is denied.

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.

December 20, 2021

o-10/19/21
KAD/jsf
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator, with modifications. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving that he sustained an accident that arose out of and in the course of his employment.

In this case, the Petitioner put forward three (3) possible manifestation dates for his repetitive trauma injury. The Commission may set the appropriate manifestation date. "Manifests itself" means 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. *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 531 (1987). It may become plainly apparent to a reasonable person well after the claimant experiences symptoms and even after his condition has been diagnosed. *Three "D" Discount Store v. Indus. Comm'n*, 198 Ill. App. 3d 43, 47-48 (1989). The method for ascertaining the accident date in repetitive trauma cases makes it possible for that date to fall after the claimant's last day of employment. *A. C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879 (1998).

In this case, Petitioner testified he believed he had conversation regarding work-relatedness with Dr. Ahuja on June 7, 2012. Dr. Ahuja believed this conversation occurred July 10, 2012. Petitioner's injury manifested itself at the time this conversation occurred, even though he was already off work at the time. Petitioner then gave timely notice by completing a Dow Employees Occupational Illness Injury Report on July 11, 2012. On this form he listed the date of injury as June 7, 2012.

In repetitive trauma cases, the employee must show that the injury is work-related and not the result of a normal degenerative aging process. *Three "D" Discount Store,* citing *Peoria Bellwood*, 115 Ill. 2d at 530. Petitioner need only prove that some act or phase of employment was a causative factor of the resulting injury. *Id.*, citing *County of Cook v. Indus. Comm'n*, 69 Ill. 2d 10 (1977).

Contrary to the majority, I believe Petitioner more than met his burden of proving that his condition of ill-being, that being a worsening of his pre-existing lumbar spine condition, was causally-related to repetitive trauma. While Petitioner did not repeat the same task every day, there can be no dispute that the nature of Petitioner's job duties were physically demanding on a daily basis over many years.

Respondent's witnesses overall agreed with Petitioner's description of the tasks he was required to perform. The testimony of Mr. Burns is notable. He confirmed that physical force using torque with either a pipe or a bolt was used 65% of the time, that activities involving kneeling and crouching was about 45% of the time, and that the cart regularly weighed about 100 pounds, but could weigh upwards of 500 pounds 10% of the time.

Dr. Ahuja credibly testified that Petitioner's work duties accelerated his underlying pathology beyond what would reasonably be expected, contributing to the need for the three-level fusion. Dr. Ahuja was aware that Petitioner had to perform multiple lifting, twisting movements, including lifting and crouching in small spaces. This is activity Mr. Burns noted to be performed 45% of the time.

Whereas, the testimony of Dr. Itkin was not convincing. In his first report of March 27, 2013, he diagnosed extensive degenerative lumbosacral disease spanning most of Petitioner's life. Notably, Petitioner was only 45 years old. Despite having a detailed description from Petitioner as to his job duties, Dr. Itkin could not make a causal connection opinion at that time. Dr. Itkin was provided additional records, but again on November 18, 2013, he was still unable to provide an opinion as to whether Petitioner's job duties aggravated his pre-existing lumbar condition. Dr. Itkin ultimately opined that Petitioner's job duties were not classified as repetitive such that would warrant a causal relation to Petitioner's back. He stated that Petitioner was involved in a variety of different tasks each day that did not amount to repetitive in nature.

The Arbitrator correctly found that there is no additional requirement that for a claim of repetitive trauma, Petitioner needs to prove that his work duties involved the same repetitive task, over and over, day after day. Compensation may be allowed where the employee's existing physical structure, whatever it may be, gives way under the stress of his usual labor and he is suddenly disabled. *International Harvester Co. v. Ill. Workers' Comp. Comm'n*, 56 Ill. 2d 84, 90 (1973).

As Dr. Itkin's opinion is predicated on a misunderstanding of the nature of "repetitive trauma" injuries, it cannot be relied upon. It was Petitioner's usual heavy labor, often in small spaces, that led to an acceleration of his preexisting lumbar condition beyond its normal progression.

Finally, the Petitioner reached MMI and became permanently and totally disabled as of the FCE on February 27, 2015. He should have been awarded permanent total disability benefits beginning this date, not maintenance benefits.

For the forgoing reasons, I would affirm the Decision of the Arbitrator, albeit with a modification as to the award of maintenance and permanent total disability.

o: 10/19/2021 /s/ *Thomas J. Tyrrell*
TJT/ahs Thomas J. Tyrrell
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BORST, BRIAN
Employee/Petitioner

Case# **12WC025629**

DOW CHEMICAL
Employer/Respondent

On 5/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4239 LAW OFFICES OF JOHN S ELIASIK
180 N LASALLE ST
SUITE 3700
CHICAGO, IL 60601

4866 KNELL O'CONNOR & DANIELWICZ
BRIAN H DRISCOLL
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

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

Brian Borst
Employee/Petitioner

v.

Dow Chemical
Employer/Respondent

Case # **2012** WC **25629**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **10/4/16 and 7/12/17,** with proofs being closed on January 16, 2020, before **Arbitrator Charles M. Watts**. 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 **04/27/12, 06/07/12 and 07/10/12,**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,374.05**; the average weekly wage was $**949.50**.

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

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

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

ORDER

Credits

Respondent shall be given a credit of $**421,043.19** 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 be given credit for $**93,055.68** for short-term and long-term disability benefits paid under Section 8(j) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**633.00**/week for **148** weeks, commencing **4/27/15** through **2/27/15**, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $**633.00**/week for **123 4/7** weeks, commencing **2/28/15** through **7/12/17**, as provided in Section 8(a) of the Act.

Permanent Total Disability

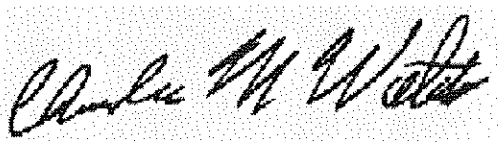
Respondent shall pay Petitioner permanent and total disability benefits of $**633.00**/week for life, commencing **2/27/15**, as provided in Section 8(f) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $**182,728.02**, according to the fee schedule, as provided in Section 8(a) 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

May 26, 2020
Date

MAY 28 2020

RIDER TO ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

Brian Borst v. Dow Chemical, 12 WC 25629

MEMORANDUM OF DECISION OF ARBITRATOR

This matter proceeded to trial before Arbitrator Falcioni on October 14, 2016 where testimony was obtained. On July 12, 2017 the parties appeared before Arbitrator Falcioni for submission of demonstrative and documentary evidence. (Testimony of Evidence on Arbitration, hereinafter, "T." 4-a). Subsequently, and before rendering a trial decision, Arbitrator Falcioni passed away. Also, the box of trial exhibits previously admitted went missing. The parties attempted to re-create the evidence and additional exhibits to address all issues in dispute. Therefore, proofs were re-opened and closed on January 16, 2020 before Arbitrator Watts to ensure accuracy of the record.

In this claim, Petitioner alleges worsening of a pre-existing spine condition pursuant to a theory of repetitive trauma. T, 6. Petitioner's Application alleges three dates of accident ("manifestation" dates): April 27, 2012; June 7, 2012; July 10, 2012. T. 11.

The Arbitrator renders findings on the following disputed issues:

(C) Did an accident occur that arose out of and in the course and scope of employment by Respondent?

(D) What was the date of the accident?

(F) Is Petitioner's present condition of ill-being causally related to the injury;

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

(K) What amount of compensation is due for temporary total disability and/or maintenance;

(M) Should penalties or fees be imposed upon Respondent?

(N) Is Respondent due any credit?

FINDINGS OF FACT

~~At the time of the claimed injury, Petitioner Brian Borst worked for Respondent Dow~~ Chemical for 18 years as a maintenance technician. (Tr 13-14). He worked at Respondent's chemical plant in Ringwood, Illinois. (Tr.14). The plant is a multi-building campus spanning 3-4 acres with about 20 separate buildings. (Tr.14). He worked in all of them. (Tr.14).

Petitioner testified that his workday started with a meeting where the day's projects would be assigned to the maintenance technicians. The technicians would then gather the

necessary tools and equipment, place them in a bucket or on a cart, and head out to whatever building required the work. The projects varied day to day.

Petitioner described some of the projects and their physical requirements. One task described by Petitioner involved repair of reactors. (Tr. 18). Reactors are large mixing vats, varying in size, with a shaft in the middle and mixing blades coming off the shaft. One of the duties of the Maintenance techs is to service and repair the shaft, blades and walls of the reactors. This involved putting on a rain suit, sometimes with a SCUBA breathing apparatus and 60 lb. oxygen tank, other times with an air hose coming in from outside the reactor, and then physically entering the reactor to perform the repairs.

Entering the reactors involved either climbing through the top where the reactor was open, or else climbing through an 18 to 24-inch hole in the side of reactor and down a latter on the inside to reach the bottom. The maintenance techs would then have to kneel, bend over or lay down on the bottom of the reactor to get underneath the blades. (Tr. 20-21). Petitioner testified that he would perform these reactor repairs once or twice a month, for one to two days at a time. (Tr. 19-20).

Petitioner also testified that he was required to bring tools and equipment out to the job sites. For smaller jobs, he was able to carry these in a bucket. For larger jobs, he used a cart and wheeled the carts on ramps to the job sites. The tools and equipment could weigh anywhere from 4 to 500 lbs. Sometime he would get help with pushing heavier carts up the ramps, and sometime a forklift was required to get the cart up to a job site. Petitioner estimated that about 40% of the time he had to push the tools and equipment on a cart by himself out to the job site. The heavier carts, in the 300 – 500 lbs. range were only required twice a month on average, with the average cart weighing 100 lbs. (Tr.23-24).

The work on the reactors consisted of either repairing blades, shafts and wall inside the reactor, or else removing motors, pumps, pipes and various other equipment from the outside of the reactors. This involved using hand-tools to loosen and remove bolts and equipment. Often, the reactor equipment would have to be loaded onto the cart and taken back to the shop for repair. The pumps and motors weighed between 50 to 250 lbs. and were on the outside of the reactor. (Tr.24-26). Petitioner performed pump and motor repair work on average once a week. (Tr.26).

The reactor mixing blades weighed from 10 to 200 lbs. and would either have to be removed and taken out of the reactor by rope or chain for repair, or the bolts would have to be torqued with hand-tools inside the reactor. (Tr.27). Petitioner removed and repaired shafts once every 6 months. (Tr.28).

The maintenance techs also lubricated the reactors, which involved bringing 5-gallon drums of oil out to the reactors, changing the oil, and then bringing the used oil back to be disposed of. Petitioner did this about once a week.

The work was all done with hand-tools, because power tools or pneumatic tolls presented an explosion hazard at the reactors. (Tr.28-29).

Petitioner also did work in the machine shop. When equipment required repair, Petitioner would bring the equipment back to the machine shop, where he did welding and repair

work on the shafts, blades, motors and pumps. (Tr.29-31). Equipment was manually loaded from the cart onto a worktable. Petitioner did all the repair work on the worktable, which was slightly lower than waist level and required bending at the waist. Respondent entered a photograph into evidence, which shows a maintenance tech performing repair work at a worktable. (RX5 A)

Petitioner prepared a summary of his job duties, which he sent to Dr. Arvind Ahuja. (PX13). He could not recall when he prepared and sent this job description, but it was after he filed his Application for Adjustment of Claim.

Petitioner estimated that 75% of all work orders involved bending at the waist, and 70% involved some kind of lifting. (Tr.31). He classified his work as involving heavy physical demand. (Tr.33-34).

Respondent presented three of its employees as witnesses via deposition. The bulk of their testimony concerned Petitioner's work duties.

Respondent presented witness, Gerard Burns, an employee of Dow, at hearing for testimony about the nature of Petitioner's job duties. Burns worked at Dow for 23 years. T. 121. In and around 2011-2012, Burns worked for Dow as an apprentice electrician. T. 122. In that capacity, he performed maintenance work on all equipment in the plant including electrical and mechanical, but his focus was on electrical. T. 122. In June 2012, Burns changed to maintenance activity coordinator. T. 122. In that capacity, Burns did less field work and was more involved with passing out work orders to mechanics and electricians, one of which was the Petitioner. T. 126-127. According to Burns, the nature of work orders has not changed since June 2012. T. 129. Burns worked with the Petitioner in 2011 and 2012 approximately 25-30% of the time, usually when working with pipes or seal replacements. T. 123-124. During that time, he witnessed Petitioner using wrenches, changing gear boxes or motors, changing piping out, and running to help hand tools, etc. T. 124.

Burns examined the job description prepared by Petitioner and agreed with most of the details of the document. T. 131-132. However, Burns testified that the description left out some required job duties. T. 131-132. Burns confirmed however, that Petitioner was engaged in a variety of different duties. T. 124-125, 140. He clarified that there was no one task or physical activity that a maintenance mechanic would perform over and over and over. T. 139-140. The only activity he would categorize as "repetitive" sitting at a desk closing work orders and working on computer. T. 141. According to Burns, the day to day activity of a maintenance mechanic has remained the same but for the addition of more computer-based work. T. 131-132.

Burns confirmed also that the table seen in RX5 was instituted in 2011 and aided in lifting things to avoid bending and for ergonomic reasons. T. 134-135. However, Burns admitted that in some instances hand tools had to be used over power tools. T. 145. And, he confirmed that on occasion Petitioner had to get into some tight spaces to work in kettles. T. 146.

Burns testified that Petitioner's work duties ranged from light to heavy in physical demand. T. 132-133. Medium to light work included: inspections of kettles, checking oil levels and seal fluid levels, checking the general condition of the machine looking for leaks. T. 133. Medium demand work included: pump re-builds. T. 133. Light work constituted approximately 30% of the tasks, medium work constituted somewhere between 65-75% of the tasks, and heavy

work constituted 15% of the tasks. T. 149. According to Burns, physical force using torque with either a pipe or a bolt was used 65% of the time. T. 149. Activities involving kneeling and crouching up 2011 was about 45% of the time. T. 149-150. Burns also confirmed use of the cart to move tools to the jobsite. T. 150-151. He testified that the carts can vary from light up to a few hundred pounds. T. 151. In his opinion, the carts would average around 100 pounds and only 10% of the time be upwards of 500 pounds. T. 151-152.

Witness, Richard Oldland, testified on behalf of the Respondent via deposition on November 15, 2016. RX 2. Oldland began working for Dow Chemical on January 10, 2005. RX 2, p. 6. He came to the Ringwood location in March 2012. While at Ringwood, Oldland worked as operations leader for two production areas and a site maintenance leader. RX 2, p. 9. While at Ringwood, Oldland was responsible for the entire maintenance department and therefore had first-hand knowledge of the maintenance technician job duties. RX 2, p. 10-11.

Mr. Oldland examined the Dow job description in connection with his testimony. RX 2, p. 12-13. He testified that one piece missing from the job description was the time a technician spent in the maintenance shop standing at a bench putting parts in and following diagrams. RX 2, p. 12.

Mr. Oldland also reviewed the job description prepared by the Petitioner and provided comment. RX 2, p. 13. In his opinion, there were two errors with the Petitioner's job description. RX 2, p. 13. First, a lot of the weights were not reasonable. RX 2, p. 13. He explained why a 400 – 500-pound cart could not be pushed by one person around the campus based on the design of ramps at the site. RX 2, p. 13-14. On cross examination, Mr. Oldland quantified that it was more likely for the cart to weigh between 20-150 pounds. RX 2, p. 35. Second, Mr. Oldland questioned the duration of various activities claimed by the Petitioner. RX 2, p. 14. Specifically, he testified that it was not accurate that any project or work would be performed for a consistent period of 8 hours per day based on necessary breaks and time for returning tools. RX 2, p. 14. Rather, according to Mr. Oldland, the maintenance technician was more likely to work only about 6 hours per day on actual maintenance activities. RX 2, p. 16. This estimate took into consideration the fact a technician might have to go and obtain additional tools in the middle of a job and had to close out the work job upon completion. RX 2, p. 17-18.

Mr. Oldland testified that the daily expectations of the maintenance technician were unpredictable and different. RX 2, p. 19. By this, he clarified that only 50 percent of the work in 2012 was anticipated, with the remaining jobs occurring as things broke down or needed attention at the plant. RX 2, p. 20. Therefore, the job duties of a maintenance technician changed daily. RX 2, p. 20. According to Oldland, no maintenance technician would perform the same job duty, same task, same job assignment over and over each day. RX 2, p. 20.

Respondent's witness, Lisa Cashbaugh-Sanchez testified via deposition on November 23, 2016. RX 3. Ms. Cashbaugh-Sanchez testified that she was an employee of Dow Chemical and previously worked at the Ringwood location from November 2009 - February 2012. RX 3, p. 5-6. At the Ringwood facility, Ms. Cashbaugh-Sanchez was an operations leader in charge of the maintenance department and process areas. RX 3, p. 6. In that capacity, she supervised the Petitioner during her entire tenure at Ringwood. RX 3, p. 7. As part of her role as operations leader, Ms. Cashbaugh-Sanchez would observe Petitioner's job duties approximately once a week. RX 7, p, 7-8. She was familiar with his job duties and abilities as she would assist weekly

with assigning various maintenance tasks and ensuring all necessary maintenance jobs were staffed. RX 7, p. 8-9. In fact, Cashbaugh-Sanchez conducted two performance reviews of Petitioner during her tenure as his supervisor. RX 3., p. 9-10. In general, Petitioner would be assigned different tasks to complete each day. RX 3, p. 36. Further, of the physical activities he performed ranged from light to heavy in nature. RX 3, p. 54. Most of Petitioner's job duties would be performed in the maintenance shop ranging in the light to medium category. RX 3, p. 55. When Petitioner worked around in the plant it might be more in the medium-heavy category. RX 3, p. 55.

Cashbaugh-Sanchez examined various job descriptions and provided testimony on the validity of each. RX 3, p. 10-14. The first discussed was the job description prepared by Dow. RX 3, p. 10-11. According to Cashbaugh-Sanchez, while the job tasks listed in the description are accurate duties, they represent activities that one would conduct over a year period and not in one day. RX 3, p. 12. In addition, Ms. Cashbaugh-Sanchez questioned that Petitioner would have to lift up to 500 pounds manually and use up to 500 pounds of torque. RX 3, p. 12. In her opinion, these activities would be very rare if at all. RX 3, p. 12-13. Further, Cashbaugh-Sanchez reiterated that pushing a 400 or 500-pound cart of tools would be a rare instance. RX 3, p. 15. Rather, on a daily basis the tools on the cart would fit inside a 5-gallon drum. RX3, p. 15. Similarly, as to the additional tasks represented in Petitioner's job description, Ms. Cashbaugh-Sanchez discussed that the tasks represented what he might do over a year and represented extreme values for purposes of weight, rather than activities he would consistently do on a day by day basis. RX 3, p. 15. According to Ms. Cashbaugh-Sanchez, there were also a number of tasks not addressed in Petitioner's job description that would take time throughout the day, such as trouble shooting, attending meetings, safety procedures, breaks, obtaining permits to work in areas, paperwork and clean up activities. RX 3, p. 20-23. Further, Ms. Cashbaugh-Sanchez confirmed that from a practical perspective, the Petitioner technically worked an 8-hour shift but would not be performing physical tasks the whole time after the necessary procedural administrative tasks and daily breaks are considered. RX 3, p. 21-22.

Ms. Cashbaugh-Sanchez further testified that when Dow took over the plant in April 2009, additional safety measures were put in place in order to address safety at the plant. RX 3, p. 32-33. For instance, no one was expected to lift over 50 pounds individually. RX 3, p. 33.

As an operations leader, Ms. Cashbaugh-Sanchez also provided testimony about accident reporting. RX 3, p. 34-35. All work injuries were expected to be reported immediately by the injured person or anyone that was made aware of a work-related injury. RX 3, p. 34. Ms. Cashbaugh-Sanchez testified she was never given notice of a work injury sustained by Petitioner. RX 3, p. 35.

Petitioner testified his back problems dated back to 2003. T. 34. On cross examination, Petitioner admitted he underwent a lumbar microdiscectomy in 1995. T. 68. On cross exam, Petitioner also admitted he did not know exactly when the back problems started. T.68-69. In 2003, Petitioner had back issues and underwent an MRI. T. 34. Petitioner did not file a worker's compensation claim at that time. T. 34. Petitioner's back pain continued and worsened through 2005. T. 35, 69. In 2003, while employed with Respondent, Petitioner developed lower back pain. (Tr.34). He did not make a workers' compensation claim at that time. (Tr.34). He came under the care and treatment of Dr. Arvid Ahuja, a neurosurgeon. (Tr.35, PX1-3). Dr. Ahuja eventually performed an L4-5 lumbar fusion on February 1, 2005. (Tr.35, PX1-3). Petitioner

was released to return to work without restriction on July 10, 2005. (Tr.36, PX1-3). He returned to his full work duties as a maintenance tech. (Tr.36-37, PX1-3).

Petitioner continued to perform his work without restrictions. Petitioner testified that eventually, sometime around October of 2010, his lower back pain returned. On May 10, 2011, Petitioner began a relationship with Dr. Fehling as his primary care physician. T. 71. At that visit, Petitioner testified he reported back issues and his legs giving out to Dr. Fehling. T. 71. Petitioner claims these incidents only occurred at work and he had no issues at home. T. 71-72. The records from Dr. Michael Fehling, his primary Care provider at Aurora Healthcare, show that he saw Dr. Fehling and complained of recurrent low back pain on May 10, 2011, but that he was doing well, and he made no mention of work. (RX19).

On May 26, 2011 Petitioner again reported his legs wanting to give out to Dr. Fehling. T.72.

Petitioner was required to have a yearly physical while working at Dow. T. 39. One such physical exam took place at the plant by Dr. Jablowski on October 26, 2011. T.69-70. On direct exam, Petitioner could not recall if he told the physicians about any back pain. T. 40.

In January 2012, Petitioner was formally referred by Dr. Fehling back to Dr. Ahuja for a neurosurgical consultation. T. 41. The visit with Dr. Ahuja took place on January 20, 2012. T. 37. Petitioner testified he told Dr. Ahuja that his worsening back pain was affecting his work. T. 38. Petitioner also advised Dr. Ahuja that the back pain had been going on for 6-9 months leading up to the visit. T. 38. More specifically, Petitioner noticed low back pain when kneeling, pushing a cart, and lifting things off the floor. T. 38-39. On cross examination, Petitioner confirmed his leg symptoms exceeded his back pain and the symptoms were worse with sitting, coughing and sneezing. T. 73. Dr. Ahuja recommended an MRI and CT of the lumbar spine. T. 41-42. Dr. Ahuja ordered an epidural steroid injection and medications. T. 42. Petitioner admitted he did not discuss that the back problems might be related to Petitioner's work. T. 73. Subsequently, Petitioner followed up with Dr. Ahuja on January 30, 2012. T. 72-73. Petitioner testified he told Dr. Ahuja he was feeling worse at that time but again, did not relate the condition to his work. T. 75. Petitioner also saw Dr. Ahuja on February 10, 2012. T. 43. At that time, Dow sent a job description to Dr. Ahuja to confirm Petitioner's work abilities for his disability. T. 43. According to Dr. Ahuja, the Petitioner did not require any physical restrictions. T. 43. Another follow-up took place with Dr. Ahuja on March 16, 2012. T. 75-76. By that visit, Petitioner had undergone two epidural steroid injections and continued to work in a full duty capacity. T. 76. Again, no mention was made by Petitioner that the condition could have been work related. T. 76-77. Petitioner subsequently continued to treat with Dr. Ahuja including additional injections through April 6, 2012. T. 43-33. Petitioner testified during that period he still had weakness and pain and informed Dr. Ahuja of the worsening symptoms. T. 45.

Petitioner worked full capacity with Dow until April 26, 2012. T. 44. As of April 27, 2012, Petitioner was taken off work by Dr. Ahuja. T. 44. Petitioner confirmed at hearing he has not returned to work at Dow since that time. T. 44. Petitioner was asked on cross examination if he knew why his Application for Adjustment of Claim indicated an accident date of April 27, 2012 and he answered, "no." T. 107.

On cross examination, Petitioner testified that around the time he was taken off work in late April 2012, he did not talk to his supervisor, Richard Oldland, about his back condition being work-related. T. 110. Petitioner testified he did not tell anyone at work about the condition being work-related before he discussed it with Dr. Ahuja. T. 116-118.

Oldland testified about a conversation he had with Petitioner just after Petitioner's last day of work, on April 27, 2012. (p.21). According to Oldland, Petitioner volunteered that his back problems were "similar to a surgery that he had 8, 10, 12 year prior and it was a natural progression of that. . ." (p.21) and that "he always knew that he would need to have another surgery. This was a natural progression of that ..." (p.22). Oldland also testified that Petitioner volunteered to him that his condition was not work related, even without being asked. (p.30-31). Oldland testified that just prior to his arrival at Ringwood to supervise the maintenance department, there were issues with workers compensation claims, and that he was specifically made aware of these issues, and to be careful to enforce Respondent's policies regarding work injuries. (p.21-22. p.27-28)

Oldland testified concerning a supervisor's statement he prepared on July 17, 2012, and that he reviewed prior to giving his testimony. (RX 2, p.29, RX8). He was asked to prepare the report by his direct supervisor. At the time he prepared the report, Oldland was aware that Petitioner was making a workers compensation claim related to his lower back, and he was specifically asked to give his opinion as to whether Petitioner's condition was work-related. (p.40). Oldland stated in the report that he did not think that Petitioner's condition was work-related, based on his conversation with Petitioner. (p.41).

Oldland did not review any medical documentation, did not speak to Petitioner's medical providers and did not ask Petitioner why he made a claim that his condition was work-related. (p.42-44). Oldland does not have medical training and admitted that his opinion is his own layman's opinion, not a medical opinion. (p.42). Oldland admitted that he discussed Petitioner's claim with representatives from Respondent on multiple occasions, and also with Respondent's counsel on multiple occasions, prior to giving his testimony. (p.43).

Prior to giving his testimony, Oldland was asked by Respondent to review specific documents, including the job descriptions. He was also asked by counsel for Respondent whether he thought Petitioner's job duties were "repetitive" in nature, meaning the same task over and over, every day. (p.45). Oldland was aware that Petitioner was claiming that his regular job duties aggravated his pre-existing lumbar condition, and not because he had to perform the same tasks repeatedly.

Petitioner continued to follow up with Dr. Ahuja T. 45-46. On May 11, 2012, Petitioner reported to Dr. Ahuja constant leg pain which was worse with sitting. T. 77-78. Again, no discussion occurred about the back being work related. T. 79.

On May 22, 2012, Dr. Ahuja discussed an additional surgery consisting of L3-4 and L5-S1 fusion with evaluation of the prior fusion at L4-5. T. 46. On May 30, 2012, Petitioner returned to Dr. Fehling for pre-operative clearance for back surgery. T. 79. No discussion occurred between Petitioner and Dr. Fehling that the back condition was work-related. T. 79-80

Petitioner returned to Dr. Ahuja on June 7, 2012. T. 47-48. At that visit, Petitioner reported to Dr. Ahuja that his pain was getting progressively worse, even though he was not

working at that time. T. 80-81. Petitioner testified multiple times that it was at this visit when a discussion occurred with Dr. Ahuja as to whether the back pain was due to work. T. 47-48, 80-82. Petitioner testified that he also discussed the potential of his back being work-related with his wife at that time as well. T. 48. Dr. Ahuja's medical record does not indicate any discussion about a relation to Petitioner's work. RX 29.

A letter was prepared by Dr. Ahuja on December 4, 2012 at Petitioner's request. PX 1. In that letter it stated Petitioner had low back pain and lumbar radicular symptoms which were aggravated by Petitioner's "current work situation." PX1. Dr. Ahuja stated, "The date of his work situation is related to June 6, 2012 because that was the day in our office when we discussed that he has this situation, and prior to this, he had not recognized that his ongoing stresses at Dow Chemical likely increased his lumbar disk disease beyond what would be reasonably expected." PX 1. According to Dr. Ahuja, the long-term work as a maintenance technician is a contributory cause in the progression of this disease. PX 1.

At hearing, Petitioner was asked why the date June 7, 2012 was listed on his Application for Adjustment of Claim. T. 104. In response, he answered, "I don't recollect." T. 104. Petitioner then confirmed he was claiming a repetitive trauma injury on that date, more specifically as a result of "doing my job at work, heavy lifting, pushing, stooping, bending." T. 105. Petitioner was unsure of when he informed the employer of his alleged June 7, 2012 date of injury but stated he informed a clerk in the office. T. 105-106.

On June 11, 2012, Petitioner underwent an additional surgery consisting of redo right and left L4 and L5 hemilaminectomies, fusion at L3-4 and L5-S1. T. 47, PX1. The first post-surgical visit occurred on July 10, 2012. T. 48. According to the testimony of Dr. Ahuja, this visit on July 10, 2012 is when a discussion was had with Petitioner about whether the condition was work-related. T. 48-49. By contrast, Petitioner testified that this was not the visit when the causal relation to work was discussed but rather believed that discussion occurred in June 2012. T. 48-49. Petitioner also admits he was on medication after surgery did not remember things from that time, including a referral to Dr. Alloi for a further evaluation of causation and work status. T. 83-84.

At hearing Petitioner was asked what occurred on July 10, 2012 to trigger that as a date of accident on his Application for Adjustment of Claim. T. 106-107. He stated, "I have no idea." T. 107. But he did confirm that he was off work at that time. T. 107.

On July 11, 2012, Petitioner completed a Dow Employees Occupational Illness Injury Report. T. 107, RX 6. He listed the date of injury as June 7, 2012. RX 6. For the description of injury, he listed that he was having back problems related to the job, being a repetitive injury. RX 6. When asked at hearing what this meant, he explained heavy lifting, excessive lifting, bending, crawling, stooping and crouching. T. 109-110. The report states the incident was reported to his supervisor, Richard Oldland on July 11, 2012. RX6.

Petitioner filed this Application for Adjustment of Claim shortly thereafter on July 26, 2012. In 2015, Petitioner filed subsequent Applications, alleging alternative "manifestation dates". After a Motion to Strike by Respondent, per agreement of the parties, Petitioner withdrew the subsequent Applications, and instead filed an amended Application. The amended Application indicates the original accident date of June 7, 2012, but also included a date of injury of April 27, 2012, the first date off work, and July 10, 2012, the date that Dr. Ahuja testified at

his deposition that he had the conversation with Petitioner regarding his work duties being a causative factor in his back condition.

On September 5, 2012, Petitioner completed an Aurora Healthcare Patient's Statement of Injury / Illness. T. 111, RX 7. Petitioner could not recall why he completed this form, but confirmed it was his handwriting on the document. T. 111. The injury is listed as lifting and kneeling and no date was provided for the injury date. T. 111-112. Petitioner testified he had similar symptoms to this in the past. T. 112. Petitioner also testified he told his employer of this injury on June 4, 2012. T. 112-113.

On September 21, 2012, Petitioner was involved in a car accident. T. 50. Petitioner saw Dr. Ahuja to follow up and ensure things were ok. T. 50-51. Petitioner testified Dr. Ahuja ordered an x-ray and ultimately said everything looked good. T. 51. At that time, Petitioner was released to return to work with restrictions. T. 52-53. However, according to Petitioner, he could not return to work unless he was at full duty capacity, therefore, he remained off work. T. 52.

Petitioner testified that around December 2012 his condition began to worsen, noting that things were going backwards. T. 52-53, 114-116. Subsequently, he underwent an additional bout of tests including CT, MRI and EMG as well as injections. T. 53. According to Petitioner, he was doing worse after the injections. T. 54. On cross examination, Petitioner confirmed that he was not working during this period after the MVA when his condition was worsening. T. 116.

A Functional Capacity Evaluation (FCE) took place on October 23, 2012. T. 55. The results did not allow Petitioner to return to work for Dow. T. 56. Petitioner testified he continued to treat with Dr. Ahuja and his primary care physician and still felt horrible. T. 56. Additional testing ensued including a bone scan and additional MRI. T. 57. On July 19, 2014, Petitioner testified he discussed an additional surgery and use of a spinal cord stimulator with Dr. Ahuja. T. 57-58. Petitioner believed the bone scan showed failed hardware and that the spinal cord stimulator was an option if another surgery failed. T. 58-59.

In fact, on August 27, 2014, Petitioner underwent his third surgery by Dr. Ahuja. T. 59. After surgery, Petitioner testified that he experienced ongoing weakness and pain in his legs and also could not feel the skin on his legs. T. 59-60. Petitioner testified he still had both lumbar pain and bilateral leg issues subsequent to that third surgery. T. 60. Therefore, Petitioner continued to follow up with Dr. Ahuja who monitored the condition which remained unchanged since the surgery. T. 61.

Later, on February 17, 2015, Petitioner underwent another functional capacity evaluation at the request of Liberty Mutual, the long-term disability provider. T. 61-62. The Petitioner confirmed this test was for purposes of long-term disability and not workers compensation. T. 113-114. The date of accident on the report states 13 years ago first fusion several since. T. 113-114. The Petitioner was deemed completely disabled as a result of that test. T. 62.

Petitioner testified that today he uses a TENS unit every week, takes pain medication and performs home exercises. T. 63-65. Petitioner testified he would use a spinal cord stimulator if his condition were to worsen. T. 63-64. At the time of trial, Petitioner continued to treat with Drs. Fehling and Ahuja. T. 65.

Testimony of Dr. Arvind Ahuja:

Dr. Ahuja is a neurosurgeon located in Milwaukee, Wisconsin. PX 18, p. 5. Ahuja was board certified in 1998 or 1999 PX 18, p, 5. He works in a private neurosurgical practice in Milwaukee since 1995. PX 18, p. 6. Dr. Ahuja testified his initial treatment of Mr. Borst was on January 7, 2005 on referral of Dr. Debra Blue. PX 18, p. 8. At that time, Petitioner complained of significant right leg pain. PX 18, p. 8. Dr. Ahuja noted disk herniations on his imaging. PX 18, p. 8). Dr. Ahuja also noted a prior microdiscectomy ten years prior with another physician. PX 18, p. 9. Dr. Ahuja subsequently performed an L4-5 fusion on the Petitioner on February 1, 2005. PX 18, p. 9. Dr. Ahuja testified the surgery revealed the disk herniation and that the pressure was relieved with the procedure. PX. 18, p. 9. Dr. Ahuja testified that Petitioner had a good result from the procedure. PX 18, p. 11. Subsequent to the surgery, Petitioner returned to work in a limited capacity on June 1, 2005 and full duty capacity on June 25, 2005. PX. 18, p. 11. The last visit with Dr. Ahuja was August 25, 2005. PX 18, p. 12.

Dr. Ahuja next saw the Petitioner seven years later, on January 20, 2012. PX 18., p. 13. At that time Petitioner was referred by Dr. Fehling for recurrent significant back pain and leg pain. PX 18, p. 13. After additional diagnostics, Dr. Ahuja diagnosed disease at L3-4 with foraminal stenosis and residual disease at L4-5. PX 18, p. 14. A three-level lumbar fusion was performed on June 11, 2012. PX 18, p. 21. Dr. Ahuja next saw him on July 10, 2012 after the surgery. PX 18, p. 22. At that visit, Petitioner's work was discussed and that he needed to be able to lift greater than 50 pounds and crawl into small spaces. PX 18, p. 22. When Petitioner was next seen by Dr. Ahuja on November 1, 2012, he had been in a car accident on September 21, 2012. PX 18, p. 23. Petitioner reported pain at a five out of ten at that time. PX 18, p. 23. When Petitioner was seen by Dr. Ahuja on December 4, 2012, his condition was deteriorating. PX 18, p. 24. Dr. Ahuja testified that Petitioner claimed he did not believe he was severely injured in the motor vehicle accident, however, since that time, he had been deteriorating and going backwards. PX 18, p. 24. After MRI and CT scans, Petitioner returned to Dr. Ahuja on December 18, 2012. PX 18, p, 29. Dr. Ahuja confirmed there was evidence of both acute and chronic changes on the diagnostics. PX 18, p. 27-28.

Dr. Ahuja prepared at the request of Petitioner's counsel, a narrative report dated December 4, 2012. PX 18, p. 24, PX 1. In that report, Dr. Ahuja stated that there was increased stress to Petitioner's body via the work he did at Dow Chemical that increased his lumbar disk disease beyond what would reasonably be expected. PX 18, p. 25. Dr. Ahuja also opined that Petitioner's job duties would be a component of continued progression of the disease for above and below the level of the fusion that would be a contributing factor to needing the recent three-level fusion. PX 18, p. 25. Dr. Ahuja's report causally related the condition to a date of June 6, 2012 stating that was the date Petitioner's work was discussed. PX. 18, 25.

Dr. Ahuja testified that as of the October 23, 2013 FCE, Petitioner was at a light duty status. PX 18, p. 34-35. By August 11, 2014, Dr. Ahuja recommended another surgery consisting of evaluation of the fusion and adding L2-3 fusion. PX 19, p. 39. The next procedure, consisting of a four-level fusion took place on August 27, 2014. PX 18, p. 41. After the surgery, Dr. Ahuja continued to examine the Petitioner. On February 17, 2015, another FCE was obtained. PX 18, p. 46. That exam found Petitioner capable of less than sedentary physical demand level due to the multiple lumbar fusions and subsequent issues with pain, balance and strength. PX 18, p. 47. According to Dr. Ahuja, at that point Petitioner had reached a point of

maximum medical improvement. PX 18, p. 48. The only additional medical treatment recommended by Dr. Ahuja at that time was a potential for a spinal cord stimulator and medication. PX 18, p. 48-49. Dr. Ahuja opined the Petitioner's work restrictions were permanent at that point in time. PX 18, p. 49.

Dr. Ahuja examined a job description provided by the employer as well as one prepared by the Petitioner. Dr. Ahuja was asked whether the Petitioner's condition as of his last visit on February 27, 2015, the Petitioner's condition was causally in any way to his work duties. PX 18, p. 50. Dr. Ahuja testified that he could not opine that Petitioner's disk herniation was causally related to an acute event. PX 18, p. 50. However, Dr Ahuja testified that chronic exposure and continued work contributed and is a component of the progression of his lumbar disease leading to three lumbar fusions. PX 18, p. 50-51. When asked for the basis for his opinion, Dr. Ahuja replied that when looking at the progression of his disease, he had the disk herniation, a fusion, did very well for a while, then the symptoms progressed further and faster and "that's what usually happens." PX 18, p. 54. He stated further, "I think looking at a job description, the work he's doing, those are the stresses that make – accelerate his underlying pathology." PX 18, p. 54.

On cross examination, Dr. Ahuja admitted that Petitioner suffered from a type of progressive degenerative lumbar spine disease that was present for many years. PX 18, p. 55. Dr. Ahuja confirmed he did not know what caused the need for the initial microdiscectomy in 1996. PX 18, p. 56. Also, Dr. Ahuja had not reviewed any medical records from this prior treatment in 1995. PX 18, p. 56. Dr. Ahuja also confirmed that the natural progression of the Petitioner's disease is something that gets worse with time. PX 18, p. 56-57. More specifically, there were no specific work activities that were mentioned causing a worsening of symptoms by the Petitioner to Dr. Ahuja. PX 18, p. 62. Dr. Ahuja also confirmed that through May 2012, no causation opinions were rendered with regard to Petitioner's work. PX 18, p. 66.

It was not until July 10, 2012 that Dr. Ahuja was asked about or considered whether Petitioner's condition was causally related to his work. PX 18, p. 72, 89.

In the September 5, 2012 report of injury, Petitioner listed his history of injury as "lifting, kneeling." PX 18, p. 79. Dr. Ahuja's impression of the culprit job duties involved getting into small areas and lifting. PX 18, p. 79. When asked specifically about his independent knowledge of Petitioner's job duties, Dr. Ahuja testified the job included "multiple lifting, twisting movements." PX 18, p. 91. And Dr. Ahuja confirmed that Petitioner's job involved a multitude of different tasks and jobs and none of which were performed repeatedly over and over. PX 18, p. 91, 94. When asked specifically what job duties he would hold responsible as a causative activity, he stated, "multiple 55 pounds lifting, going into small areas. That is it." PX 18, p, 103. On re-direct examination, Dr. Ahuja specified that the activities that were capable of exacerbating the underlying degenerative condition were: lifting and crouching into cramped spaces. PX 18, p. 105.

Testimony Dr. Arthur Itkin

Dr. Itkin provided testimony via deposition on October 25, 2015. RX 1. Dr. Itkin is board certified in neurology and is a fellow of the Academy of Electrodiagnostic Medicine. RX 1, p. 5. Throughout the course of the case, Dr. Itkin prepared six reports dated: March 27, 2013,

November 18, 2013, April 10, 2014, September 2, 2014, May 2, 2015, and July 7, 2015. RX 1, p. 12. Two physical examinations were conducted with four addendum reports.

The first exam took place on March 27, 2013. RX 1, p. 13-14. At that time, Dr. Itkin obtained a history from the Petitioner which included chronic lower back problems since the mid-1990s. RX 1, p. 17-18. In 1997 the Petitioner had some procedures. RX 1, p. 18. Subsequently, Petitioner had lower back pains radiating into the right leg. RX 1, p. 18. Petitioner had conservative care from 2000 – 2002 but in 2005, Petitioner had a fusion at L4-5. RX 1, p. 18. Subsequently, Petitioner was relatively stable until 2010 when he began to have right leg giving out and worsening pain in the back and radiating into the leg. RX 1, p. 18. As the pain progressed, Petitioner started treatment with his primary physician and subsequently returned to treatment with neurosurgeon, Dr. Ahuja who performed his prior surgery in 2005. RX 1, p. 18-19. The right leg continued to give out and Dr. Ahuja performed multi-level fusion in June 2012. RX 1, p. 19. Subsequently, Petitioner improved but still had significant low back pain. RX 1, p. 19. In fact, by the time Dr. Itkin performed his initial exam of the Petitioner, the pain was excruciating and Petitioner could not sit for more than five minutes. RX 1, p. 19.

At the March 27, 2013 exam, Dr. Itkin inquired about how the Petitioner was injured. RX 1, p. 20. In response, no specific date of injury was provided. RX 1, p, 20-21. Rather, Petitioner simply discussed his work duties. RX 1, p. 20-21. Therefore, Dr. Itkin also obtained a detailed description of the Petitioner's job duties directly from the Petitioner. RX 1, p. 20.

Dr. Itkin performed a physical exam at which time he believed he observed evidence of symptom magnification. RX 1, p. 25. Ultimately, Dr. Itkin diagnosed extensive degenerative lumbosacral disease spanning most of Petitioner's life. RX 1, p. 23. As to causation, Dr. Itkin felt he could not make an opinion at that initial visit without additional information to support the requested opinions. RX 1, p. 25. Based on the history, medical records, physical exam and interview with Petitioner, and Respondent's job duty evidence, Dr. Ithkin could not give an opinion one way or the other as to whether Petitioner's job duties aggravated his pre-existing lumbar condition. (RX1, p.27, 29). He further said that he would re-visit his opinion if he was given new information concerning Petitioner's job duties for Respondent. (RX1, p.27-28).

A second report was authored by Dr. Itkin on November 18, 2013 addressing review of additional records. RX 1, p. 30. No new opinions were provided in that report. RX 1, p. 31.

Dr. Itkin performed a second physical examination of the Petitioner on April 10, 2014. RX 1, p. 31. At that time, Petitioner informed Dr. Itkin that his symptoms had not changed and that his right leg was giving out more. RX 1, p. 32. Dr. Itkin believed he observed symptom magnification. RX 1, p. 33. Additional medical records were reviewed as well. RX 1, 32-33. Dr. Itkin noted that the Petitioner's condition was worsening while Petitioner was no longer working. RX 1, p. 33-34. Based on this continued progression, Dr. Itkin opined Petitioner's job duties were not causally related to his degenerative condition. RX 1, p. 34.

Following review of additional records, Dr. Itkin prepared a fourth report dated September 2, 2014. RX 1, p. 35. The records he reviewed included: 7/7/12 Dow Chemical Occupational Illness-Injury Report, the Aurora Health Care "Patient Statement of Injury" dated September 5, 2012, records from Dr. Ahuja dated August 25, 2005, records from Centegra health Systems, and records from Dr. Ahuja from 2012. RX 1, p. 35. Dr. Itkin opined that review of

these records further confirmed his causation opinions regarding the progressive lumbosacral disease. RX 1, p. 35. Dr. Itkin stated that there was nothing to support a causal relation between Petitioner's work and the progressive degenerative lumbar disease. RX 1, p. 36. Dr. Itkin confirmed that review of these records did not substantiate a particular accident date. RX 1, p. 36. Dr. Itkin opinend the progressive degenerative lumbosacral disease was biological. RX 1, p. 36-37

Dr. Itkin also commented again on the causation opinion of Dr. Ahuja noting a lack of any evidence to suggest Petitioner participated in repetitive work activities which would substantiate a causal opinion to his work. RX 1, p. 41. Dr. Itkin also commented on his review of the medical records from Petitioner's primary care physician noting that the records supported his conclusion of a progressive degenerative condition and not a causal relation to work activities. RX 1, p. 42-43. Dr. Itkin also testified, after reviewing a number of written, verbal, and video job descriptions, that Petitioner's job duties were not classified as repetitive such that would warrant a causal relation to Petitioner's back. RX 1, p. 45. Dr. Itkin stated that Petitioner was involved in a variety of different tasks each day that did not amount to repetitive in nature. RX 1, p. 45.

Another report was prepared by Dr. Itkin on May 2, 2015 after reviewing Dr. Ahuja's operative report from August 27, 2014. RX 1, p. 46. Dr. Itkin noted the Petitioner's ongoing significant pain after this surgery lasting through 2015. RX 1, p. 46. According to Dr. Itkin, the ongoing complaints and worsening of the condition after the additional surgery further confirmed his opinions that Petitioner suffered from failed back syndrome and the underlying process. RX 1, p. 46.

Dr. Itkin's last report is dated July 7, 2015. RX 1, p. 46. In conjunction with preparing that report, Dr. Itkin examined Petitioner's own written job description and the FCE from Australian Physical Therapy. RX 1, p. 48. Dr. Itkin reiterated his opinion that there was no evidence to suggest that Petitioner's work at Dow materially affected his progressive degenerative lumbosacral pathology. RX 1, p. 50.

On cross examination, Dr. Ithkin admitted that when he examined Petitioner, reviewed the records and prepared his initial report, he did not have an opinion either way whether Petitioner's job duties aggravated his lumbar spine condition. (p.64-65). When asked to explain, Dr. Ithikin said that he changed his opinion as a "clarification" after just "thinking about it further". (p.72-75).

FINDINGS OF LAW

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

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

63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board*, 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

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 testimony. 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). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980).

The Arbitrator decided this case only by reviewing the transcripts because the case was tried before Arbitrator Falcioni. Petitioner appeared via transcript review to testify consistent with the medical records and other witnesses in general. His testimony regarding dates and conversations was flawed by forgetfulness that the Arbitrator finds to be a product of a hazy memory. There are simply too many admissions that are not entirely favorable and his forgetfulness is non-selective. Simply put, there is no evidence of prevarication. The Arbitrator also finds Petitioner's testimony consistent with the medical records in terms of the extent of his pain. The Arbitrator notes that Respondent's IME witness Dr. Itkin believed that Petitioner exhibited symptom magnification on two occasions. Petitioner has had numerous surgeries and is restricted with sedentary activity and all agree he has failed back syndrome. Petitioner also has a history of working with pain and, having not filed for workers' compensation for prior back injuries, a history of forbearance. Petitioner is mostly credible.

Respondent's witness, Richard Oldland, comes across as too eager to come up with a perfect narrative to support Respondent's argument that Petitioner's spine condition is entirely a degenerative process not impacted by wielding three foot long wrenches or crawling into chemical mixing tanks to replace 200 pound mixing blades with only hand tools. Oldland's account of Petitioner volunteering that his upcoming surgery was in no way related to work duties, while not relevant for causation as Oldland has no medical background, is farfetched. Matching this account with the fact that Oldland had been brought to this particular facility from out of state to police a perceived workers' compensation claim problem makes his testimony less believable.

Respondent's other two fact witnesses, Gerald Burns and Lisa Cashbaugh-Sanchez, mostly testified consistent with Petitioner as to the nature of his work duties. They are mostly credible upon review of all transcripts although the Arbitrator does not find any relevance to the

testimony of Ms. Cashbaugh-Sanchez that Petitioner reported injuring his back at home because she provided no general time frame and no details other than she believe he missed a day or two of work.

The credibility of Petitioner's treating physician Dr. Ahuja is found to be more credible than Respondent's IME Dr. Itkin for reasons that will be discussed below.

(C,F) In support of the Arbitrator's decision with regard to whether an accident occurred within the course and scope of Petitioner's employment with Respondent and whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner claims that his regular, heavy-labor work duties, over the course of a number of years, aggravated his pre-existing lumbar spine condition, causing it to become symptomatic and require additional surgery. Respondent claims that Petitioner's current lumbar spine condition is solely the result of the natural progression of his pre-existing condition, and that his work duties did not contribute to his current condition in any way because they were not "repetitive". For the reasons stated below, the Arbitrator find that Petitioner has sustained his burden and proved that his current condition is related to his work duties.

The Court has explained Petitioner's burden of proof under the Workers Compensation Act for a repetitive trauma, aggravating a pre-existing condition:

> Employers take their employees as they find them; when a worker's physical structure, diseased or not, gives way under the stress of his usual tasks, the law views it as an accident arising out of and in the course of his employment. *General Electric Co. v. Industrial Comm'n*, 89 Ill.2d 432, 433 N.E.2d 671(1982).

Further, the Court has defined what constitutes a repetitive trauma within the meaning of the Workers Compensation Act:

> Compensation may be allowed where the employee's existing physical structure, whatever it may be, gives way under the stress of his usual labor and he is suddenly disabled. This is true even though the result would not have obtained had he been in normal health. *International Harvester Co. v. IWCC*, 305 NE 2d 529 (1973)

There is no additional requirement that for a claim of repetitive trauma, Petitioner needs to prove that his work duties involved the same repetitive task, over and over, day after day. Rather:

> In repetitive trauma cases, the employee must show that the injury is work related and not the result of a normal degenerative aging process. *Peoria Belwood*, 115 Ill.2d at 530, 505 N.E.2d at 1028. Petitioner need only prove that some act or phase of employment was a causative factor of the resulting injury. (*County of Cook v. Industrial Comm'n*, 69 Ill.2d 10, 370 N.E.2d 520 (1977)

In the present case, Petitioner has proven that his work duties caused or contributed contributed to his lumbar spine condition. Based upon the evidence presented at the hearing, there does not appear to be any dispute that the nature of Petitioner's job duties were physically demanding, and that the lifting, bending, crouching, pulling of carts and use of torqueing tools involved

significant physical involvement of Petitioner's lumbar spine on a daily basis. Petitioner performed these physically demanding tasks over the course of many years as part of his regular job duties for Respondent. And, it is clear that this physical labor is beyond the normal physical activity associated with the normal tasks of daily living experience by the general public.

Respondent disputes that Petitioner could have suffered a repetitive trauma because his job duties were varied and he was not required to perform the same task, every day, over and over. Respondent's position relies on a flawed understanding of the meaning of repetitive trauma. Respondent's understanding of the term repetitive trauma is too narrow, and not consistent with the meaning under the workers Compensation Act and the case law discussed above. For this reason, Respondent's argument based on the meaning of "repetitive trauma" is rejected.

Respondent also relies on the testimony of their Section 12 examiner Dr. Ithkin and his opinion that Petitioner's condition is not causally related to work. For the reasons stated below, the Arbitrator finds Dr. Ahuja's opinions supported by the record, and that Dr. Ithkin's opinions are not credible.

Dr. Ithkin's concluded that Petitioner's current condition of ill-being is not casually related to his work activities, because they were not repetitive in nature –meaning Petitioner did not perform the same activity, over and over, every day. Dr. Ithkin's opinion that Petitioner's current condition of ill-being is not causally related to his work duties is not otherwise persuasive. In Dr. Ithkin's original report, he concluded that he could not give an opinion one way or another on the issues of causation. The record does not support this conclusion because Petitioner's job duties were of the heavy physical demand category, a finding that a thorough IME exam would note.

Dr. Ithkin's credibility declines upon review of his subsequent report. In his later report, without any additional evidence, Dr. Ithkin changed his opinion and definitively concluded that Petitioner's condition was not causally related to his job duties. At his deposition, he attempted to explain this change by explaining that he thought about it further between his first and his later report, despite having to be aware that his first report was generated for purposes of litigation, and thus could be used as the basis for Respondent denying Petitioner benefits.

In contrast, Dr. Ahuja gave a more credible opinion. Dr. Ahuja was familiar with Petitioner's physical condition and work duties. Dr. Ahuja treated Petitioner over the course of many years prior to and after Petitioner's claimed work-related aggravation.

In addition to the medical opinion testimony, Respondent further disputes that Petitioner's condition is work-related on the basis that Petitioner had a pre-existing lumbar spine condition, and on more than one occasion expressed that he believed his current problems were related to his pre-existing condition.

What a Petitioner believes or doesn't believe does not determine whether his work duties aggravated a pre-existing condition. Rather, the causal relationship to work is a legal and medical question: "A claimant is not expected to know the unique meaning of the word "accident" under the Act." *Luckenbill v. Industrial Comm'n*, 155 Ill. App.3d 106, 507 N.E.2d 1185 (1987).

The Arbitrator finds the testimony of Dr. Ahuja, that Petitioner's pre-existing lumbar condition was aggravated by his work duties, is the most credible and is supported by the record. Petitioner has sustained his burden of proving that his current lumbar condition is casually related to his work for the Respondent.

(D) In support of the Arbitrator's decision with regard to what was the date of the accident, the Arbitrator makes the following conclusions of law:

Petitioner alleges three accident dates: initially July 7, 2012, the day that Petitioner remembers being told by Dr. Ahuja that his condition is work related. Petitioner later alleged April 27, 2012, the first day that Petitioner was off work for this condition, and also July 10, 2012, the date that Dr. Ahuja testified he remembered discussing causal relationship to work with Petitioner. The Arbitrator has reviewed the transcript and notes that Petitioner is confused by this whole line of questioning which makes sense given that Petitioner was a demonstrated tough guy who worked through pain for a number of years until he finally could not do so.

Respondent claims that Petitioner has failed to prove an accident date, because of the multiple claimed dates of accident. Further, according to Respondent, Petitioner should have been aware of his condition and that it was related to his work duties earlier, because his most recent complaints of lower back pain started sometime in 2011, and then he was in active treatment for his lower back with Dr. Ahuja in early 2011.

For a repetitive trauma claim, Petitioner must allege a "manifestation date", as opposed to a date of a specific event. *Darling v. Industrial Comm'n*, 176 Ill. App.3d 186, 191, \ 530 N.E.2d 1135, 1139 (1988). "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 Nursing Home*, 115 Ill.2d at 531505 N.E.2d at 1029. This does not mean, however, necessarily the date the employee became aware of the physical condition and its clear relationship to his employment. A date based purely on discovery would penalize those employees who continue to work without significant medical complications when the eventual breakdown of the physical structure occurs beyond the statute of limitations period. Consequently, where the employee continues to work until the day his structure collapses or surgery is required, that can reasonably be considered by the Commission to be the date of accident in certain instances. *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill.App.3d 607, 610, 531 N.E.2d 174, 176(1988).

In the present case, Petitioner has alleged the date on which he discovered the fact of his injury and its relation to his work for Respondent was when he discussed it with Dr. Ahuja. He has also alleged the last date he worked for Respondent as an alternative date, representing when his physical structure broke down to the point of collapse. Both of these dates are appropriate "manifestation dates" under the applicable case law, and are supported by the evidence on the record.

(J) In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges for reasonable and necessary medical treatment, the Arbitrator makes the following conclusions of law:

For the reasons stated above, the Arbitrator finds that Petitioner's current state of ill-being is casually related to his work duties. There is no dispute between the parties concerning the nature and extent of the medical treatment received by Petitioner as a result of his condition. For that reason, the Arbitrator finds that Respondent shall pay Petitioner for the following outstanding medical bills:

Neurosurgery and Endovascular Associates	$170,384.27
Aurora Healthcare	$23.95
Lakes Area Physical Therapy	$9,735.00
ATI	$1,684.80
Midwest Physicians Anesthesia	$1,000.00
Total	$182,728.02

Additionally, these bills are unpaid, and are not reflected in Respondent's claim for a credit for payments made by Petitioner's group health policy.

(K) In support of the Arbitrator's decision with regard to the amount due for temporary total disability and maintenance, the Arbitrator makes the following conclusions of law:

For the reasons stated above, the Arbitrator finds that Petitioner's current state of ill-being is casually related to his work duties. There is no dispute between the parties that Petitioner's condition prevents him from returning to his usual and customary employment. There is also no dispute that Petitioner's restrictions are permanent, and that as of the FCE of February 27, 2015, Petitioner has become completely disabled as a result of his condition. For that reason, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits from April 27, 2012 to February 26, 2015, and maintenance from February 27, 2015 to the time of hearing and ongoing.

(M) In support of the Arbitrator's decision whether penalties or fees should be imposed on Respondent, the Arbitrator makes the following conclusions of law:

No penalties are awarded because Respondent made reasonable arguments that Petitioner failed to allege an accident date because, as discussed above, multiple dates were offered at trial and upon a review of the record. Respondent also made good faith arguments that repetitive trauma was not present in this case.

(N) In support of the Arbitrator's decision with regard to whether Respondent is due any credit, the Arbitrator makes the following conclusions of law:

Respondent is making a claim for credit under Section 8(j) for benefits paid to Petitioner under his group health and short and long term disability. Petitioner agreed that Respond is entitled to a credit having made payments towards the premiums for the respective insurance policies, but disagrees with the amount claimed by Respondent for short and long term disability payments.

As to the claimed amount for group health insurance payment (RX42), Petitioner did not object to the credit claimed, but that it should not be applied to any unpaid balances or any other benefit awarded. (RX42).

As to Respondent's claimed credit for short-term disability benefits paid to Petitioner, Petitioner did not object to the amount claimed of $25,842.07. (RX41).

As to Respondent's claimed credit of $116,506.95 for long-term disability payment to Petitioner, which represents the gross amount paid in LTD benefits of $147,269.63 (RX43), minus $31,060.72, the amount that Petitioner paid back to Respondent's insurer for overpayment due to receiving socials security benefits, Petitioner disputes the amount of this claimed credit.

Instead, Petitioner claims that Respondent is only entitled to a credit of $67,213.61, which represents the amount claimed by Respondent, minus attorney's fees of $18,003.44 incurred by Petitioner when Respondent's insurer wrongfully withheld long term disability payments (PX19), and also an additional amount of $7,040.00 in Federal taxes that Respondent withheld from Petitioner benefits because they ran his long-term disability benefits through their own payroll (RX43), and also minus Respondent's deductions from Petitioner's long term disability benefits for group medical insurance premiums in the amount of $27,280.73 (RX43).

Under Section 8(j), Respondent is allowed a credit for payments made to Petitioner. The total amount claimed by Respondent does not accurately reflect the actual payments made to Petitioner.

For these reasons, the Arbitrator agrees with Petitioner that Respondent's Section 8(j) credit for long-term disability payments should be limited to $67,213.61.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC018638
Case Name	BORST, BRIAN v. DOW CHEMICAL
Consolidated Cases	12WC025629
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0610
Number of Pages of Decision	48
Decision Issued By	Kathryn Doerries, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	John Eliasik
Respondent Attorney	Paul W. Pasche

DATE FILED: 12/20/2021

/s/Kathryn Doerries, Commissioner

Signature

DISSENT

/s/Thomas Tyrrell, Commissioner

Signature

21IWCC0610

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRIAN BORST,

Petitioner,

vs.

NO: 15 WC 018638
(consol 15 WC 018637
voluntarily dismissed 12/10/15
and 12 WC 025629)

DOW CHEMICAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, date of accident, causal connection, notice, temporary total disability, medical expenses, permanent partial disability, and other-credit due to Respondent for benefits paid and under Section 8(j), and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claims for compensation, for the reasons stated below.

Procedural History

Respondent and Petitioner filed Petitions for Review on June 30, 2020 and July 8, 2020, respectively. Respondent filed a Motion to Dismiss Petitioner's Petition for Review on August 31, 2020, arguing Petitioner failed to timely file their Petition for Review. Commissioner Doerries granted Respondent's Motion to Dismiss Petitioner's Petition for Review on October 2, 2020.

Applications for Adjustment of Claim

Respondent introduced the three Applications for Adjustment of Claim that Petitioner filed alleging repetitive trauma claims with different manifestation dates for the same body part. 12 WC 25629, filed on July 25, 2012, alleges an accident date on June 7, 2012. (RX10) 15 WC

18637, filed June 9, 2015, alleges an accident date on July 10, 2012 and was voluntarily dismissed on December 10, 2015. (RX11) 15 WC 18638, filed June 9, 2015, alleges an accident date on April 27, 2012. (RX12) All indicated the nature of the injury was repetitive trauma.

At the hearing on October 14, 2016, the parties were asked by the Arbitrator for preliminary matters or motions that needed to be addressed before beginning testimony. The Petitioner's attorney noted the Petitioner had filed additional applications for adjustment of claims alleging different dates of accident: "And after there was a motion by Respondent to dismiss those two additional applications we came to an agreement to in fact dismiss those other applications and then to add the additional accident dates to the original application which was done." (RX39, pp. 9-10)

The Commission notes that the court file contains a record of the dismissal for case 15 WC 18627, however, no record of the dismissal for case number 15 WC 18638 is in the court file. Therefore, the Commission has issued a Decision in that case which mirrors the Decision entered in case number 12 WC 25629.

The Arbitrator found that June 7, 2012, the date Petitioner "discovered the fact of his injury and its relation to his work for Respondent was when he discussed it with Dr. Ahuja" his treating surgeon, was an appropriate manifestation date. (ArbDec. p. 17) We disagree based upon the fact that the doctor's notes do not reflect any such discussion and Dr. Ahuja testified that he never had such a discussion with Petitioner until after his surgery, in July 2012. Further, the Arbitrator found that the date Petitioner last worked for Respondent, April 27, 2012 was also an appropriate manifestation date. However, at that juncture, Petitioner had been released to full duty by Drs. Jablonski, Fehling and Ahuja. Petitioner admitted at trial he did not know the reason the date had been chosen and at that time Petitioner did not claim any work injury. In fact, Petitioner and Dr. Ahuja filled out and signed three "Employee Health Certification" forms on May 7, May 11 and May 24, 2012, stating that the low back pain began on "11-1-11" and the injury/illness was not "related to work." (PX1)

Petitioner alleged a third manifestation date at the time of trial, July 10, 2012, despite voluntarily dismissing that Application for Adjustment of Claim in December 2015. The Commission notes that Petitioner vehemently denied that this was the first time he discussed the possibility that his condition could be a worker's compensation matter with his surgeon, Dr. Ahuja. The Commission finds, however, that Dr. Ahuja's treating records are devoid of any reference or connection between Petitioner's job activities and his pain until after Petitioner solicited an opinion from doctor sometime after his third surgery.

Further, the Commission disagrees with the Arbitrator's assessment of Petitioner's credibility. The Arbitrator found Petitioner is "mostly credible" but the Commission finds that Petitioner's testimony was deliberate and not "forgetful" as the Arbitrator surmised but instead, that Petitioner deliberately inflated the physical demands of his job and in many instances, his testimony did not comport with the medical records, nor with the job demands described by his peers. Based upon a thorough review of the evidence in the record and, in part, due to Petitioner's lack of credibility, we disagree with the Arbitrator's finding that the alternate manifestation dates are supported by the evidence on the record and find that Petitioner failed to prove accident and

causation based upon the following.

Findings of Fact

Testimony
Job Descriptions

Petitioner was employed as a maintenance (mechanic) technician for Respondent between 1996-2012 (T. 13-14) Petitioner testified that at some point he worked in every one of the approximately twenty buildings located on three-four acres at Respondent's Ringwood, Illinois plant campus which, in total, was on 50 acres. (T. 13-15)

Petitioner testified that his job consisted of a daily meeting, getting his job assignments, collecting tools, equipment, and personnel, and going to the assigned building to perform the work order. (T. 17) Petitioner testified that he would receive two to three written orders per day. (T. 94 – 95, RX4) Petitioner's work varied each day and from hour to hour. (T. 17-18, 87-88) Some of the job duties were very light duty. (T. 88) For instance, he repaired small pumps weighing less than 15 - 20 pounds and the parts he worked on weighed a lot less than 15 pounds. (T. 90-91) He hardly ever ended up repairing the same thing. (T. 18-19) One to two days per month he would work on reactor kettles which sometimes required him to wear a breathing apparatus with air tanks weighing about 60 pounds, but sometimes required an air hose with no tanks. (T. 19-20) He repaired various-sized agitator blades in kettle tanks. (T. 18, 20)

Rarely, one to two times per year, Petitioner would work inside kettles that required him to hunch over. (T. 21) Sometimes Petitioner would bring tools and equipment to or from the work site in a bucket on a two-wheel cart, and twice per month he would move 400-500 pounds of tools and equipment in a four-wheel cart. (T. 22, 23) If he needed help, he had help pushing the carts, and sometimes a forklift was used. (T. 22-23) On an average day, he would only push a cart that weighed 100 pounds. (T. 24) Once a week, Petitioner moved a pump weighing between 50 and 250 pounds from the floor to a cart. (T. 24 – 26) Once every three months, Petitioner would use rigging with ropes and chains to remove blades weighing between 10 and 200 pounds from a kettle. (T. 26-27)

Petitioner testified that if the agitator blades were bent, dirty or damaged, he would have to take them off and replace them or re-torque the bolts to tighten them back up. (T. 26-27) Petitioner testified the blades can weigh from 10 to 200 pounds. Petitioner testified sometimes he had to repair the shafts. He stated once in the kettle they have to take all the blades off the hub, remove the hub and pull the shaft out with a crane through the roof; that is done every 6 months. Some of the agitator blades and shafts have 1" bolts, although the size of the bolts do vary. The procedure of fixing the shafts require torqueing the bolts. They do not use pneumatic or electronic tools due to explosion hazards so he had to use hand tools and get the bolts as tight as he could. Besides removing the blades, agitator blades, shaft and hub, he had to perform preventive maintenance. Petitioner testified he was also one of the main welders and sometimes he would work in the shop fixing a shaft. (T. 27-30)

Once per week, Petitioner would change the oil in a gear box using a bucket that was brought out on a cart. (T. 30) Occasionally he would repair seals by removing a stub shaft and seal together, hooking it to a hoist, and using a cart to bring it to the fabrication shop, rebuild, repair, or replace it. (T. 30-31) When Petitioner worked as a welder in the fabrication shop, he worked on a table or on the floor using welders, cutting torches, or grinders. (T. 31) When he worked on the table, it was at a height where he did not have to bend over when welding. (T. 31-32)

In addition to his other job duties, Petitioner was also with the haz-mat, space rescue and fire teams. Petitioner testified that about 75% of his job required him to bend at the waist and 70% of the time his job required him to do lifting. In Petitioner's layperson opinion, his job was in the heavy physical demand level. His job duties had essentially been the same from when he started at Respondent until his last day. Petitioner testified that at some point during his job he developed a problem with his low back. (T. 32-34)

Petitioner admitted that he used a lift cart to lift objects from the floor to the table or to the proper height to work on them. (T. 91-93, RX 5)

Petitioner prepared a document entitled "My day to day work activity" for review by Dr. Ahuja sometime between June 2012 and August 2014. (T. 16-17, 84-85) This document mentioned that Petitioner would push the tool cart to the job site and either repair the piece of equipment or remove the piece and bring it back to the shop for repairs. (PX13, RX18) The document also described the procedure for pump repairing, welding, performing repairs on reactors, installation and repair of piping and bottom valves. (PX13, RX18) Petitioner admitted this document did not include everything he did for his job duties. (T. 87)

Petitioner identified a job description that was prepared by Respondent and he agreed the highlighted portions fairly and accurately described the physical requirements of his job. (T. 66-67, 98; PX 16) Petitioner had first seen the document when he was hired. (T. 98) Petitioner offered into evidence three job descriptions prepared by Respondent. (04/18/18 T. 19-21; PX 14, 15, 16) These job descriptions included additional duties including field service on electrical controls, repairing vehicles, responding to plant emergencies, and reading and preparation of paperwork. *Id.* The highlighted physical requirements included: the abilities to walk, sit, stand, talk, or hear; the frequent demands to reach with hands and arms, and to use hands to finger, handle or feel; and the occasional demands to climb, balance, stoop, kneel, crouch, crawl, and occasionally lift or move up to 100 pounds. (PX 14) The demands also required the ability to reach all work areas in the plant (i.e., climb ladders, negotiate catwalks, handle heights to 50 feet), to lift, twist, and turn up to 50 pounds. *Id.* In addition, the highlighted sections included the following functions: to move 500 lb. drums using the appropriate equipment; to physically enter reactors for maintenance purposes; to manually lift and handle a nominal weight of 25 kgs. (55 lbs.); and to manually torque fasteners to 100 pounds. (PX 16)

Respondent presented three witnesses to verify Petitioner's job duties. The witnesses confirmed Petitioner's job duties varied. Gerard Burns ("Burns") testified he worked for Respondent for 23 years, including as an electrician apprentice from 2009 to 2011, and then

as maintenance activity coordinator beginning June 2012. (T. 122)

In 2011 and 2012 Burns' duties included maintenance work on all equipment. (T. 122) Burns worked with Petitioner about 25% to 30% of the time, including on pipe work and seal replacements. (T. 123-124) After 2012, Burns' work as maintenance activity coordinator included distributing work orders, like the ones identified by Petitioner. (T. 127, RX 6) Burns identified Petitioner's job description (PX 13) as accurate, but incomplete. (T. 131-132) Petitioner's job included light work such as "round inspections," involving checking oil and seal fluid levels, and medium level work including smaller pump rebuilds. (T. 133) Burns described Petitioner's work as a maintenance mechanic as "constantly changing" and "varied." (T. 124, 140) There was no particular job or physical activity that a maintenance technician would perform over and over again except sitting at a desk closing work orders and working on a computer. Burns testified "That's the only real repetitive job we have." (T. 141)

Burns identified a short video depicting maintenance work activity at the plant. (RX37) He noted a mechanic going to replace a pipe. Burns believed he had filmed that video sometime in 2012. He noted the mechanic putting on a face shield on the hard hat and safety equipment and getting ready to break open a line which was plugged with glue. He testified it represented work orders/jobs a maintenance person would receive. He indicated there is usually a plugged pipe once per week on average. (T.141-144)

Burns estimated maintenance technicians worked about 15% at the heavy physical demand level, and about 65% of the work required the technician to torque a pipe or bolt. (T. 149-150) Prior to 2011, a technician would work approximately 45% of the time while kneeling or crouching. (T. 150) About 10% of the maintenance work involved items weighing 300-500 pounds. (T. 151) About 50% of the time, the tools and equipment in a lift cart would be in the 100-200 pound range. (T. 151)

Richard Oldland ("Oldland") testified via deposition. Oldland worked for Respondent from 2005 to 2014, and he was operations manager from 2010 until 2014. (RX2, 6) His duties included training and assisting maintenance technicians. (RX2, 5) He originally worked at a North Carolina plant and came to the Ringwood, Illinois plant in March 2012. (RX2, pp. 5-6) The duties of maintenance technicians were the same in each plant. (RX2, p. 6) Oldland reviewed Respondent's job description (PX16) and agreed it was accurate. (RX2, p. 12) He also reviewed Petitioner's job description and testified the weights and durations were not reasonable. (RX2, p. 13, 36, 37) Specifically, he disagreed that a cart weighing 400-500 pounds would be able to be pushed around the plant by a single person, due to the presence of steep inclines. (RX2, pp. 13, 36) Oldland also noted that maintenance technicians would stop working prior to 3:00 PM to return their tools so they could leave right at 3:00. (RX2, p. 14) Due to the morning meetings, the safety permit process, and setting up the work, the maintenance technician would not typically begin actual maintenance work until 8:15 or 8:30 AM. (RX2, p. 15) In an average day, a technician would perform maintenance work about six hours out of the eight-hour shift. (RX2, pp. 15-16, 37) The actual job orders varied in nature between light, medium, and heavy levels of work. (RX2, p. 18) The nature and types of jobs were different and changed daily. (RX2, pp. 20, 50) Oldland did not believe Petitioner's job

as a maintenance technician was repetitive in nature. *Id.*

Oldland testified that on April 27, 2012, Petitioner reported to him his back was bothering him, it was something similar to a surgery he had 8- 12 years before, and he was going to have another surgery immediately. (RX 2, pp. 21, 29) Petitioner did not report any work injury or accident, and stated he always knew he would need to have another back surgery and that this was a natural progression and it was timefor him to have it fixed. (RX 2, pp. 22, 32 - 33, 4I – 42) Oldland completed a supervisor report on July 17, 2012, shortly after being informed Petitioner had made a workers' compensation claim. (RX 2, pp. 23, 25, 39 40; RX 8) In the report, Oldland recounted his conversation with the Petitioner. (RX 2, p. 41; RX 8) Oldland testified that he did not consider Petitioner's low back condition to be work-related, due to the conversation he had with Petitioner in April. (RX 2, p. 41) Oldland also testified Respondent had a zero- tolerance policy that employees were to immediately report work injuries or they would be disciplined. (RX 2, pp. 21 – 22)

Lisa Cashbaugh-Sanchez ("Sanchez") testified via deposition. Sanchez worked for Respondent as operations leader in Ringwood from November 2009 until February 2012. (RX3, p. 3) Sanchez was in charge of the maintenance department and worked closely with maintenance technicians, including Petitioner. (RX3, p. 4-7) Sanchez reviewed Respondent's job description (PX 16) and testified it was accurate for an annual description but unlikely for a worker to have to perform all those jobs in one day. She also took exception to two descriptions-there were no drums at the plant weighing 500 pounds and for the drums Respondent had, the workers were required to use lifting devices. Also, any job requiring the technician to manually torque would have been done with a torque wrench requiring a maximum of 10 pounds of manual force. (RX3, pp. 12 – 13) Sanchez reviewed Petitioner's job description and noted it excluded lighter duties, including pulling release valves weighing ten pounds, lubrication of machines, re-gasking heat exchangers, line labeling, and one to two hours of daily paperwork, all of which Petitioner did. (RX3, pp. 19 - 20, 22-23) Sanchez stated that Respondent had safety requirements including that no individual was to lift over 50 pounds without assistance. (RX3, pp. 33, 48 49) Sanchez stated maintenance technicians would work on different tasks each day. (RX3, p. 36) Sanchez confirmed the injury reporting policy and testified Petitioner never reported a work injuryto her. (RX3, pp. 34-35) Sanchez testified the policy applied whether a worker was claiming a specific accident or an aggravation caused by work. (RX 3, p. 43)

Medical

Petitioner testified his back problems dated back to 2003. (T. 34) On cross-examination, Petitioner admitted he underwent a lumbar microdiscectomy in 1995, as referenced by Dr. Ahuja. (T. 68; PX1). The Commission records also show Petitioner settled a workers' compensation claim against Modine Corporation in Case No. 96 WC 33537, in which he alleged a low back injury occurring August 18, 1995. Petitioner admitted he did not know exactly when his low back problems started. (T .68-69) On December 9, 2003, Petitioner underwent an MRI of the lumbar spine that showed mild to moderate disk bulging on the left at L-4 and a moderate bulge at L4-5 without evidence of recurrent herniation. (T. 34; PX 1) Petitioner did not file a workers' compensation claim at that time. (T. 34) Petitioner's back pain continued and worsened through

2005, when he received an epidural steroid injection, a TLSO brace, and ultimately underwent a second back surgery, fusions at L4-5 and L5-S1, by Dr. Ahuja on February 1, 2005. (T. 35-36, 69; PX 1; RX 14) Subsequently, Petitioner was returned to full duty with no restrictions or issues as of July 10, 2005. (T. 36 37; PX 1) On August 25, 2005, a lumbar x-ray showed a stable fusion at L4-5, but disk space narrowing at L3-4. (PX 1; RX21) Dr. Ahuja continued to allow Petitioner to work full duty and he released Petitioner to return on an as-needed basis. *Id.*

Petitioner testified he had no back problems from 2005 until 2012, when he returned to Dr. Ahuja. (T. 37 – 38) However, the records of Aurora Health showed Petitioner had a lumbar x-ray on November 16, 2009. (PX 6)

Petitioner also testified that he underwent a yearly physical examination as part of his job as maintenance technician. Before returning to Dr. Ahuja in January 2012, Petitioner underwent a physical. Petitioner testified that he may have indicated he was having a low back problems for the annual physical; he did not recall specifically, but in the 6-9 month period before returning to the doctor he was having increased back pain. (T. 39-41) On May 10, 2011, Petitioner saw Dr. Fehling, his new primary care physician, and reported low back pain with his legs giving out. (T 71-72; RX 19) Petitioner claimed these incidents only occurred at work and he had no issues at home. *Id*. Petitioner did not recall talking about digging 10 post holes and shoveling mulch for hours on end at home with no problem but he had no reason to argue that if it was documented in the records. (T. 72) Dr. Fehling referred Petitioner to Dr. Ahuja, but Petitioner did not see Dr. Ahuja until 2012. (RX 19) At his annual physical for Respondent on October 26,2011, Petitioner reported to Dr. Jablowski he had low back pain and weakness of the legs, and that he was "seeing Dr. Ahuja." (T. 70; RX20)

Petitioner consulted Dr. Ahuja January 20, 2012. He reported back and right leg pain for the prior nine months. (T. 38, 41; PX1) Dr. Ahuja recommended an MRI which was performed on January 26, 2012 at Aurora Healthcare. Dr. Ahuja recommended ESI's and prescribed oral steroid medication. The MRI showed: post-operative changes consistent with L4-5 fusion, left foraminal disk/osteophyte complex that may have been contacting the left L5 nerve root, and a small left protrusion at L3-4 that may have been contacting the L3 nerve root. (T. 41-42; PX 1)

The CT scan showed the cage at L4-5 appeared bent, but this was unchanged since the prior study of August 25, 2005; in addition, it showed degenerative disk disease at L3-4. (PX l) On January 30, 2012, Dr. Ahuja diagnosed "adjacent segment disease" status post prior lumbar fusion, and he ordered lumbar epidural steroid injections and medications. (T. 42; PX 1) Petitioner admitted he did not discuss that the back problems might be related to Petitioner's work. (T. 73, 75)

Petitioner next saw Dr. Ahuja on February 10, 2012. (T. 43) At that time, Respondent sent its job description to Dr. Ahuja and requested specific restrictions in order to accommodate them. (T. 43; PX1, PX16, RX13). According to Dr. Ahuja, the Petitioner did not require any physical restrictions. (T. 43, PX 1) On February 11, 2012 and February 24, 2012, Dr. Ahuja performed the first two injections. (PX 1) On March 8, 2012, Dr. Jablonski medically cleared Petitioner to return to work. (RX 20) At the next follow-up with Dr. Ahuja on March 16, 2012, Petitioner continued to work in a full duty capacity. (T. 75-76; PXl, RX 27) Again, no mention

was made by Petitioner that the condition could have been work-related. (T. 76-77, PX 1) Dr. Ahuja recommended a third epidural steroid injection, and he made no mention of surgery. (PXl) Dr. Ahuja noted: "He has not had any limitations in place for his work thus far." (PX1) Petitioner underwent the third injection on April 6, 2012. (T. 43-; PX1)

Dr. Ahuja reviewed Petitioner's job description and released Petitioner to return to work with no restrictions. Petitioner continued to treat with Dr. Ahuja during that time until April 26, 2012. (T. 44) On April 27, 2012, Dr. Ahuja took Petitioner off work. (T. 44) Petitioner was asked on cross-examination if he knew why his second Application for Adjustment of Claim (Case No. 15 WC 18637) indicated an accident date of April 27, 2012 and he answered, "no." (T. 107)

Petitioner saw Dr. Ahuja May 11, 2012, and reported his leg pain was constant and symptoms were worse with prolonged sitting. Petitioner advised he felt the pain was getting progressively worse and he wanted to know his options. (T. 77-80)

Petitioner testified despite the medications and injections, his back was getting worse and he advised Dr. Ahuja. Petitioner testified that at that visit Dr. Ahuja discussed performing another lumbar surgery, specifically a fusion at L3-4, L5-S1, and evaluate the prior fusion at L4-5. (T. 44-47)

Petitioner saw Dr. Ahuja on June 7, 2012. Petitioner testified that he asked Dr. Ahuja if he thought his condition was because of his job duties. (T.47-48) Petitioner reported to Dr. Ahuja that his pain was getting progressively worse, even though he was not working at that time. (T80-81; PX1; RX29). Petitioner testified repeatedly that this was the visit where he discussed with Dr. Ahuja whether the back pain was due to work. (T. 47-48, 80-82) Dr. Ahuja's office visit notes on June 7, 2012, have no mention of that conversation nor documentation of a discussion regarding causation. (PX1) Petitioner testified that if Dr. Ahuja's records made no mention of a discussion of that nature, Petitioner would dispute the accuracy of those records. Petitioner testified that it was June when they had the conversation. He did not know why Dr. Ahuja would have testified that he had that conversation for the first time after surgery at the July 10, 2012 visit. (T. 48-49) Petitioner disagreed with Dr Ahuja's testimony that on July 10, 2012, there was a discussion whether or not Petitioner's back condition was related to his work duties. (T. 81-82)

Petitioner underwent his third low back surgery on June 11, 2012, when Dr. Ahuja performed a redo right and left L4 and LS hemilaminectomies and fusions at L3-4 and LS-Sl. (T. 47, PXl) The nurse notes on July 2, 2012, document that Petitioner called with a post-operative report and, "States he is not claiming this as workers' compensation, has lawyer and wants to ensure that it is in notes that symptoms related to his long standing activities at work. Will review at next office visit. Patient does not have WC case number yet." (PX1)

Dr. Ahuja testified that he had a conversation with Petitioner at his first post-operative office visit on July 12, 2012 regarding Petitioner pursuing a workers' compensation claim and his opinion regarding causation. (PX18, 26) In the office note, Dr. Ahuja mentioned Petitioner asked him about workers' compensation, and Dr. Ahuja recommended a causation evaluation by Dr. Alloi. (PX l; RX 30) Dr. Ahuja's note contained no opinion about causation. (PX l; RX 30)

According to the testimony of Dr. Ahuja, this visit on July 10, 2012 was the first discussion with Petitioner about whether the condition was work-related. (PX 18, pp. 22, 26) Dr. Ahuja recommended a causation evaluation by Dr. Alloi. (PX l; RX 30) Dr. Ahuja's note contained no opinion about causation. (PX l; RX 30) By contrast, Petitioner denied the discussion occurred on this date. (T. 48-49) When Petitioner was asked what occurred on July 10, 2012, to trigger that as a date of accident on his second Application for Adjustment of Claim, he stated, "I have no idea." (T. 106-107; RX 11)

Dr. Ahuja noted Petitioner had "been off work for 4 weeks, and his disability started June 4, 2012." (PX 1; RX 29)

On July 26, 2012, Petitioner filed his first Application for Adjustment of Claim (Case 12 WC 25629), alleging an accident date of June 7, 2012. (RX10) At hearing, Petitioner was asked why the date June 7, 2012 was listed on his Application. (T. 104) In response, he answered, "I don't recollect." (T. 104) Petitioner stated he was claiming a repetitive trauma injury on that date, as a result of "doing my job at work, heavy lifting, pushing, stooping, bending." (T. 105) Petitioner was unsure of when he informed the employer of his alleged June 7, 2012 date of injury but stated he informed a clerk in the office. (T. 105-106)

On July 11, 2012, Petitioner completed a Dow Employees Occupational Illness Injury Report. (T. 107, RX 6) He listed the date of injury as June 7, 2012. (RX 6) For the description of injury he listed that he was having back problems related to his job duties, being a repetitive injury. (RX 6) When asked at hearing what this meant, he explained heavy lifting, excessive lifting, bending, crawling, stooping, and crouching. (T. 109-110) The report stated Petitioner first reported the incident to his supervisor on July 11, 2012. (RX6)

Petitioner testified he did not tell anyone at work about the condition being work-related before he discussed it with Dr. Ahuja. (T. 116-118)

On September 5, 2012, Petitioner completed an Aurora Healthcare Patient's Statement of Injury/Illness. (T. 111; RX 7) Petitioner could not recall why he completed this form but confirmed it was his handwriting on the document. (T. 111) In the report, Petitioner listed the injury as "lifting kneeling," but he provided no date for the injury date. (T. 111-112; RX 7) The Petitioner also wrote in the report he had similar symptoms to this in the past. (Tl. 112; RX 7) In this report, Petitioner stated he told his employer of this injury on June 4, 2012. (T. 112-113; RX 7)

Lumbar x-rays on September 5, 2012, showed a stable fusion. (PX1) At the office visit on that date, Dr Ahuja noted Petitioner thought he would be able to return to work. (PX1) Dr. Ahuja recommended continued physical therapy, but he released Petitioner to return to light to medium work with lifting up to20 pounds frequently and 35 pounds occasionally. (PX l)

Petitioner was involved in a motor vehicle accident on September 21, 2012. after which he sought medical attention at Aurora Healthcare. (T. 50-51)

Petitioner was released to return to work with restrictions at the follow-up appointment

post motor vehicle accident. Petitioner took the work restrictions to Respondent. Respondent could not accommodate the work restrictions. Petitioner remained off work. Petitioner returned to Dr. Ahuja around December 4, 2012. (T. 51-53)

On cross-examination, Petitioner agreed Dr. Ahuja then recommended another CT and a cervical MRI, brain MRI, and EMG and ESIs that were performed in summer 2013. Petitioner testified after the series of ESI's he was getting worse; they provided no improvement. Dr. Ahuja then changed his medication to Amitriptyline. (T. 53-55)

On cross-examination, Petitioner agreed he had a lumbar micro-discectomy, low back surgery in 1995. He agreed he had back problems for at least 20 years; he did not recall exactly when the problems began. He agreed at some point his condition worsened that required the surgery in 2005 by Dr. Ahuja. Petitioner had returned to full duty after that surgery and his back problems increased approximately nine months before his third surgery. (T. 68-69)

Petitioner underwent a general physical exam for Respondent on October 26, 2011 and testified that the record indicated he had recurrent back problems for the last year worsening in the prior 2 weeks. He agreed at that time his back was starting to act up again and even prior to that exam in October 2011. (T. 70-71)

Petitioner testified that he was interested in pursuing a workers' compensation claim because Petitioner did not think he would be able to return to work with Respondent because he must be able to lift more than 50 pounds and crawl into small spaces; he did not recall the specific conversation. He did not recall being given a referral to Dr. Alloi to determine his return to work status and a causation evaluation and diagnosis evaluation. Petitioner did not recall if he ever went to Dr. Alloi to get an opinion. (T. 80-83)

Medical Records

Dr. Ahuja's January 16, 2012, records noted he placed Petitioner on restrictions, no lifting more than 40 pounds with frequent position changes. He noted Petitioner's job description with needing the ability to reach all work areas and lift, twist, turn 50 pounds. (PX 1)

Dr. Ahuja's office visit notes dated January 20, 2012 noted complaints of back pain with lumbar radiculopathy. Dr. Ahuja noted Petitioner's prior lumbar fusion February 1, 2005. His impression then was "status post posterior fusion L4-5, who has recurrent LBP" and he prescribed an MRI, CT, and Medrol dose pack. (RX23)

Dr. Ahuja authored a letter to Dr. Fehling dated January 30, 2012. He noted Petitioner presented for further evaluation of low back pain and radiculopathy and noted Petitioner's prior fusion. Dr. Ahuja noted Petitioner was then feeling worse with a lot of discomfort in his back and sharp pain at the top of his right buttock with right leg weakness, and bilateral groin pain when laying down. His diagnosis was post prior fusion, now developing adjacent segment disease. (RX26)

Dr. Ahuja authored a letter to Dr. Fehling dated March 16, 2012. He again noted Petitioner

was post fusion from 2005 with recent recurrent LBP. Dr. Ahuja noted the MRI showed disc prominence and narrowing left L3-4 nerve root and some spondylosis at the fusion level causing narrowing. He noted the trial of conservative care, which included 2 ESI's, which had improved symptoms for a week. Petitioner's pain was rated 3-9/10, with some numbness and tingling. (RX27)

Dr. Ahuja authored a letter to Dr. Fehling dated May 11, 2012. Dr. Ahuja again noted Petitioner's history of post fusion 2005, with recent recurrent LBP. He again noted the MRI showing disc prominence and narrowing left L3-4 nerve root and some spondylosis at fusion level causing narrowing. Petitioner's pain level was rated as 9/10 with pain worse with prolonged sitting; symptoms also worsened with over activity and some numbness and tingling. Dr. Ahuja diagnosed Petitioner's condition as post prior fusion, and noted Petitioner then developing adjacent segment disease. Dr. Ahuja noted Petitioner had reasonable improvement with conservative care with ESI's providing about one week of improvement of symptoms. Dr. Ahuja noted Petitioner felt like he was getting progressively worse and wants options. (RX28)

Dr. Ahuja authored a letter to Dr. Fehling dated June 7, 2012. Dr. Ahuja again noted Petitioner's history of post fusion 2005, with recent recurrent LBP. He noted Petitioner was nervous about surgery. Petitioner's pain level was rated as 4/10. Dr. Ahuja noted Petitioner had been sitting 70 minutes in car and had LBP and radiation. Petitioner again reported he felt like he was getting progressively worse. Dr. Ahuja then recommended posterior decompression and transforaminal fusion at L3-4, L5-S1 with evaluation of prior fusion at L4-5. (RX29)

Dr. Ahuja authored a letter to Dr. Fehling dated July 10, 2012. He noted Petitioner's post-operative evaluation; surgery June 12, 2012. Dr. Ahuja noted Petitioner did not feel he can return to his job as he must be able to lift, carry 50 pounds and crawl in small spaces. (RX30)

The medical records of Neurosurgery & Endovascular Associates/Dr. Ahuja contained nurse/patient's notes. On July 2, 2012, the entry documented Petitioner called and reported doing "okay" post-surgery. Petitioner reported he was "now claiming this as work comp-has lawyer and wants to ensure that it is in the notes that his symptoms are related to his long-standing activities at work-will review at next office visit-pt does not have WC case # yet." (PX 1)

Dr. Ahuja authored a letter to Dr. Fehling dated September 6, 2012. Dr. Ahuja noted Petitioner's ongoing LBP complaints, numbness and tingling in the left leg. However, symptoms improved some since surgery. Petitioner did not think he could return to work. Dr. Ahuja further noted Petitioner had filed a workers' compensation claim on July 17, 2012. (RX31)

Dr. Ahuja's September 14, 2012, patient/nurse notes reflect that someone from his office spoke with Petitioner's wife regarding the situation and his wife noted Petitioner had always worked at the same place and he did not realize at the time of his prior surgeries that there was ever a possibility of "work comp." Petitioner's wife reported he had done a lot of heavy work his whole life up to his work restrictions –"per Dr. Ahuja Petitioner likely increased his back injury by his work." (PX 1)

On December 4, 2012, Dr Ahuja authored a response letter to Petitioner's attorney. Dr.

Ahuja noted Petitioner was status post micro-discectomy performed by another surgical service in the past. On February 1, 2005 Petitioner underwent a posterior lumbar interbody fusion L4-5. Dr. Ahuja noted Petitioner has had low back pain and lumbar radicular symptoms which were aggravated by his current work situation. Dr. Ahuja indicated, "The date of his work situation is June 6, 2012, because on that day in our office we discussed that he had this situation, and prior to this, he had not recognized the ongoing stresses at Dow likely increasing his lumbar disc disease beyond that would be reasonably expected. He certainly had problems for a lengthy period of time and although it is not possible to determine what symptoms were at the time of his initial surgery, his long term work as a maintenance technician is a contributory cause of the progression of his disease." (PX 1)

Dr. Ahuja's Testimony

At request of Petitioner, Dr. Ahuja testified by way of evidence deposition May 12, 2015. He first saw Petitioner January 7, 2005, on referral from Dr. Blue. At that time Petitioner was complaining of significant right leg pain and images showed evidence of disc herniations. They discussed Petitioner's low back pain and his prior micro discectomy from 10 years before. Dr. Ahuja performed a fusion at L4-5 on February 1, 2005. (PX18, 7-9)

Dr. Ahuja released Petitioner to return to work with restrictions on April 27, 2005. He anticipated no restrictions would be necessary by July 10, 2005. Petitioner was given work conditioning and returned to work June 1, 2005. Dr. Ahuja testified Petitioner ultimately had a good result from the fusion surgery. Petitioner reached MMI and was released to return to full duty work on August 25, 2005. (PX18, 9-12)

Dr. Ahuja next saw Petitioner on January 20, 2012. Petitioner was still working full duty and overall doing well. Petitioner gave no indication of having sought medical treatment from the release in 2005 until 2012. In 2012, Dr. Fehling, Petitioner's primary care physician (PCP) sent Petitioner back to him. Dr. Ahuja noted that Petitioner had continued complaining of significant recurring LBP and leg pain and Dr. Ahuja was concerned about additional disc disease. (PX18, 12-14)

Dr. Ahuja saw Petitioner January 30, 2012, after review of a January 26, 2012 MRI and CT scan. It appeared Petitioner had developed disc disease at L3-4, some residual disease or movement at L4-5 that could contribute to osteophyte formation on the left, foraminal stenosis. Petitioner clearly had foraminal stenosis consistent with the pain. He was aware in the meantime Petitioner had been sent to Centegra Occupational Medicine by Respondent. He identified Petitioner's deposition Exhibit 3 as the report in his chart from Centegra. Centegra PA inquired about restrictions and requested the CT scan and MRI scan. Dr. Ahuja testified that Centegra provided a description of the Petitioner's job duties. Dr. Ahuja testified he would have reviewed those job duties at the time. The essential physical functions noted he had to manually move 500-pound drums using the appropriate equipment and must be able to physically enter reactors for maintenance and manually lift and handle 55-pound drums, and manually torque fasteners to 100 feet per. (PX18. 14-17)

Dr. Ahuja authored a letter/report to Dr. Fehling dated March 16, 2012. At that time, he

placed no restrictions on Petitioner. (PX18, 17-18)

Dr. Ahuja received a fax from Petitioner on May 7, 2012. It noted Petitioner reporting his legs aching all the time and sharp pain walking at work. Petitioner had noted working Thursday but could not sit or walk for periods of time and did not work on Friday or the current week until he could see the doctor. Petitioner had requested an Employee's Health Certification form indicating he was unable to work at that time be completed. (PX18, 18-19)

Dr. Ahuja noted on May 11, 2012, Petitioner reported continued low back pain, rating his pain level as 9/10. He reported both legs were feeling numb, and the pain feeling like in the bone radiating to his feet. Petitioner reported symptoms worse with prolonged sitting and more pain standing straight up and with coughing and sneezing. Petitioner felt the pain getting progressively worse. Petitioner had discomfort walking, especially toe to heel and Petitioner had decreased pin prick in the right lower extremity at the L4-5 distribution and left lateral thigh. Dr. Ahuja stated based on Petitioner development of more disease at the level above and below the fusion and the significance in nature and continued progression, they talked about extending the fusion above and below the prior fusion. (PX18, 19-20)

Dr. Ahuja next saw Petitioner June 7, 2012, with the same history, findings and recommendations. He sent Petitioner for psychological clearance for surgery. Dr. Ahuja performed surgery and identified Petitioner's deposition exhibit 4 as the operative report. He stated surgery went well and he saw Petitioner post-surgery on July 10, 2012 and Petitioner reported doing well. They had discussed Petitioner's work and need to lift greater than 50 pounds and crawl into small spaces. (PX18, 20-22)

Dr. Ahuja next saw Petitioner September 6, 2012, and Petitioner continued to have some numbness and tingling in the left leg however, he was improving since the surgery. At that point he was about 90% improved, sitting and walking were progressing, and Petitioner was not wearing the brace. At that point he felt Petitioner could return to work lifting to 25-30 pounds infrequently. (PX18, 22-23)

Dr. Ahuja next saw Petitioner November 1, 2012. Petitioner had reported being involved in a motor vehicle accident on September 21, 2012, when he was T-boned Petitioner felt he was back to baseline 2-3 days after the motor vehicle accident . Petitioner reported a pain rating of 5/10 with some difficulty sitting, but overall improving. Plain x-rays performed after the motor vehicle accident showed stable post-operative changes, good alignment. He recommended Petitioner return to work December 3, 2012 with lifting up to 40 pounds. (PX18, 23-24)

Dr. Ahuja saw Petitioner on December 4, 2012, and Petitioner stated he was deteriorating since surgery. Petitioner did not believe he was severely injured in the motor vehicle accident, but he was deteriorating. Dr. Ahuja stated overall Petitioner's condition had worsened after getting better initially from surgery. Dr. Ahuja viewed deposition exhibit 5 and identified it as a narrative report he prepared in response to Petitioner's attorney's letter dated September 26, 2012. Petitioner reported ongoing stress with working for Respondent and Dr. Ahuja testified that increased the lumbar disc disease beyond that would be reasonably expected. Dr. Ahuja further testified Petitioner's job condition would be a component of the continued progression of the disease for

above and below the (prior) fusion and that would be a contributing factor in Petitioner needing the three-level fusion. (PX18, 24-25)

At that time, Dr. Ahuja noted an EMG showed acute and chronic changes L5-S1. (DepX6) He noted the lumbar CT showed post-operative changes and artifact at L3-S1. There was some documentation of foraminal narrowing, but metal artifact limited a good evaluation. (PX18, 26-29)

Dr. Ahuja agreed that in the middle of the report he stated the date of work situation is related to June 6, 2012, as on that day, in his office, they discussed that he had the situation prior and was not recognizing the ongoing stress at Respondent likely increased the disc disease in the lumbar spine beyond what would be reasonably expected. However, Dr. Ahuja testified that there was no discussion of Petitioner's work duties on June 6, 2012. (PX 18, p. 26) On July 10, 2012, Petitioner had requested a letter stating his condition could be work related. He believed the discussion as to causal connection was July 10, 2012. (PX18, 25-26)

Dr. Ahuja saw Petitioner December 18, 2012, with continued symptoms. Petitioner returned on April 1, 2013, and reported sacral pain, continued numbness and decreased sensation in the leg. Petitioner reported physical therapy wore him out, but any activity tired him and he needed to lie down. On May 13, 2013, Petitioner reported it was day by day and he still complained of back pain. Dr. Ahuja viewed the CT scan of May 7, 2013 that showed left paracentral disc protrusion L2-3 which narrowed the spinal canal, and also showed the fusion L3-S1. (PX18, 29-31)

Dr. Ahuja administered three ESI's, June 4, 2013, June 11, 2013 and on June 27, 2013. On June 27, 2013 Petitioner reported not noticing any essential improvement overall from the prior 2 ESI's. (PX18, 31-32)

Dr. Ahuja testified that on July 29, 2013, he and Petitioner discussed his additional segmental disease and Petitioner noted his leg bothering him 2-3 times per week, but the low back was significantly bothering him. Petitioner returned on September 11, 2013, and reported his legs were improving and the pain was located generally in the low back (2-7/10). Petitioner had limited function and symptoms were easily exacerbated. (PX18, 32-34)

Dr. Ahuja saw Petitioner December 4, 2013 and his condition was essentially the same. He next saw Petitioner February 19, 2014, and Petitioner reported an increase in symptoms with low back pain, bilateral leg pain and buttock pain. A new MRI showed a consistent bulge at L2-3 still present. He reviewed the MRI at the May 22, 2014 visit. At that time he was concerned about pseudo arthritis and he recommended a bone scan which was performed at St. Luke's on June 30, 2014. (PX18, 34-38)

Dr. Ahuja saw Petitioner August 11, 2014, and he recommended fusion surgery as he had suggested prior and recommended adding L2-3 to fusion. He was concerned about pseudo arthritis and loosening of screws and the EMG showed some acute changes at L5-S1. He testified he does not prefer to do 4 level fusion surgery, but he knew Petitioner had significant ligament hypertrophy changes at L2-3. (PX18, 38-40)

Dr. Ahuja viewed deposition exhibit eight, the summary dated August 27, 2014, after Petitioner underwent a four level fusion. He next saw Petitioner August 9, 2014, and Petitioner complained of low back his pain radiating to left buttock, groin, and chronic low back pain. The medical record indicated Petitioner's back pain was tolerable and overall moving on. (PX18, 40-43)

Dr. Ahuja next saw Petitioner November 13, 2014. Petitioner had some pain, stiffness in low back, his symptoms were exacerbated by sitting or supine position, left leg worse, starting to have more chronic pain. It was then 3 months post-surgery and symptoms were within realm. A CT scan was performed on November 7, 2014 which showed good incomplete osseous fusion L3-4, good osseous fusion L4-5, new changes L2-3, and an incomplete fusion L5-S1. He stated L5-S1 is the highest level of stress and you worry if it becomes solid fusion or not. Some people, whether they have a solid fusion or not, can have back pain. It was still in the process of fusing. (PX18, 43-44)

Dr. Ahuja next saw Petitioner on February 27, 2015. Petitioner described pain, aching and burning He rated his pain level as 3/10, and a maximum of 8/10. He was still having symptoms exacerbated by back movement, low back pain, sleeping poorly, but progressing. Petitioner was having some incremental improvement. An FCE was done in Madison, Wisconsin at his request (DepX9 from February 17, 2015). Dr. Ahuja noted that FCE found Petitioner severely incapacitated and limited to less than sedentary due to the multiple fusions and subsequent severe pain, balance and strength issues. He was still hopeful but cautious as to improvement. He indicated then it was reasonable to say Petitioner was at MMI; they usually try to give a patient one year from surgery. He felt Petitioner's FCE limitations then were more or less permanent. (PX18, 44-49))

Dr. Ahuja agreed at some point Petitioner wrote a job description of work activities (PX18, DepX10). He viewed it and had reviewed it prior. He indicated Petitioner's job description was consistent with that from Respondent. He stated at the time he saw Petitioner he clearly had a herniated disc, but he could not state the work duties caused an acute event of herniation; but Petitioner needed the surgery. Dr. Ahuja stated that looking at the work, the condition with chronic exposure, work condition is a component of his progression of the disease at L4-5 that led to the subsequent fusion at L4-5, leading to chronic exposure leading to further degeneration at the levels above and below that fusion and eventually leading to L2-3 disease. He stated in that way, a chronic exposure and continued work had contributed to and is a component of his progression of lumbar disease leading to the 3 fusion surgeries. (PX18, 49-51)

Dr. Ahuja viewed DepX11, report of March 27, 2013. He read Dr. Itkin's opinion regarding Petitioner's condition that it could not be determined if it was aggravated by Petitioner's extensive physical labor. He would say they are work related. He viewed DepX12, the September 2, 2014 report of Dr. Itkin indicating his opinion had not changed. He read Dr. Itkin's opinion stating there was no basis for Dr. Ahuja's causal opinion and Dr. Itkin did not see any objective basis to support the opinion from the records. Dr. Itkin had noted there was no evidence to suggest Petitioner suffered a work accident June 7, 2012, and Dr. Itkin stated no evidence to suggest any particular activity he performed working there accelerated or exacerbated in any material fashion Petitioner's

underlying degenerative lumbosacral pathology. Dr. Ahuja stated in his opinion the activities at work were related and they exacerbated Petitioner's underlying pathology. Dr. Ahuja stated looking at the progression of the disease there is basis. He stated Petitioner had the lumbar disc herniation, underwent the fusion, did well for a while and then symptoms just progressed further and faster, that was essentially what happens. He stated looking at the job description, the work Petitioner was doing, the stresses, accelerated Petitioner's pathology. (PX18, 51-54)

On cross examination, Dr. Ahuja admitted that Petitioner suffered from a type of progressive degenerative lumbar spine disease that was present for many years. (PX 18, 55) Dr. Ahuja confirmed he had no idea what caused the need for the initial microdiscectomy in 1996. (PX 18, 56) Also, Dr. Ahuja had not reviewed any medical records to address the nature of that condition from 1995. (PX 18, 56) Dr. Ahuja also admitted that the natural progression of the Petitioner's disease is something that gets worse with time. (PX 18, 56-57) Dr. Ahuja conceded that when he saw Petitioner again in January 2012, he did not have any details as to why Petitioner had recurrent pain within the last nine months. (PX 18, 61-62) More specifically, there were no specific work activities that were mentioned causing a worsening of symptoms by the Petitioner to Dr. Ahuja. (PX 18, p. 62) Dr. Ahuja admitted there was no causation opinion regarding work was made until December 4, 2012. (PX 18, 60, 66, 71, 72, 89) In fact, Dr. Ahuja also agreed that even when Petitioner was off of work, his condition still worsened. (PX 18, p. 66-67)

Dr. Itkin's Testimony

At request of Respondent, Dr. Itkin testified by way of evidence deposition October 29, 2015. Dr. Itkin is a board-certified neurologist and a fellow of the Academy of Electrodiagnostic Medicine. fellowship trained in electrodiagnostics. He is a clinical assistant professor at the University of Illinois. He testified he probably has had about 5,000 patients and he has been in practice about 23 years. He does medical-legal consulting and IME's. He spends less than 5% of his practice on medical-legal issues. (RX1, 4-10)

Dr. Itkin examined Petitioner twice and prepared 6 reports dated March 27, 2013, November 18, 2013, April 10, 2014, September 2, 2014, May 2, 2015, and July 7, 2015. (RX1, 10-13)

Dr. Itkin first examined Petitioner on March 27, 2013. At the evidence deposition, Petitioner's counsel objected to any testimony regarding Dr. Itkin's independent medical evaluation of Petitioner for two reasons. Petitioner objected to Dr. Itkin's testimony because the report Petitioner's attorney reviewed indicated Dr. Itkin's opinions were based on part on a video he viewed and attorney for Petitioner was not provided the video. The Arbitrator sustained the objection citing *Ghere v. Industrial Comm'n (Howell Asphalt),* 278 Ill. App. 3d 840, 663 N.E.2d 1046, 1996 Ill. App. LEXIS 171, 215 Ill. Dec. 532. Petitioner's counsel further objected to Dr. Itkin's testimony stating Respondent's counsel did not provide a copy of correspondence sent to Dr. Itkin. The Arbitrator overruled this objection citing relevance. (RX 1, 14)

The Commission notes Petitioner's counsel had Dr. Itkin's report more than 48 hours

before the evidence deposition. As the Commission has *de novo* review of the evidence, the Commission reverses the Arbitrator's ruling on Petitioner's *Ghere* objection to Dr. Itkin's testimony.

Dr. Itkin obtained a history from Petitioner noting a history of chronic lower back problems stemming from the mid-1990s. Petitioner recalled receiving procedures as early as 1997. Petitioner reported low back pain subsequently. Dr. Itkin testified Petitioner reported being treated conservatively from 2000 to 2002. Petitioner reported low back pain radiating to his right leg and underwent a fusion surgery at L4-5 in 2005. Petitioner reported his back was relatively stable until 2008 or so. In about 2010, without provocation or injuries, the right leg started giving out and the pain worsened in his back and radiated into his leg. Petitioner reported to Dr. Itkin that in 2011, his leg started tingling with any flexion of his body, which he was required to do at work. Petitioner started receiving more aggressive treatment at that time including epidural steroid injections. In December 2011, Petitioner returned Dr. Ahuja who performed in surgery in 2005. (RX 1, 17-19)

Dr. Itkin noted Dr. Ahuja tried conservative treatment which did not help. He noted subsequently in June 2012, Petitioner underwent multiple level fusion surgery to the low back. He testified, "And it's important to know that before his surgery, the right leg was giving out." (RX 1, 19) Symptoms had improved after surgery, but Petitioner still had significant low back pain which was excruciating and exacerbated by movement per Petitioner. (RX 1, 19)

Dr. Itkin stated Petitioner reported to him that he could not sit for more than five minutes. Petitioner complained of bilateral leg pain at night and his legs needed to move or they hurt. Petitioner reported significant pain in the back, buttocks and tailbone. (RX 1, 19-20)

Dr. Itkin testified they discussed what he was doing at work in general terms and told him what his daily routine was at work. Petitioner did not describe specifically how he was injured. (T.20-21) (RX 1)

Dr. Itkin reviewed medical records noting in his report a summary of what he reviewed. Dr. Itkin reviewed some of Dr. Ahuja's notes which included notes from procedures performed in 2005 and prior procedures. He stated Petitioner's history was very extensive and progressive, so he needed to review radiographic data. As to the forensic question, he did not see any evidence Dr. Ahuja had any information regarding the work Petitioner was doing. Dr. Itkin testified that other than the letter to Petitioner's attorney dated December 4, 2012 , he found no specific causal opinion from Dr. Ahuja contained in his treating records. (RX 1, 21-23)

Dr. Itkin stated Petitioner had a very extensive degenerative lumbosacral disease spanning almost half his life. He noted Petitioner had multiple lumbosacral surgeries required because of the progressive degenerative processes. In his report he could not address the safety of Petitioner returning to work with or without restrictions without an objective functional analysis being performed. Dr. Itkin diagnosed Petitioner's condition as failed back syndrome and discogenic pain.

Dr. Itkin performed a sensory examination which revealed some changes which were not substantiated by objective anatomical analysis. He felt Petitioner had significant symptom

amplification. It was inconsistent with his exam and exams by Dr. Ahuja as recorded in his medical records. (RX 1, 23-25) He concluded Petitioner was an unreliable historian for his sensory exam. (RX 1, 25)

Dr. Itkin reviewed Dr. Ahuja's notes and his opinion and stated he disagreed with the causal connection opinion. He noted Dr. Ahuja had less information than he did regarding what Petitioner did at work. Although he had more information and evidence regarding Petitioner's work, at that first visit Dr. Itkin testified, he was unable to arrive at a precise conclusion of a correlation with the information he had ta that time. His objection to Dr. Ahuja's opinion was based on Dr. Ahuja's had less information than he (Dr. Itkin) did.

In 2013, he could not answer if Petitioner's work as a laborer exacerbated the problems with his lower back. He stated Petitioner started having symptoms in his late 20s by history. He could not offer opinion if extensive physical labor exacerbated the degenerative condition over time. He had noted in his report that the evidence was inconclusive and could not be qualified either way if the work worsened/aggravated the condition. He did not know how many times Petitioner performed each task, repetitively, duration/length, force used. He stated it was clear Petitioner's job was not sedentary/light, possibly it could have worsened/aggravated the pre-existing condition but could not offer an opinion conclusively or to a reasonable degree of medical certainty. He testified he felt Dr. Ahuja's causal relationship opinions were weak. (RX 1, 25-30)

Dr. Itkin subsequently reviewed additional medical records and generated his November 18, 2013 report which he described as a technical opinion on the ATI Physical Therapy report dated October 23, 2013. (RX 1, 30-31)

Dr. Itkin examined Petitioner for a second time on April 10, 2014, and generated a four-page report. Petitioner reported his symptoms had not changed and he felt the right leg was giving out more and both legs hurt. Petitioner also complained of left shoulder pain. He had reviewed additional medical records including the October 23, 2013 FCE and the December 4, 2013 Dr. Ahuja records, which restricted Petitioner to light duty work 6 hours per day. On neurologic exam, Dr. Itkin noted symptom magnification but otherwise the exam was unchanged. His opinion remained unchanged but he noted Petitioner was progressively getting worse, even with the job restrictions. Dr. Itkin's noted his degenerative problems had not changed and his work, as described could not be implicated in any way that he could explain. (RX 1, 34)

Dr. Itkin reviewed additional records and wrote another addendum report dated September 2, 2014. He reviewed the Employee Occupational Injury-Illness Report from Dow Chemical of July 7, 2012, medical from Aurora Health, Patient Statement of Injury of September 5, 2012, Dr. Ahuja's August 25, 2005 records, Centegra Health Systems records, and Dr. Ahuja's subsequent records from 2012. He stated these records further substantiated and confirmed his opinion that regarding causality between Petitioner's progressive lumbosacral disease and his work duties. Based on his review of the records, he concluded that there was no particular accident and he did not find any cause in Petitioner's work activity. He testified, "The cause is progressive degenerative lumbosacral disease, which is a biological cause." (RX1m 34-37)

Dr. Itkin reviewed the Employee Occupational Illness-Injury report of July 11, 2012 signed

by Petitioner. He noted Petitioner reported "…having back problems that are related to my job duties, being a repetitive injury." (RX 1, 38) He stated that did not help him understand the cause of the alleged injury. (RX 1, 37-38)

Dr. Itkin was directed to his September 2, 2014, report where he noted Dr. Fehling's May 10, 2011 record. He found Dr. Fehling's review of systems an unusual entry. Petitioner then reported basically both legs giving out all the time at work, but it did not happen at home. Dr. Fehling's record stated he can dig ten hole posts, shovel mulch for hours on end without any problem and could bend and stretch and move around without any trouble. That records indicated symptoms mainly happen at work. Dr. Itkin stated if you are going to have a problem with a spinal disease, "you will have it at home, at work and probably even on the moon." (RX1, 38-40)

Dr. Itkin reviewed job descriptions including one written by Petitioner and reviewed videos. Based on his review, he stated Mr. Borst does not perform repetitive jobs. He further stated as a basis of his opinion: "I read the report, I read his job duties. He wrote it down, he told me what he does, he wrote down what he does, how much he does of that. These are very objective facts here. We know what he did as a maintenance tech for Dow." When asked what makes Petitioner's job not a repetitive job, Dr. Itkin testified, "He does different things on different days. He does different jobs on different days. They're not repetitive." (RX 1, 45)

Dr. Itkin reviewed additional records of May 2, 2015, and noted Dr. Ahuja had performed a multi-level fusion surgery as well as other procedures and discectomies on August 27, 2014. He noted Petitioner still had significant pain after all the way to 2015. Dr. Ahuja performed another surgery and Petitioner was still getting worse progressively he noted. Dr. Itkin testified this further confirmed the underlying process that was going on. (RX1, 46)

Dr. Itkin authored his final report on July 7, 2015, after reviewing additional records, including Dr. Ahuja's deposition, the FCE from ATI, and Petitioner's notes regarding day-to-day work activity where Mr. Borst explicitly described what he did at work. He again noted Petitioner was getting worse. Dr. Itkin stated after reviewing Dr. Ahuja's deposition his opinions remained the same. He again indicated he saw no evidence of repetitive trauma; there was not a specific repetitive job task. He stated Dr. Ahuja agreed Petitioner had multiple work duties. (RX 1, 46-51)

After reviewing the February 17, 2016, FCE report, Dr. Itkin reiterated his opinion that there was no evidence Petitioner's work at Dow materially affected his progressive degenerative lumbosacral pathology. (RX1, 48-50) Dr. Itkin opined Petitioner's rate of progression of his spine disability did not change as a result of work activities. (RX 1, p. 87)

Conclusions of Law

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 144 Ill. Dec. 794, 797, 556 N.E.2d 261, 264 (Ill. App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill. Dec. 634, 510 N.E.2d 502 (1987). The Petitioner must prove a precise, identifiable date when the accidental injury

manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Bellwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 106 Ill. Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Id.* at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill. Dec. 620, 507 N.E.2d 533 (1987). An employee alleging repetitive trauma "must still show that the injury is work related and not the result of a normal degenerative aging process." *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. ¶ 31

Further, 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. *Hansel & Gretel Day Care v. Industrial Commission*, 158 Ill. Dec. 851, 858, 574 N.E.2d 1244, 1251 (Ill. App. 3 Dist. 1991); citing *Board of Education v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969).

The Commission finds that the Petitioner failed to sustain his burden of proving a repetitive trauma for any of the alleged manifestation dates. The Commission finds that Petitioner's condition was the result of his pre-existing condition and degenerative aging process and that his varied job duties were not a causative factor. As the *Nunn* court held, "Cases involving aggravation of a preexisting condition primarily concern medical questions and not legal questions. (*Berry v. Industrial Com*. (1984), 99 Ill. 2d 401, 459 N.E.2d 963, quoting *Long* [***14] *v. Industrial Com*. (1979), 76 Ill. 2d 561, 394 N.E.2d 1192.) This is especially true in repetitive trauma cases. (See *Johnson v.* [**507] [****639] *Industrial Com*. (1982), 89 Ill. 2d 438, 433 N.E.2d 649.) In a repetitive trauma case, 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*. (1987), 115 Ill. 2d 524, 505 N.E.2d 1026.) *Nunn v. Industrial Com*m'n., 157 Ill. App. 3d 470, 478, 510 N.E.2d 502, 506-507, 1987 Ill. App. LEXIS 2728, *13-14, 109 Ill. Dec. 634, 638-639

Based on the above, and the record taken as a whole, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of evidence that he suffered accidental injuries arising out of and in the course of his employment on April 27, 2012, June 7, 2012 and/or July 10, 2012, and likewise failed to prove that his current condition of ill-being is causally related to his employment. More to the point, the Commission is not convinced that Petitioner's job duties were sufficiently repetitive or performed in such a manner as to cause and/or aggravate his low back condition. In support of this determination, the Commission relies on the testimony of Petitioner, as well as Respondent's witnesses, Mr. Burns, Mr. Oldland, and Ms. Cashbaugh-Sanchez, as to the variety of duties and changes in positions and rest breaks. The Commission further relies on the job descriptions entered into evidence and prepared by both Petitioner and Respondent (PX13, PX14, PX 16, PX17, RX17, & RX18) indicating the various and varied activities Petitioner performed on a daily basis.

The Commission finds Dr. Ahuja's causation opinion is not supported by the record. Dr. Ahuja testified that multiple 55 pound lifting and going in small areas caused Petitioner's

condition. (PX18, 103-104) However, this testimony is refuted by Petitioner's testimony and written job description as well as Respondent's witnesses and job descriptions admitted into evidence which document the varied nature of the work that also includes paperwork, computer entry, light and medium work duties. Dr. Ahuja's opinion was solicited by Petitioner after Petitioner's third surgery in July 2012. He provided the opinion only after referring Petitioner to another practitioner for a causal opinion. Then in December 2012, he provided a retrospective causal opinion at the behest of Petitioner. "An expert opinion is only as valid as the reasons for the opinion." (Internal quotation marks omitted.) *Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587, 355 Ill. Dec. 705*

The basis of his opinion is disputed by Petitioner' own testimony. Further, Dr. Ahuja's treating medical records, specifically records of January 20, 2012, where he specifically references, "I am concerned for adjacent segment disease", January 30, 2012, March 16, 2012, May 11, 2012, June 4, 2012, July 10, 2012, September 6, 2012, November 1, 2012, are notably devoid of any reference to Petitioner's work activities as being a cause of his low back complaints. In fact, not until December 4, 2012, does Dr. Ahuja opine on causation in response to correspondence from Petitioner's attorney. Further, contrary to testimony of Dr. Ahuja and Petitioner, there was nothing in medical records until December 4, 2012 as to any causal opinion. In forming his causation opinion, Dr. Ahuja relies on two specific job duties, however, those specific job duties are never mentioned by Petitioner in Dr. Ahuja's records as activities that caused Petitioner's worsening of symptoms. Prior records from July 2, 2012, and September 14, 2012, only indicated Petitioner's wife was considering or realized a possibility of a workers' compensation claim, but no causal opinion was given by Dr. Ahuja at that time. The Commission finds the contemporaneous medical records more reliable than the solicited causation opinion of Dr. Ahuja. Thus his opinion is unpersuasive.

In further support of this determination, the Commission relies on the opinions of §12 examining physician Dr. Itkin, as it is more persuasive and supported by the evidence. Dr. Itkin had a better forensic understanding as to the nature of Petitioner's variety of job duties compared to the treating surgeon Dr. Ahuja. Dr. Itkin performed a comprehensive review of Petitioner's medical records gleaning an understanding of the progressive nature of Petitioner's condition. Further, Dr. Itkin reviewed the job descriptions, Petitioner's own description of his job duties, the video and the medical records and determined Petitioner's job duties were not repetitive and the cause of his low back condition. Dr. Itkin further noted on his examinations evidence of symptom magnification. He noted that Dr. Ahuja had, until July 2, 2012, solely related Petitioner's condition back to the 2005 surgery.

The Commission further takes notice of the Dow Confidential Worker's Compensation Supervisors Statement dated July 17, 2012 prepared by Rich Oldland. The report noted that Petitioner did not consider it work related. Petitioner had communicated to Mr. Oldland that Petitioner had a similar injury 8-10 years prior for which he had an operation. When they discussed discomfort, Petitioner indicated this was a natural progression of the same injury/ affliction and he now needed the same operation in different area. Mr. Oldland noted, at no time did Petitioner express concern that the condition was an acute on chronic issue. (RX 2)

Based on the above, and the record taken as a whole, the Commission reverses the decision

of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the evidence that he suffered accidental injuries arising out of and in the course of his employment by the Respondent on or about June 7, 2012, July 10, 2012, or April 27, 2012, and likewise failed to prove that his current condition of ill-being relative to his lower back is causally related to his employment. All other issues are rendered moot.

Accordingly, the Arbitrator's decision is hereby reversed and Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated May 28, 2020 is vacated and Petitioner's claim for compensation is denied.

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.

December 20, 2021

o-10/19/21
KAD/jsf
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator, with modifications. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving that he sustained an accident that arose out of and in the course of his employment.

In this case, the Petitioner put forward three (3) possible manifestation dates for his repetitive trauma injury. The Commission may set the appropriate manifestation date. "Manifests itself" means 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. *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 531 (1987). It may become plainly apparent to a reasonable person well after the claimant experiences symptoms and even after his condition has been diagnosed. *Three "D" Discount Store v. Indus. Comm'n*, 198 Ill. App. 3d 43, 47-48 (1989). The method for ascertaining the accident date in repetitive trauma cases makes it possible for that date to fall after the claimant's last day of employment. *A. C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879 (1998).

In this case, Petitioner testified he believed he had conversation regarding work-relatedness with Dr. Ahuja on June 7, 2012. Dr. Ahuja believed this conversation occurred July 10, 2012. Petitioner's injury manifested itself at the time this conversation occurred, even though he was already off work at the time. Petitioner then gave timely notice by completing a Dow Employees Occupational Illness Injury Report on July 11, 2012. On this form he listed the date of injury as June 7, 2012.

In repetitive trauma cases, the employee must show that the injury is work-related and not the result of a normal degenerative aging process. *Three "D" Discount Store,* citing *Peoria Bellwood*, 115 Ill. 2d at 530. Petitioner need only prove that some act or phase of employment was a causative factor of the resulting injury. *Id.*, citing *County of Cook v. Indus. Comm'n*, 69 Ill. 2d 10 (1977).

Contrary to the majority, I believe Petitioner more than met his burden of proving that his condition of ill-being, that being a worsening of his pre-existing lumbar spine condition, was causally-related to repetitive trauma. While Petitioner did not repeat the same task every day, there can be no dispute that the nature of Petitioner's job duties were physically demanding on a daily basis over many years.

Respondent's witnesses overall agreed with Petitioner's description of the tasks he was required to perform. The testimony of Mr. Burns is notable. He confirmed that physical force using torque with either a pipe or a bolt was used 65% of the time, that activities involving kneeling and crouching was about 45% of the time, and that the cart regularly weighed about 100 pounds, but could weigh upwards of 500 pounds 10% of the time.

Dr. Ahuja credibly testified that Petitioner's work duties accelerated his underlying pathology beyond what would reasonably be expected, contributing to the need for the three-level fusion. Dr. Ahuja was aware that Petitioner had to perform multiple lifting, twisting movements, including lifting and crouching in small spaces. This is activity Mr. Burns noted to be performed 45% of the time.

Whereas, the testimony of Dr. Itkin was not convincing. In his first report of March 27, 2013, he diagnosed extensive degenerative lumbosacral disease spanning most of Petitioner's life. Notably, Petitioner was only 45 years old. Despite having a detailed description from Petitioner as to his job duties, Dr. Itkin could not make a causal connection opinion at that time. Dr. Itkin was provided additional records, but again on November 18, 2013, he was still unable to provide an opinion as to whether Petitioner's job duties aggravated his pre-existing lumbar condition. Dr. Itkin ultimately opined that Petitioner's job duties were not classified as repetitive such that would warrant a causal relation to Petitioner's back. He stated that Petitioner was involved in a variety of different tasks each day that did not amount to repetitive in nature.

The Arbitrator correctly found that there is no additional requirement that for a claim of repetitive trauma, Petitioner needs to prove that his work duties involved the same repetitive task, over and over, day after day. Compensation may be allowed where the employee's existing physical structure, whatever it may be, gives way under the stress of his usual labor and he is suddenly disabled. *International Harvester Co. v. Ill. Workers' Comp. Comm'n*, 56 Ill. 2d 84, 90 (1973).

As Dr. Itkin's opinion is predicated on a misunderstanding of the nature of "repetitive trauma" injuries, it cannot be relied upon. It was Petitioner's usual heavy labor, often in small spaces, that led to an acceleration of his preexisting lumbar condition beyond its normal progression.

Finally, the Petitioner reached MMI and became permanently and totally disabled as of the FCE on February 27, 2015. He should have been awarded permanent total disability benefits beginning this date, not maintenance benefits.

For the forgoing reasons, I would affirm the Decision of the Arbitrator, albeit with a modification as to the award of maintenance and permanent total disability.

o: 10/19/2021 /s/ *Thomas J. Tyrrell*
TJT/ahs Thomas J. Tyrrell
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BORST, BRIAN
Employee/Petitioner

Case# **12WC025629**

DOW CHEMICAL
Employer/Respondent

On 5/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Brian Borst
Employee/Petitioner

v.

Dow Chemical
Employer/Respondent

Case # **2012** WC **25629**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **10/4/16 and 7/12/17,** with proofs being closed on January 16, 2020, before **Arbitrator Charles M. Watts**. 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 **04/27/12, 06/07/12 and 07/10/12,**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,374.05**; the average weekly wage was $**949.50**.

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

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

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

ORDER

Credits

Respondent shall be given a credit of $**421,043.19** 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 be given credit for $**93,055.68** for short-term and long-term disability benefits paid under Section 8(j) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**633.00**/week for **148** weeks, commencing **4/27/15** through **2/27/15**, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $**633.00**/week for **123 4/7** weeks, commencing **2/28/15** through **7/12/17**, as provided in Section 8(a) of the Act.

Permanent Total Disability

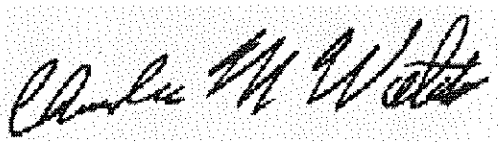
Respondent shall pay Petitioner permanent and total disability benefits of $**633.00**/week for life, commencing **2/27/15**, as provided in Section 8(f) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $**182,728.02**, according to the fee schedule, as provided in Section 8(a) 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

May 26, 2020
Date

MAY 28 2020

RIDER TO ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

Brian Borst v. Dow Chemical, 12 WC 25629

MEMORANDUM OF DECISION OF ARBITRATOR

This matter proceeded to trial before Arbitrator Falcioni on October 14, 2016 where testimony was obtained. On July 12, 2017 the parties appeared before Arbitrator Falcioni for submission of demonstrative and documentary evidence. (Testimony of Evidence on Arbitration, hereinafter, "T." 4-a). Subsequently, and before rendering a trial decision, Arbitrator Falcioni passed away. Also, the box of trial exhibits previously admitted went missing. The parties attempted to re-create the evidence and additional exhibits to address all issues in dispute. Therefore, proofs were re-opened and closed on January 16, 2020 before Arbitrator Watts to ensure accuracy of the record.

In this claim, Petitioner alleges worsening of a pre-existing spine condition pursuant to a theory of repetitive trauma. T, 6. Petitioner's Application alleges three dates of accident ("manifestation" dates): April 27, 2012; June 7, 2012; July 10, 2012. T. 11.

The Arbitrator renders findings on the following disputed issues:

(C) Did an accident occur that arose out of and in the course and scope of employment by Respondent?

(D) What was the date of the accident?

(F) Is Petitioner's present condition of ill-being causally related to the injury;

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

(K) What amount of compensation is due for temporary total disability and/or maintenance;

(M) Should penalties or fees be imposed upon Respondent?

(N) Is Respondent due any credit?

FINDINGS OF FACT

~~At the time of the claimed injury, Petitioner Brian Borst worked for Respondent Dow~~ Chemical for 18 years as a maintenance technician. (Tr 13-14). He worked at Respondent's chemical plant in Ringwood, Illinois. (Tr.14). The plant is a multi-building campus spanning 3-4 acres with about 20 separate buildings. (Tr.14). He worked in all of them. (Tr.14).

Petitioner testified that his workday started with a meeting where the day's projects would be assigned to the maintenance technicians. The technicians would then gather the

necessary tools and equipment, place them in a bucket or on a cart, and head out to whatever building required the work. The projects varied day to day.

Petitioner described some of the projects and their physical requirements. One task described by Petitioner involved repair of reactors. (Tr. 18). Reactors are large mixing vats, varying in size, with a shaft in the middle and mixing blades coming off the shaft. One of the duties of the Maintenance techs is to service and repair the shaft, blades and walls of the reactors. This involved putting on a rain suit, sometimes with a SCUBA breathing apparatus and 60 lb. oxygen tank, other times with an air hose coming in from outside the reactor, and then physically entering the reactor to perform the repairs.

Entering the reactors involved either climbing through the top where the reactor was open, or else climbing through an 18 to 24-inch hole in the side of reactor and down a latter on the inside to reach the bottom. The maintenance techs would then have to kneel, bend over or lay down on the bottom of the reactor to get underneath the blades. (Tr. 20-21). Petitioner testified that he would perform these reactor repairs once or twice a month, for one to two days at a time. (Tr. 19-20).

Petitioner also testified that he was required to bring tools and equipment out to the job sites. For smaller jobs, he was able to carry these in a bucket. For larger jobs, he used a cart and wheeled the carts on ramps to the job sites. The tools and equipment could weigh anywhere from 4 to 500 lbs. Sometime he would get help with pushing heavier carts up the ramps, and sometime a forklift was required to get the cart up to a job site. Petitioner estimated that about 40% of the time he had to push the tools and equipment on a cart by himself out to the job site. The heavier carts, in the 300 – 500 lbs. range were only required twice a month on average, with the average cart weighing 100 lbs. (Tr.23-24).

The work on the reactors consisted of either repairing blades, shafts and wall inside the reactor, or else removing motors, pumps, pipes and various other equipment from the outside of the reactors. This involved using hand-tools to loosen and remove bolts and equipment. Often, the reactor equipment would have to be loaded onto the cart and taken back to the shop for repair. The pumps and motors weighed between 50 to 250 lbs. and were on the outside of the reactor. (Tr.24-26). Petitioner performed pump and motor repair work on average once a week. (Tr.26).

The reactor mixing blades weighed from 10 to 200 lbs. and would either have to be removed and taken out of the reactor by rope or chain for repair, or the bolts would have to be torqued with hand-tools inside the reactor. (Tr.27). Petitioner removed and repaired shafts once every 6 months. (Tr.28).

The maintenance techs also lubricated the reactors, which involved bringing 5-gallon drums of oil out to the reactors, changing the oil, and then bringing the used oil back to be disposed of. Petitioner did this about once a week.

The work was all done with hand-tools, because power tools or pneumatic tolls presented an explosion hazard at the reactors. (Tr.28-29).

Petitioner also did work in the machine shop. When equipment required repair, Petitioner would bring the equipment back to the machine shop, where he did welding and repair

work on the shafts, blades, motors and pumps. (Tr.29-31). Equipment was manually loaded from the cart onto a worktable. Petitioner did all the repair work on the worktable, which was slightly lower than waist level and required bending at the waist. Respondent entered a photograph into evidence, which shows a maintenance tech performing repair work at a worktable. (RX5 A)

Petitioner prepared a summary of his job duties, which he sent to Dr. Arvind Ahuja. (PX13). He could not recall when he prepared and sent this job description, but it was after he filed his Application for Adjustment of Claim.

Petitioner estimated that 75% of all work orders involved bending at the waist, and 70% involved some kind of lifting. (Tr.31). He classified his work as involving heavy physical demand. (Tr.33-34).

Respondent presented three of its employees as witnesses via deposition. The bulk of their testimony concerned Petitioner's work duties.

Respondent presented witness, Gerard Burns, an employee of Dow, at hearing for testimony about the nature of Petitioner's job duties. Burns worked at Dow for 23 years. T. 121. In and around 2011-2012, Burns worked for Dow as an apprentice electrician. T. 122. In that capacity, he performed maintenance work on all equipment in the plant including electrical and mechanical, but his focus was on electrical. T. 122. In June 2012, Burns changed to maintenance activity coordinator. T. 122. In that capacity, Burns did less field work and was more involved with passing out work orders to mechanics and electricians, one of which was the Petitioner. T. 126-127. According to Burns, the nature of work orders has not changed since June 2012. T. 129. Burns worked with the Petitioner in 2011 and 2012 approximately 25-30% of the time, usually when working with pipes or seal replacements. T. 123-124. During that time, he witnessed Petitioner using wrenches, changing gear boxes or motors, changing piping out, and running to help hand tools, etc. T. 124.

Burns examined the job description prepared by Petitioner and agreed with most of the details of the document. T. 131-132. However, Burns testified that the description left out some required job duties. T. 131-132. Burns confirmed however, that Petitioner was engaged in a variety of different duties. T. 124-125, 140. He clarified that there was no one task or physical activity that a maintenance mechanic would perform over and over and over. T. 139-140. The only activity he would categorize as "repetitive" sitting at a desk closing work orders and working on computer. T. 141. According to Burns, the day to day activity of a maintenance mechanic has remained the same but for the addition of more computer-based work. T. 131-132.

Burns confirmed also that the table seen in RX5 was instituted in 2011 and aided in lifting things to avoid bending and for ergonomic reasons. T. 134-135. However, Burns admitted that in some instances hand tools had to be used over power tools. T. 145. And, he confirmed that on occasion Petitioner had to get into some tight spaces to work in kettles. T. 146.

Burns testified that Petitioner's work duties ranged from light to heavy in physical demand. T. 132-133. Medium to light work included: inspections of kettles, checking oil levels and seal fluid levels, checking the general condition of the machine looking for leaks. T. 133. Medium demand work included: pump re-builds. T. 133. Light work constituted approximately 30% of the tasks, medium work constituted somewhere between 65-75% of the tasks, and heavy

work constituted 15% of the tasks. T. 149. According to Burns, physical force using torque with either a pipe or a bolt was used 65% of the time. T. 149. Activities involving kneeling and crouching up 2011 was about 45% of the time. T. 149-150. Burns also confirmed use of the cart to move tools to the jobsite. T. 150-151. He testified that the carts can vary from light up to a few hundred pounds. T. 151. In his opinion, the carts would average around 100 pounds and only 10% of the time be upwards of 500 pounds. T. 151-152.

Witness, Richard Oldland, testified on behalf of the Respondent via deposition on November 15, 2016. RX 2. Oldland began working for Dow Chemical on January 10, 2005. RX 2, p. 6. He came to the Ringwood location in March 2012. While at Ringwood, Oldland worked as operations leader for two production areas and a site maintenance leader. RX 2, p. 9. While at Ringwood, Oldland was responsible for the entire maintenance department and therefore had first-hand knowledge of the maintenance technician job duties. RX 2, p. 10-11.

Mr. Oldland examined the Dow job description in connection with his testimony. RX 2, p. 12-13. He testified that one piece missing from the job description was the time a technician spent in the maintenance shop standing at a bench putting parts in and following diagrams. RX 2, p. 12.

Mr. Oldland also reviewed the job description prepared by the Petitioner and provided comment. RX 2, p. 13. In his opinion, there were two errors with the Petitioner's job description. RX 2, p. 13. First, a lot of the weights were not reasonable. RX 2, p. 13. He explained why a 400 – 500-pound cart could not be pushed by one person around the campus based on the design of ramps at the site. RX 2, p. 13-14. On cross examination, Mr. Oldland quantified that it was more likely for the cart to weigh between 20-150 pounds. RX 2, p. 35. Second, Mr. Oldland questioned the duration of various activities claimed by the Petitioner. RX 2, p. 14. Specifically, he testified that it was not accurate that any project or work would be performed for a consistent period of 8 hours per day based on necessary breaks and time for returning tools. RX 2, p. 14. Rather, according to Mr. Oldland, the maintenance technician was more likely to work only about 6 hours per day on actual maintenance activities. RX 2, p. 16. This estimate took into consideration the fact a technician might have to go and obtain additional tools in the middle of a job and had to close out the work job upon completion. RX 2, p. 17-18.

Mr. Oldland testified that the daily expectations of the maintenance technician were unpredictable and different. RX 2, p. 19. By this, he clarified that only 50 percent of the work in 2012 was anticipated, with the remaining jobs occurring as things broke down or needed attention at the plant. RX 2, p. 20. Therefore, the job duties of a maintenance technician changed daily. RX 2, p. 20. According to Oldland, no maintenance technician would perform the same job duty, same task, same job assignment over and over each day. RX 2, p. 20.

Respondent's witness, Lisa Cashbaugh-Sanchez testified via deposition on November 23, 2016. RX 3. Ms. Cashbaugh-Sanchez testified that she was an employee of Dow Chemical and previously worked at the Ringwood location from November 2009 - February 2012. RX 3, p. 5-6. At the Ringwood facility, Ms. Cashbaugh-Sanchez was an operations leader in charge of the maintenance department and process areas. RX 3, p. 6. In that capacity, she supervised the Petitioner during her entire tenure at Ringwood. RX 3, p. 7. As part of her role as operations leader, Ms. Cashbaugh-Sanchez would observe Petitioner's job duties approximately once a week. RX 7, p, 7-8. She was familiar with his job duties and abilities as she would assist weekly

with assigning various maintenance tasks and ensuring all necessary maintenance jobs were staffed. RX 7, p. 8-9. In fact, Cashbaugh-Sanchez conducted two performance reviews of Petitioner during her tenure as his supervisor. RX 3., p. 9-10. In general, Petitioner would be assigned different tasks to complete each day. RX 3, p. 36. Further, of the physical activities he performed ranged from light to heavy in nature. RX 3, p. 54. Most of Petitioner's job duties would be performed in the maintenance shop ranging in the light to medium category. RX 3, p. 55. When Petitioner worked around in the plant it might be more in the medium-heavy category. RX 3, p. 55.

Cashbaugh-Sanchez examined various job descriptions and provided testimony on the validity of each. RX 3, p. 10-14. The first discussed was the job description prepared by Dow. RX 3, p. 10-11. According to Cashbaugh-Sanchez, while the job tasks listed in the description are accurate duties, they represent activities that one would conduct over a year period and not in one day. RX 3, p. 12. In addition, Ms. Cashbaugh-Sanchez questioned that Petitioner would have to lift up to 500 pounds manually and use up to 500 pounds of torque. RX 3, p. 12. In her opinion, these activities would be very rare if at all. RX 3, p. 12-13. Further, Cashbaugh-Sanchez reiterated that pushing a 400 or 500-pound cart of tools would be a rare instance. RX 3, p. 15. Rather, on a daily basis the tools on the cart would fit inside a 5-gallon drum. RX3, p. 15. Similarly, as to the additional tasks represented in Petitioner's job description, Ms. Cashbaugh-Sanchez discussed that the tasks represented what he might do over a year and represented extreme values for purposes of weight, rather than activities he would consistently do on a day by day basis. RX 3, p. 15. According to Ms. Cashbaugh-Sanchez, there were also a number of tasks not addressed in Petitioner's job description that would take time throughout the day, such as trouble shooting, attending meetings, safety procedures, breaks, obtaining permits to work in areas, paperwork and clean up activities. RX 3, p. 20-23. Further, Ms. Cashbaugh-Sanchez confirmed that from a practical perspective, the Petitioner technically worked an 8-hour shift but would not be performing physical tasks the whole time after the necessary procedural administrative tasks and daily breaks are considered. RX 3, p. 21-22.

Ms. Cashbaugh-Sanchez further testified that when Dow took over the plant in April 2009, additional safety measures were put in place in order to address safety at the plant. RX 3, p. 32-33. For instance, no one was expected to lift over 50 pounds individually. RX 3, p. 33.

As an operations leader, Ms. Cashbaugh-Sanchez also provided testimony about accident reporting. RX 3, p. 34-35. All work injuries were expected to be reported immediately by the injured person or anyone that was made aware of a work-related injury. RX 3, p. 34. Ms. Cashbaugh-Sanchez testified she was never given notice of a work injury sustained by Petitioner. RX 3, p. 35.

Petitioner testified his back problems dated back to 2003. T. 34. On cross examination, Petitioner admitted he underwent a lumbar microdiscectomy in 1995. T. 68. On cross exam, Petitioner also admitted he did not know exactly when the back problems started. T.68-69. In 2003, Petitioner had back issues and underwent an MRI. T. 34. Petitioner did not file a worker's compensation claim at that time. T. 34. Petitioner's back pain continued and worsened through 2005. T. 35, 69. In 2003, while employed with Respondent, Petitioner developed lower back pain. (Tr.34). He did not make a workers' compensation claim at that time. (Tr.34). He came under the care and treatment of Dr. Arvid Ahuja, a neurosurgeon. (Tr.35, PX1-3). Dr. Ahuja eventually performed an L4-5 lumbar fusion on February 1, 2005. (Tr.35, PX1-3). Petitioner

was released to return to work without restriction on July 10, 2005. (Tr.36, PX1-3). He returned to his full work duties as a maintenance tech. (Tr.36-37, PX1-3).

Petitioner continued to perform his work without restrictions. Petitioner testified that eventually, sometime around October of 2010, his lower back pain returned. On May 10, 2011, Petitioner began a relationship with Dr. Fehling as his primary care physician. T. 71. At that visit, Petitioner testified he reported back issues and his legs giving out to Dr. Fehling. T. 71. Petitioner claims these incidents only occurred at work and he had no issues at home. T. 71-72. The records from Dr. Michael Fehling, his primary Care provider at Aurora Healthcare, show that he saw Dr. Fehling and complained of recurrent low back pain on May 10, 2011, but that he was doing well, and he made no mention of work. (RX19).

On May 26, 2011 Petitioner again reported his legs wanting to give out to Dr. Fehling. T.72.

Petitioner was required to have a yearly physical while working at Dow. T. 39. One such physical exam took place at the plant by Dr. Jablowski on October 26, 2011. T.69-70. On direct exam, Petitioner could not recall if he told the physicians about any back pain. T. 40.

In January 2012, Petitioner was formally referred by Dr. Fehling back to Dr. Ahuja for a neurosurgical consultation. T. 41. The visit with Dr. Ahuja took place on January 20, 2012. T. 37. Petitioner testified he told Dr. Ahuja that his worsening back pain was affecting his work. T. 38. Petitioner also advised Dr. Ahuja that the back pain had been going on for 6-9 months leading up to the visit. T. 38. More specifically, Petitioner noticed low back pain when kneeling, pushing a cart, and lifting things off the floor. T. 38-39. On cross examination, Petitioner confirmed his leg symptoms exceeded his back pain and the symptoms were worse with sitting, coughing and sneezing. T. 73. Dr. Ahuja recommended an MRI and CT of the lumbar spine. T. 41-42. Dr. Ahuja ordered an epidural steroid injection and medications. T. 42. Petitioner admitted he did not discuss that the back problems might be related to Petitioner's work. T. 73. Subsequently, Petitioner followed up with Dr. Ahuja on January 30, 2012. T. 72-73. Petitioner testified he told Dr. Ahuja he was feeling worse at that time but again, did not relate the condition to his work. T. 75. Petitioner also saw Dr. Ahuja on February 10, 2012. T. 43. At that time, Dow sent a job description to Dr. Ahuja to confirm Petitioner's work abilities for his disability. T. 43. According to Dr. Ahuja, the Petitioner did not require any physical restrictions. T. 43. Another follow-up took place with Dr. Ahuja on March 16, 2012. T. 75-76. By that visit, Petitioner had undergone two epidural steroid injections and continued to work in a full duty capacity. T. 76. Again, no mention was made by Petitioner that the condition could have been work related. T. 76-77. Petitioner subsequently continued to treat with Dr. Ahuja including additional injections through April 6, 2012. T. 43-33. Petitioner testified during that period he still had weakness and pain and informed Dr. Ahuja of the worsening symptoms. T. 45.

Petitioner worked full capacity with Dow until April 26, 2012. T. 44. As of April 27, 2012, Petitioner was taken off work by Dr. Ahuja. T. 44. Petitioner confirmed at hearing he has not returned to work at Dow since that time. T. 44. Petitioner was asked on cross examination if he knew why his Application for Adjustment of Claim indicated an accident date of April 27, 2012 and he answered, "no." T. 107.

On cross examination, Petitioner testified that around the time he was taken off work in late April 2012, he did not talk to his supervisor, Richard Oldland, about his back condition being work-related. T. 110. Petitioner testified he did not tell anyone at work about the condition being work-related before he discussed it with Dr. Ahuja. T. 116-118.

Oldland testified about a conversation he had with Petitioner just after Petitioner's last day of work, on April 27, 2012. (p.21). According to Oldland, Petitioner volunteered that his back problems were "similar to a surgery that he had 8, 10, 12 year prior and it was a natural progression of that. . ." (p.21) and that "he always knew that he would need to have another surgery. This was a natural progression of that ..." (p.22). Oldland also testified that Petitioner volunteered to him that his condition was not work related, even without being asked. (p.30-31). Oldland testified that just prior to his arrival at Ringwood to supervise the maintenance department, there were issues with workers compensation claims, and that he was specifically made aware of these issues, and to be careful to enforce Respondent's policies regarding work injuries. (p.21-22. p.27-28)

Oldland testified concerning a supervisor's statement he prepared on July 17, 2012, and that he reviewed prior to giving his testimony. (RX 2, p.29, RX8). He was asked to prepare the report by his direct supervisor. At the time he prepared the report, Oldland was aware that Petitioner was making a workers compensation claim related to his lower back, and he was specifically asked to give his opinion as to whether Petitioner's condition was work-related. (p.40). Oldland stated in the report that he did not think that Petitioner's condition was work-related, based on his conversation with Petitioner. (p.41).

Oldland did not review any medical documentation, did not speak to Petitioner's medical providers and did not ask Petitioner why he made a claim that his condition was work-related. (p.42-44). Oldland does not have medical training and admitted that his opinion is his own layman's opinion, not a medical opinion. (p.42). Oldland admitted that he discussed Petitioner's claim with representatives from Respondent on multiple occasions, and also with Respondent's counsel on multiple occasions, prior to giving his testimony. (p.43).

Prior to giving his testimony, Oldland was asked by Respondent to review specific documents, including the job descriptions. He was also asked by counsel for Respondent whether he thought Petitioner's job duties were "repetitive" in nature, meaning the same task over and over, every day. (p.45). Oldland was aware that Petitioner was claiming that his regular job duties aggravated his pre-existing lumbar condition, and not because he had to perform the same tasks repeatedly.

Petitioner continued to follow up with Dr. Ahuja T. 45-46. On May 11, 2012, Petitioner reported to Dr. Ahuja constant leg pain which was worse with sitting. T. 77-78. Again, no discussion occurred about the back being work related. T. 79.

On May 22, 2012, Dr. Ahuja discussed an additional surgery consisting of L3-4 and L5-S1 fusion with evaluation of the prior fusion at L4-5. T. 46. On May 30, 2012, Petitioner returned to Dr. Fehling for pre-operative clearance for back surgery. T. 79. No discussion occurred between Petitioner and Dr. Fehling that the back condition was work-related. T. 79-80

Petitioner returned to Dr. Ahuja on June 7, 2012. T. 47-48. At that visit, Petitioner reported to Dr. Ahuja that his pain was getting progressively worse, even though he was not

working at that time. T. 80-81. Petitioner testified multiple times that it was at this visit when a discussion occurred with Dr. Ahuja as to whether the back pain was due to work. T. 47-48, 80-82. Petitioner testified that he also discussed the potential of his back being work-related with his wife at that time as well. T. 48. Dr. Ahuja's medical record does not indicate any discussion about a relation to Petitioner's work. RX 29.

A letter was prepared by Dr. Ahuja on December 4, 2012 at Petitioner's request. PX 1. In that letter it stated Petitioner had low back pain and lumbar radicular symptoms which were aggravated by Petitioner's "current work situation." PX1. Dr. Ahuja stated, "The date of his work situation is related to June 6, 2012 because that was the day in our office when we discussed that he has this situation, and prior to this, he had not recognized that his ongoing stresses at Dow Chemical likely increased his lumbar disk disease beyond what would be reasonably expected." PX 1. According to Dr. Ahuja, the long-term work as a maintenance technician is a contributory cause in the progression of this disease. PX 1.

At hearing, Petitioner was asked why the date June 7, 2012 was listed on his Application for Adjustment of Claim. T. 104. In response, he answered, "I don't recollect." T. 104. Petitioner then confirmed he was claiming a repetitive trauma injury on that date, more specifically as a result of "doing my job at work, heavy lifting, pushing, stooping, bending." T. 105. Petitioner was unsure of when he informed the employer of his alleged June 7, 2012 date of injury but stated he informed a clerk in the office. T. 105-106.

On June 11, 2012, Petitioner underwent an additional surgery consisting of redo right and left L4 and L5 hemilaminectomies, fusion at L3-4 and L5-S1. T. 47, PX1. The first post-surgical visit occurred on July 10, 2012. T. 48. According to the testimony of Dr. Ahuja, this visit on July 10, 2012 is when a discussion was had with Petitioner about whether the condition was work-related. T. 48-49. By contrast, Petitioner testified that this was not the visit when the causal relation to work was discussed but rather believed that discussion occurred in June 2012. T. 48-49. Petitioner also admits he was on medication after surgery did not remember things from that time, including a referral to Dr. Alloi for a further evaluation of causation and work status. T. 83-84.

At hearing Petitioner was asked what occurred on July 10, 2012 to trigger that as a date of accident on his Application for Adjustment of Claim. T. 106-107. He stated, "I have no idea." T. 107. But he did confirm that he was off work at that time. T. 107.

On July 11, 2012, Petitioner completed a Dow Employees Occupational Illness Injury Report. T. 107, RX 6. He listed the date of injury as June 7, 2012. RX 6. For the description of injury, he listed that he was having back problems related to the job, being a repetitive injury. RX 6. When asked at hearing what this meant, he explained heavy lifting, excessive lifting, bending, crawling, stooping and crouching. T. 109-110. The report states the incident was reported to his supervisor, Richard Oldland on July 11, 2012. RX6.

Petitioner filed this Application for Adjustment of Claim shortly thereafter on July 26, 2012. In 2015, Petitioner filed subsequent Applications, alleging alternative "manifestation dates". After a Motion to Strike by Respondent, per agreement of the parties, Petitioner withdrew the subsequent Applications, and instead filed an amended Application. The amended Application indicates the original accident date of June 7, 2012, but also included a date of injury of April 27, 2012, the first date off work, and July 10, 2012, the date that Dr. Ahuja testified at

his deposition that he had the conversation with Petitioner regarding his work duties being a causative factor in his back condition.

On September 5, 2012, Petitioner completed an Aurora Healthcare Patient's Statement of Injury / Illness. T. 111, RX 7. Petitioner could not recall why he completed this form, but confirmed it was his handwriting on the document. T. 111. The injury is listed as lifting and kneeling and no date was provided for the injury date. T. 111-112. Petitioner testified he had similar symptoms to this in the past. T. 112. Petitioner also testified he told his employer of this injury on June 4, 2012. T. 112-113.

On September 21, 2012, Petitioner was involved in a car accident. T. 50. Petitioner saw Dr. Ahuja to follow up and ensure things were ok. T. 50-51. Petitioner testified Dr. Ahuja ordered an x-ray and ultimately said everything looked good. T. 51. At that time, Petitioner was released to return to work with restrictions. T. 52-53. However, according to Petitioner, he could not return to work unless he was at full duty capacity, therefore, he remained off work. T. 52.

Petitioner testified that around December 2012 his condition began to worsen, noting that things were going backwards. T. 52-53, 114-116. Subsequently, he underwent an additional bout of tests including CT, MRI and EMG as well as injections. T. 53. According to Petitioner, he was doing worse after the injections. T. 54. On cross examination, Petitioner confirmed that he was not working during this period after the MVA when his condition was worsening. T. 116.

A Functional Capacity Evaluation (FCE) took place on October 23, 2012. T. 55. The results did not allow Petitioner to return to work for Dow. T. 56. Petitioner testified he continued to treat with Dr. Ahuja and his primary care physician and still felt horrible. T. 56. Additional testing ensued including a bone scan and additional MRI. T. 57. On July 19, 2014, Petitioner testified he discussed an additional surgery and use of a spinal cord stimulator with Dr. Ahuja. T. 57-58. Petitioner believed the bone scan showed failed hardware and that the spinal cord stimulator was an option if another surgery failed. T. 58-59.

In fact, on August 27, 2014, Petitioner underwent his third surgery by Dr. Ahuja. T. 59. After surgery, Petitioner testified that he experienced ongoing weakness and pain in his legs and also could not feel the skin on his legs. T. 59-60. Petitioner testified he still had both lumbar pain and bilateral leg issues subsequent to that third surgery. T. 60. Therefore, Petitioner continued to follow up with Dr. Ahuja who monitored the condition which remained unchanged since the surgery. T. 61.

Later, on February 17, 2015, Petitioner underwent another functional capacity evaluation at the request of Liberty Mutual, the long-term disability provider. T. 61-62. The Petitioner confirmed this test was for purposes of long-term disability and not workers compensation. T. 113-114. The date of accident on the report states 13 years ago first fusion several since. T. 113-114. The Petitioner was deemed completely disabled as a result of that test. T. 62.

Petitioner testified that today he uses a TENS unit every week, takes pain medication and performs home exercises. T. 63-65. Petitioner testified he would use a spinal cord stimulator if his condition were to worsen. T. 63-64. At the time of trial, Petitioner continued to treat with Drs. Fehling and Ahuja. T. 65.

Testimony of Dr. Arvind Ahuja:

Dr. Ahuja is a neurosurgeon located in Milwaukee, Wisconsin. PX 18, p. 5. Ahuja was board certified in 1998 or 1999 PX 18, p, 5. He works in a private neurosurgical practice in Milwaukee since 1995. PX 18, p. 6. Dr. Ahuja testified his initial treatment of Mr. Borst was on January 7, 2005 on referral of Dr. Debra Blue. PX 18, p. 8. At that time, Petitioner complained of significant right leg pain. PX 18, p. 8. Dr. Ahuja noted disk herniations on his imaging. PX 18, p. 8). Dr. Ahuja also noted a prior microdiscectomy ten years prior with another physician. PX 18, p. 9. Dr. Ahuja subsequently performed an L4-5 fusion on the Petitioner on February 1, 2005. PX 18, p. 9. Dr. Ahuja testified the surgery revealed the disk herniation and that the pressure was relieved with the procedure. PX. 18, p. 9. Dr. Ahuja testified that Petitioner had a good result from the procedure. PX 18, p. 11. Subsequent to the surgery, Petitioner returned to work in a limited capacity on June 1, 2005 and full duty capacity on June 25, 2005. PX. 18, p. 11. The last visit with Dr. Ahuja was August 25, 2005. PX 18, p. 12.

Dr. Ahuja next saw the Petitioner seven years later, on January 20, 2012. PX 18., p. 13. At that time Petitioner was referred by Dr. Fehling for recurrent significant back pain and leg pain. PX 18, p. 13. After additional diagnostics, Dr. Ahuja diagnosed disease at L3-4 with foraminal stenosis and residual disease at L4-5. PX 18, p. 14. A three-level lumbar fusion was performed on June 11, 2012. PX 18, p. 21. Dr. Ahuja next saw him on July 10, 2012 after the surgery. PX 18, p. 22. At that visit, Petitioner's work was discussed and that he needed to be able to lift greater than 50 pounds and crawl into small spaces. PX 18, p. 22. When Petitioner was next seen by Dr. Ahuja on November 1, 2012, he had been in a car accident on September 21, 2012. PX 18, p. 23. Petitioner reported pain at a five out of ten at that time. PX 18, p. 23. When Petitioner was seen by Dr. Ahuja on December 4, 2012, his condition was deteriorating. PX 18, p. 24. Dr. Ahuja testified that Petitioner claimed he did not believe he was severely injured in the motor vehicle accident, however, since that time, he had been deteriorating and going backwards. PX 18, p. 24. After MRI and CT scans, Petitioner returned to Dr. Ahuja on December 18, 2012. PX 18, p, 29. Dr. Ahuja confirmed there was evidence of both acute and chronic changes on the diagnostics. PX 18, p. 27-28.

Dr. Ahuja prepared at the request of Petitioner's counsel, a narrative report dated December 4, 2012. PX 18, p. 24, PX 1. In that report, Dr. Ahuja stated that there was increased stress to Petitioner's body via the work he did at Dow Chemical that increased his lumbar disk disease beyond what would reasonably be expected. PX 18, p. 25. Dr. Ahuja also opined that Petitioner's job duties would be a component of continued progression of the disease for above and below the level of the fusion that would be a contributing factor to needing the recent three-level fusion. PX 18, p. 25. Dr. Ahuja's report causally related the condition to a date of June 6, 2012 stating that was the date Petitioner's work was discussed. PX. 18, 25.

Dr. Ahuja testified that as of the October 23, 2013 FCE, Petitioner was at a light duty status. PX 18, p. 34-35. By August 11, 2014, Dr. Ahuja recommended another surgery consisting of evaluation of the fusion and adding L2-3 fusion. PX 19, p. 39. The next procedure, consisting of a four-level fusion took place on August 27, 2014. PX 18, p. 41. After the surgery, Dr. Ahuja continued to examine the Petitioner. On February 17, 2015, another FCE was obtained. PX 18, p. 46. That exam found Petitioner capable of less than sedentary physical demand level due to the multiple lumbar fusions and subsequent issues with pain, balance and strength. PX 18, p. 47. According to Dr. Ahuja, at that point Petitioner had reached a point of

maximum medical improvement. PX 18, p. 48. The only additional medical treatment recommended by Dr. Ahuja at that time was a potential for a spinal cord stimulator and medication. PX 18, p. 48-49. Dr. Ahuja opined the Petitioner's work restrictions were permanent at that point in time. PX 18, p. 49.

Dr. Ahuja examined a job description provided by the employer as well as one prepared by the Petitioner. Dr. Ahuja was asked whether the Petitioner's condition as of his last visit on February 27, 2015, the Petitioner's condition was causally in any way to his work duties. PX 18, p. 50. Dr. Ahuja testified that he could not opine that Petitioner's disk herniation was causally related to an acute event. PX 18, p. 50. However, Dr Ahuja testified that chronic exposure and continued work contributed and is a component of the progression of his lumbar disease leading to three lumbar fusions. PX 18, p. 50-51. When asked for the basis for his opinion, Dr. Ahuja replied that when looking at the progression of his disease, he had the disk herniation, a fusion, did very well for a while, then the symptoms progressed further and faster and "that's what usually happens." PX 18, p. 54. He stated further, "I think looking at a job description, the work he's doing, those are the stresses that make – accelerate his underlying pathology." PX 18, p. 54.

On cross examination, Dr. Ahuja admitted that Petitioner suffered from a type of progressive degenerative lumbar spine disease that was present for many years. PX 18, p. 55. Dr. Ahuja confirmed he did not know what caused the need for the initial microdiscectomy in 1996. PX 18, p. 56. Also, Dr. Ahuja had not reviewed any medical records from this prior treatment in 1995. PX 18, p. 56. Dr. Ahuja also confirmed that the natural progression of the Petitioner's disease is something that gets worse with time. PX 18, p. 56-57. More specifically, there were no specific work activities that were mentioned causing a worsening of symptoms by the Petitioner to Dr. Ahuja. PX 18, p. 62. Dr. Ahuja also confirmed that through May 2012, no causation opinions were rendered with regard to Petitioner's work. PX 18, p. 66.

It was not until July 10, 2012 that Dr. Ahuja was asked about or considered whether Petitioner's condition was causally related to his work. PX 18, p. 72, 89.

In the September 5, 2012 report of injury, Petitioner listed his history of injury as "lifting, kneeling." PX 18, p. 79. Dr. Ahuja's impression of the culprit job duties involved getting into small areas and lifting. PX 18, p. 79. When asked specifically about his independent knowledge of Petitioner's job duties, Dr. Ahuja testified the job included "multiple lifting, twisting movements." PX 18, p. 91. And Dr. Ahuja confirmed that Petitioner's job involved a multitude of different tasks and jobs and none of which were performed repeatedly over and over. PX 18, p. 91, 94. When asked specifically what job duties he would hold responsible as a causative activity, he stated, "multiple 55 pounds lifting, going into small areas. That is it." PX 18, p, 103. On re-direct examination, Dr. Ahuja specified that the activities that were capable of exacerbating the underlying degenerative condition were: lifting and crouching into cramped spaces. PX 18, p. 105.

Testimony Dr. Arthur Itkin

Dr. Itkin provided testimony via deposition on October 25, 2015. RX 1. Dr. Itkin is board certified in neurology and is a fellow of the Academy of Electrodiagnostic Medicine. RX 1, p. 5. Throughout the course of the case, Dr. Itkin prepared six reports dated: March 27, 2013,

November 18, 2013, April 10, 2014, September 2, 2014, May 2, 2015, and July 7, 2015. RX 1, p. 12. Two physical examinations were conducted with four addendum reports.

The first exam took place on March 27, 2013. RX 1, p. 13-14. At that time, Dr. Itkin obtained a history from the Petitioner which included chronic lower back problems since the mid-1990s. RX 1, p. 17-18. In 1997 the Petitioner had some procedures. RX 1, p. 18. Subsequently, Petitioner had lower back pains radiating into the right leg. RX 1, p. 18. Petitioner had conservative care from 2000 – 2002 but in 2005, Petitioner had a fusion at L4-5. RX 1, p. 18. Subsequently, Petitioner was relatively stable until 2010 when he began to have right leg giving out and worsening pain in the back and radiating into the leg. RX 1, p. 18. As the pain progressed, Petitioner started treatment with his primary physician and subsequently returned to treatment with neurosurgeon, Dr. Ahuja who performed his prior surgery in 2005. RX 1, p. 18-19. The right leg continued to give out and Dr. Ahuja performed multi-level fusion in June 2012. RX 1, p. 19. Subsequently, Petitioner improved but still had significant low back pain. RX 1, p. 19. In fact, by the time Dr. Itkin performed his initial exam of the Petitioner, the pain was excruciating and Petitioner could not sit for more than five minutes. RX 1, p. 19.

At the March 27, 2013 exam, Dr. Itkin inquired about how the Petitioner was injured. RX 1, p. 20. In response, no specific date of injury was provided. RX 1, p, 20-21. Rather, Petitioner simply discussed his work duties. RX 1, p. 20-21. Therefore, Dr. Itkin also obtained a detailed description of the Petitioner's job duties directly from the Petitioner. RX 1, p. 20.

Dr. Itkin performed a physical exam at which time he believed he observed evidence of symptom magnification. RX 1, p. 25. Ultimately, Dr. Itkin diagnosed extensive degenerative lumbosacral disease spanning most of Petitioner's life. RX 1, p. 23. As to causation, Dr. Itkin felt he could not make an opinion at that initial visit without additional information to support the requested opinions. RX 1, p. 25. Based on the history, medical records, physical exam and interview with Petitioner, and Respondent's job duty evidence, Dr. Ithkin could not give an opinion one way or the other as to whether Petitioner's job duties aggravated his pre-existing lumbar condition. (RX1, p.27, 29). He further said that he would re-visit his opinion if he was given new information concerning Petitioner's job duties for Respondent. (RX1, p.27-28).

A second report was authored by Dr. Itkin on November 18, 2013 addressing review of additional records. RX 1, p. 30. No new opinions were provided in that report. RX 1, p. 31.

Dr. Itkin performed a second physical examination of the Petitioner on April 10, 2014. RX 1, p. 31. At that time, Petitioner informed Dr. Itkin that his symptoms had not changed and that his right leg was giving out more. RX 1, p. 32. Dr. Itkin believed he observed symptom magnification. RX 1, p. 33. Additional medical records were reviewed as well. RX 1, 32-33. Dr. Itkin noted that the Petitioner's condition was worsening while Petitioner was no longer working. RX 1, p. 33-34. Based on this continued progression, Dr. Itkin opined Petitioner's job duties were not causally related to his degenerative condition. RX 1, p. 34.

Following review of additional records, Dr. Itkin prepared a fourth report dated September 2, 2014. RX 1, p. 35. The records he reviewed included: 7/7/12 Dow Chemical Occupational Illness-Injury Report, the Aurora Health Care "Patient Statement of Injury" dated September 5, 2012, records from Dr. Ahuja dated August 25, 2005, records from Centegra health Systems, and records from Dr. Ahuja from 2012. RX 1, p. 35. Dr. Itkin opined that review of

these records further confirmed his causation opinions regarding the progressive lumbosacral disease. RX 1, p. 35. Dr. Itkin stated that there was nothing to support a causal relation between Petitioner's work and the progressive degenerative lumbar disease. RX 1, p. 36. Dr. Itkin confirmed that review of these records did not substantiate a particular accident date. RX 1, p. 36. Dr. Itkin opinend the progressive degenerative lumbosacral disease was biological. RX 1, p. 36-37

Dr. Itkin also commented again on the causation opinion of Dr. Ahuja noting a lack of any evidence to suggest Petitioner participated in repetitive work activities which would substantiate a causal opinion to his work. RX 1, p. 41. Dr. Itkin also commented on his review of the medical records from Petitioner's primary care physician noting that the records supported his conclusion of a progressive degenerative condition and not a causal relation to work activities. RX 1, p. 42-43. Dr. Itkin also testified, after reviewing a number of written, verbal, and video job descriptions, that Petitioner's job duties were not classified as repetitive such that would warrant a causal relation to Petitioner's back. RX 1, p. 45. Dr. Itkin stated that Petitioner was involved in a variety of different tasks each day that did not amount to repetitive in nature. RX 1, p. 45.

Another report was prepared by Dr. Itkin on May 2, 2015 after reviewing Dr. Ahuja's operative report from August 27, 2014. RX 1, p. 46. Dr. Itkin noted the Petitioner's ongoing significant pain after this surgery lasting through 2015. RX 1, p. 46. According to Dr. Itkin, the ongoing complaints and worsening of the condition after the additional surgery further confirmed his opinions that Petitioner suffered from failed back syndrome and the underlying process. RX 1, p. 46.

Dr. Itkin's last report is dated July 7, 2015. RX 1, p. 46. In conjunction with preparing that report, Dr. Itkin examined Petitioner's own written job description and the FCE from Australian Physical Therapy. RX 1, p. 48. Dr. Itkin reiterated his opinion that there was no evidence to suggest that Petitioner's work at Dow materially affected his progressive degenerative lumbosacral pathology. RX 1, p. 50.

On cross examination, Dr. Ithkin admitted that when he examined Petitioner, reviewed the records and prepared his initial report, he did not have an opinion either way whether Petitioner's job duties aggravated his lumbar spine condition. (p.64-65). When asked to explain, Dr. Ithikin said that he changed his opinion as a "clarification" after just "thinking about it further". (p.72-75).

FINDINGS OF LAW

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

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

63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board*, 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

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 testimony. 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). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980).

The Arbitrator decided this case only by reviewing the transcripts because the case was tried before Arbitrator Falcioni. Petitioner appeared via transcript review to testify consistent with the medical records and other witnesses in general. His testimony regarding dates and conversations was flawed by forgetfulness that the Arbitrator finds to be a product of a hazy memory. There are simply too many admissions that are not entirely favorable and his forgetfulness is non-selective. Simply put, there is no evidence of prevarication. The Arbitrator also finds Petitioner's testimony consistent with the medical records in terms of the extent of his pain. The Arbitrator notes that Respondent's IME witness Dr. Itkin believed that Petitioner exhibited symptom magnification on two occasions. Petitioner has had numerous surgeries and is restricted with sedentary activity and all agree he has failed back syndrome. Petitioner also has a history of working with pain and, having not filed for workers' compensation for prior back injuries, a history of forbearance. Petitioner is mostly credible.

Respondent's witness, Richard Oldland, comes across as too eager to come up with a perfect narrative to support Respondent's argument that Petitioner's spine condition is entirely a degenerative process not impacted by wielding three foot long wrenches or crawling into chemical mixing tanks to replace 200 pound mixing blades with only hand tools. Oldland's account of Petitioner volunteering that his upcoming surgery was in no way related to work duties, while not relevant for causation as Oldland has no medical background, is farfetched. Matching this account with the fact that Oldland had been brought to this particular facility from out of state to police a perceived workers' compensation claim problem makes his testimony less believable.

Respondent's other two fact witnesses, Gerald Burns and Lisa Cashbaugh-Sanchez, mostly testified consistent with Petitioner as to the nature of his work duties. They are mostly credible upon review of all transcripts although the Arbitrator does not find any relevance to the

testimony of Ms. Cashbaugh-Sanchez that Petitioner reported injuring his back at home because she provided no general time frame and no details other than she believe he missed a day or two of work.

The credibility of Petitioner's treating physician Dr. Ahuja is found to be more credible than Respondent's IME Dr. Itkin for reasons that will be discussed below.

(C,F) In support of the Arbitrator's decision with regard to whether an accident occurred within the course and scope of Petitioner's employment with Respondent and whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner claims that his regular, heavy-labor work duties, over the course of a number of years, aggravated his pre-existing lumbar spine condition, causing it to become symptomatic and require additional surgery. Respondent claims that Petitioner's current lumbar spine condition is solely the result of the natural progression of his pre-existing condition, and that his work duties did not contribute to his current condition in any way because they were not "repetitive". For the reasons stated below, the Arbitrator find that Petitioner has sustained his burden and proved that his current condition is related to his work duties.

The Court has explained Petitioner's burden of proof under the Workers Compensation Act for a repetitive trauma, aggravating a pre-existing condition:

> Employers take their employees as they find them; when a worker's physical structure, diseased or not, gives way under the stress of his usual tasks, the law views it as an accident arising out of and in the course of his employment. *General Electric Co. v. Industrial Comm'n*, 89 Ill.2d 432, 433 N.E.2d 671(1982).

Further, the Court has defined what constitutes a repetitive trauma within the meaning of the Workers Compensation Act:

> Compensation may be allowed where the employee's existing physical structure, whatever it may be, gives way under the stress of his usual labor and he is suddenly disabled. This is true even though the result would not have obtained had he been in normal health. *International Harvester Co. v. IWCC*, 305 NE 2d 529 (1973)

There is no additional requirement that for a claim of repetitive trauma, Petitioner needs to prove that his work duties involved the same repetitive task, over and over, day after day. Rather:

> In repetitive trauma cases, the employee must show that the injury is work related and not the result of a normal degenerative aging process. *Peoria Belwood*, 115 Ill.2d at 530, 505 N.E.2d at 1028. Petitioner need only prove that some act or phase of employment was a causative factor of the resulting injury. (*County of Cook v. Industrial Comm'n*, 69 Ill.2d 10, 370 N.E.2d 520 (1977)

In the present case, Petitioner has proven that his work duties caused or contributed contributed to his lumbar spine condition. Based upon the evidence presented at the hearing, there does not appear to be any dispute that the nature of Petitioner's job duties were physically demanding, and that the lifting, bending, crouching, pulling of carts and use of torqueing tools involved

significant physical involvement of Petitioner's lumbar spine on a daily basis. Petitioner performed these physically demanding tasks over the course of many years as part of his regular job duties for Respondent. And, it is clear that this physical labor is beyond the normal physical activity associated with the normal tasks of daily living experience by the general public.

Respondent disputes that Petitioner could have suffered a repetitive trauma because his job duties were varied and he was not required to perform the same task, every day, over and over. Respondent's position relies on a flawed understanding of the meaning of repetitive trauma. Respondent's understanding of the term repetitive trauma is too narrow, and not consistent with the meaning under the workers Compensation Act and the case law discussed above. For this reason, Respondent's argument based on the meaning of "repetitive trauma" is rejected.

Respondent also relies on the testimony of their Section 12 examiner Dr. Ithkin and his opinion that Petitioner's condition is not causally related to work. For the reasons stated below, the Arbitrator finds Dr. Ahuja's opinions supported by the record, and that Dr. Ithkin's opinions are not credible.

Dr. Ithkin's concluded that Petitioner's current condition of ill-being is not casually related to his work activities, because they were not repetitive in nature –meaning Petitioner did not perform the same activity, over and over, every day. Dr. Ithkin's opinion that Petitioner's current condition of ill-being is not causally related to his work duties is not otherwise persuasive. In Dr. Ithkin's original report, he concluded that he could not give an opinion one way or another on the issues of causation. The record does not support this conclusion because Petitioner's job duties were of the heavy physical demand category, a finding that a thorough IME exam would note.

Dr. Ithkin's credibility declines upon review of his subsequent report. In his later report, without any additional evidence, Dr. Ithkin changed his opinion and definitively concluded that Petitioner's condition was not causally related to his job duties. At his deposition, he attempted to explain this change by explaining that he thought about it further between his first and his later report, despite having to be aware that his first report was generated for purposes of litigation, and thus could be used as the basis for Respondent denying Petitioner benefits.

In contrast, Dr. Ahuja gave a more credible opinion. Dr. Ahuja was familiar with Petitioner's physical condition and work duties. Dr. Ahuja treated Petitioner over the course of many years prior to and after Petitioner's claimed work-related aggravation.

In addition to the medical opinion testimony, Respondent further disputes that Petitioner's condition is work-related on the basis that Petitioner had a pre-existing lumbar spine condition, and on more than one occasion expressed that he believed his current problems were related to his pre-existing condition.

What a Petitioner believes or doesn't believe does not determine whether his work duties aggravated a pre-existing condition. Rather, the causal relationship to work is a legal and medical question: "A claimant is not expected to know the unique meaning of the word "accident" under the Act." *Luckenbill v. Industrial Comm'n*, 155 Ill. App.3d 106, 507 N.E.2d 1185 (1987).

The Arbitrator finds the testimony of Dr. Ahuja, that Petitioner's pre-existing lumbar condition was aggravated by his work duties, is the most credible and is supported by the record. Petitioner has sustained his burden of proving that his current lumbar condition is casually related to his work for the Respondent.

(D) In support of the Arbitrator's decision with regard to what was the date of the accident, the Arbitrator makes the following conclusions of law:

Petitioner alleges three accident dates: initially July 7, 2012, the day that Petitioner remembers being told by Dr. Ahuja that his condition is work related. Petitioner later alleged April 27, 2012, the first day that Petitioner was off work for this condition, and also July 10, 2012, the date that Dr. Ahuja testified he remembered discussing causal relationship to work with Petitioner. The Arbitrator has reviewed the transcript and notes that Petitioner is confused by this whole line of questioning which makes sense given that Petitioner was a demonstrated tough guy who worked through pain for a number of years until he finally could not do so.

Respondent claims that Petitioner has failed to prove an accident date, because of the multiple claimed dates of accident. Further, according to Respondent, Petitioner should have been aware of his condition and that it was related to his work duties earlier, because his most recent complaints of lower back pain started sometime in 2011, and then he was in active treatment for his lower back with Dr. Ahuja in early 2011.

For a repetitive trauma claim, Petitioner must allege a "manifestation date", as opposed to a date of a specific event. *Darling v. Industrial Comm'n*, 176 Ill. App.3d 186, 191, \ 530 N.E.2d 1135, 1139 (1988). "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 Nursing Home*, 115 Ill.2d at 531505 N.E.2d at 1029. This does not mean, however, necessarily the date the employee became aware of the physical condition and its clear relationship to his employment. A date based purely on discovery would penalize those employees who continue to work without significant medical complications when the eventual breakdown of the physical structure occurs beyond the statute of limitations period. Consequently, where the employee continues to work until the day his structure collapses or surgery is required, that can reasonably be considered by the Commission to be the date of accident in certain instances. *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill.App.3d 607, 610, 531 N.E.2d 174, 176(1988).

In the present case, Petitioner has alleged the date on which he discovered the fact of his injury and its relation to his work for Respondent was when he discussed it with Dr. Ahuja. He has also alleged the last date he worked for Respondent as an alternative date, representing when his physical structure broke down to the point of collapse. Both of these dates are appropriate "manifestation dates" under the applicable case law, and are supported by the evidence on the record.

(J) In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges for reasonable and necessary medical treatment, the Arbitrator makes the following conclusions of law:

For the reasons stated above, the Arbitrator finds that Petitioner's current state of ill-being is casually related to his work duties. There is no dispute between the parties concerning the nature and extent of the medical treatment received by Petitioner as a result of his condition. For that reason, the Arbitrator finds that Respondent shall pay Petitioner for the following outstanding medical bills:

Neurosurgery and Endovascular Associates	$170,384.27
Aurora Healthcare	$23.95
Lakes Area Physical Therapy	$9,735.00
ATI	$1,684.80
Midwest Physicians Anesthesia	$1,000.00
Total	$182,728.02

Additionally, these bills are unpaid, and are not reflected in Respondent's claim for a credit for payments made by Petitioner's group health policy.

(K) In support of the Arbitrator's decision with regard to the amount due for temporary total disability and maintenance, the Arbitrator makes the following conclusions of law:

For the reasons stated above, the Arbitrator finds that Petitioner's current state of ill-being is casually related to his work duties. There is no dispute between the parties that Petitioner's condition prevents him from returning to his usual and customary employment. There is also no dispute that Petitioner's restrictions are permanent, and that as of the FCE of February 27, 2015, Petitioner has become completely disabled as a result of his condition. For that reason, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits from April 27, 2012 to February 26, 2015, and maintenance from February 27, 2015 to the time of hearing and ongoing.

(M) In support of the Arbitrator's decision whether penalties or fees should be imposed on Respondent, the Arbitrator makes the following conclusions of law:

No penalties are awarded because Respondent made reasonable arguments that Petitioner failed to allege an accident date because, as discussed above, multiple dates were offered at trial and upon a review of the record. Respondent also made good faith arguments that repetitive trauma was not present in this case.

(N) In support of the Arbitrator's decision with regard to whether Respondent is due any credit, the Arbitrator makes the following conclusions of law:

Respondent is making a claim for credit under Section 8(j) for benefits paid to Petitioner under his group health and short and long term disability. Petitioner agreed that Respond is entitled to a credit having made payments towards the premiums for the respective insurance policies, but disagrees with the amount claimed by Respondent for short and long term disability payments.

As to the claimed amount for group health insurance payment (RX42), Petitioner did not object to the credit claimed, but that it should not be applied to any unpaid balances or any other benefit awarded. (RX42).

As to Respondent's claimed credit for short-term disability benefits paid to Petitioner, Petitioner did not object to the amount claimed of $25,842.07. (RX41).

As to Respondent's claimed credit of $116,506.95 for long-term disability payment to Petitioner, which represents the gross amount paid in LTD benefits of $147,269.63 (RX43), minus $31,060.72, the amount that Petitioner paid back to Respondent's insurer for overpayment due to receiving socials security benefits, Petitioner disputes the amount of this claimed credit.

Instead, Petitioner claims that Respondent is only entitled to a credit of $67,213.61, which represents the amount claimed by Respondent, minus attorney's fees of $18,003.44 incurred by Petitioner when Respondent's insurer wrongfully withheld long term disability payments (PX19), and also an additional amount of $7,040.00 in Federal taxes that Respondent withheld from Petitioner benefits because they ran his long-term disability benefits through their own payroll (RX43), and also minus Respondent's deductions from Petitioner's long term disability benefits for group medical insurance premiums in the amount of $27,280.73 (RX43).

Under Section 8(j), Respondent is allowed a credit for payments made to Petitioner. The total amount claimed by Respondent does not accurately reflect the actual payments made to Petitioner.

For these reasons, the Arbitrator agrees with Petitioner that Respondent's Section 8(j) credit for long-term disability payments should be limited to $67,213.61.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001202
Case Name	PUCCINI, FABIO v. VILLAGE OF SCHAUMBURG
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b-1) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0611
Number of Pages of Decision	63
Decision Issued By	Christopher Harris, Commisioner

Petitioner Attorney	Patrick Serowka
Respondent Attorney	Jeffrey Rusin, Michael Manseau

DATE FILED: 12/27/2021

/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

FABIO PUCCINI,

Petitioner,

vs. NO: 21 WC 1202

VILLAGE OF SCHAUMBURG,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b-1) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical benefits, temporary total disability (TTD) benefits, credit, and penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties, and affirms and adopts the Arbitrator's findings that Petitioner's left shoulder condition and need for surgery were causally related to the November 1, 2019 undisputed work accident. The Commission, however, modifies the Arbitrator's award of medical expenses and TTD benefits.

In the Order Section of the Arbitrator's Decision, the Arbitrator awarded the following medical bills to be paid to Petitioner in accordance with Sections 8(a) and 8.2 of the Act:

a)	HOASC	$21,768.87
b)	ATI	$20,173.66
c)	Salt Creek Surgery Center	$22,270.34
d)	American MRI Diagnostics	$1,600.00
e)	Midwest Anesthesia Partners	$3,799.00
		$69,611.87

The Commission finds that the above-referenced bills are evidenced in the arbitration record, namely in Petitioner's Exhibits 4, 6, 7, 8 and 10.

The Arbitrator further awarded, "Respondent shall pay to Petitioner's attorney the ATI balance of $8,728.59 as provided in Sections 8(a) and 8.2 of the Act." The Arbitrator did not include this specific balance or award this bill in the body of the Decision under the Conclusions of Law Section. A review of the ATI medical bills in evidence does not indicate any outstanding bill in the amount of $8,728.59. By his Brief, Petitioner requests this additional amount of $8,728.59, indicating that there are two separate ATI medical bills. Petitioner's Exhibits 6 and 10 indeed demonstrated two bills from ATI – the first bill totaled $4,736.95 and was paid in full. The second bill had an outstanding balance of $20,173.66. In the Request for Hearing form, Petitioner claimed that $69,611.87 in medical bills remained outstanding and indicated, "See Petitioner's Exhibit #10." Petitioner's Exhibit 10, which is the exhibit specific to the claimed medical bills, again lists the outstanding amount as $69,611.87. Other than the Arbitrator's Order Section and Petitioner's Brief, the Commission finds no information or evidence with respect to the alleged $8,728.59 ATI physical therapy bill. The Commission, thus, finds no basis in which to award this alleged amount and modifies down the Arbitrator's award of medical bills to $69,611.87 – the amount which is evidenced and supported by the record.

With respect to TTD benefits, the Request for Hearing form and Respondent's Brief stated that Respondent disputed the Arbitrator's award of TTD benefits from February 24, 2020 through March 4, 2020, and from April 8, 2021 through June 22, 2021. The Commission agrees that Petitioner is not entitled to TTD benefits from February 24, 2020 through March 4, 2020. The evidence demonstrated that Dr. Chehab, Petitioner's treating physician, provided a work status form on February 24, 2020 which indicated that Petitioner was discharged from treatment and allowed to return to work without restriction. At arbitration, Petitioner confirmed that he did not have anything in writing from any doctor imposing restrictions on his ability to work as a firefighter from March 2020 through March 2021. He also agreed that he had been working full duty until his surgery on April 8, 2021.

The Commission therefore strikes the Arbitrator's TTD award for the period of February 24, 2020 through March 4, 2020, but affirms the Arbitrator's award of TTD benefits from November 2, 2019 through December 1, 2019 and from April 8, 2021 through June 22, 2021. The parties did not dispute that Petitioner was entitled to TTD benefits commencing November 2, 2019. Petitioner testified that he returned to light duty work with Respondent on December 2, 2019. The

evidence further demonstrated that Dr. Burra kept Petitioner off work following his left shoulder surgery on April 8, 2021 and allowed Petitioner to return to modified work activity on June 23, 2021. Petitioner confirmed that he returned to work with Respondent at that time.

The Commission additionally modifies the Arbitrator's Decision with respect to the credit due Respondent. By its Brief, Respondent stated that Petitioner received his full salary under the Public Employee Disability Act (PEDA) from November 2, 2019 through December 1, 2019, and requests a credit but only up to the amount of its TTD liability for that period. Counsel for the parties presented their positions with respect to PEDA and credit at arbitration, and by the record, there was no dispute Petitioner received PEDA benefits in November and December 2019 in lieu of TTD benefits. (T.6-7). Respondent's Exhibit 6 also demonstrated that Petitioner used sick time following his surgery on April 8, 2021. Respondent did not request a credit for this period in his Brief, but on the record stated that it was claiming a credit for Petitioner's used sick pay benefits for the time he was off work following surgery. (T.7).

The Arbitrator denied Respondent's request for both types of credit under Section 8(j) of the Act. Section 8(j) provides for credit as such:

> 1. 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 this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act . . . This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act . . .
>
> 2. Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment. *820 ILCS 305/8(j)(1-2)*.

Petitioner in this case disputes that any credit is due for PEDA payments or sick pay benefits and argues that Section 8(j) of the Act allows credit for payments made by a group plan

covering non-occupational disability, and does not allow credit for payments made under any group plan which would have been payable irrespective of an accidental injury under the Act. Notwithstanding, the Commission finds that PEDA itself provides the specific provision for handling worker's compensation payments and credits; this is noted by and consistent with our previous Commission Decisions. See *Jeremiah Gericke v. Lockport Fire Protection District*, *2011 Ill. Wrk. Comp. LEXIS* 1196; *Daniel Walz v. City of Harvey*, *2019 Ill. Wrk. Comp. LEXIS 512*; *Jerry Valadez v. City of Harvey*, *2020 Ill. Wrk. Comp. LEXIS 1144*.

PEDA provides certain benefits to full-time firefighters and states: "Whenever an eligible employee suffers any injury in the line of duty which causes him to be unable to perform his duties, he shall continue to be paid by the employing public entity on the same basis as he was paid before the injury . . ." *5 ILCS 345/1(b)*. Section (d) of PEDA further states: "Any salary compensation due the injured person from workers' compensation or any salary due him from any type of insurance which may be carried by the employing public entity shall revert to that entity during the time for which continuing compensation is paid to him under this Act." *5 ILCS 345/1(d)*. Therefore, the Commission finds that Respondent is entitled to a credit for PEDA payments made under Section (d) of PEDA, but only up to the amount of temporary total disability benefits that were owed for the relevant period pursuant to Section 8(j)(2) of the Act.

A review of Respondent's Exhibit 5 indicated that Petitioner was paid $9,773.00 in November and December 2019 in lieu of TTD benefits. The TTD benefits owed to Petitioner in this period was $6,279.32. This amount represents 4 2/7 weeks of TTD benefits – from November 2, 2019 through December 1, 2019. Thus, the Commission finds that Respondent is entitled to a credit of $6,279.32 for PEDA benefits paid in lieu of TTD benefits.

The Commission further finds that Respondent failed to establish its entitlement to a credit for Petitioner's use of his sick pay benefits. Again, Section 8(j) of the Act expressly excludes credit for "payments made under any group plan which would have been payable irrespective of an accidental injury under this Act."

Finally, Petitioner filed his Petition for Penalties and Attorney's Fees Under Sections 19(k), 19(l) and 16 of the Act in May 2021 and included a copy in the arbitration record as Petitioner's Exhibit 11. The Arbitrator had denied Petitioner's claim for penalties and fees on the basis that a reasonable dispute existed on the issue of causation. Petitioner failed to file his cross-review on the matter but attempted to raise the issue by including it in his Brief. As such, the Commission finds that Petitioner was not entitled to oral arguments on the issue of penalties and attorney's fees, but has reviewed the Arbitrator's Decision and the arbitration transcript pursuant to Section 19(e) of the Act. Accordingly, the Commission finds the Arbitrator's analysis on this issue to be well-reasoned and hereby affirms the Arbitrator's denial of penalties and attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 1, 2021 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the following reasonable, necessary, and related medical bills to Petitioner, and as evidenced in Petitioner's Exhibits 4, 6, 7, 8 and 10, and as provided under Sections 8(a) and 8.2 of the Act:

a)	HOASC	$21,768.87
b)	ATI	$20,173.66
c)	Salt Creek Surgery Center	$22,270.34
d)	American MRI Diagnostics	$1,600.00
e)	Midwest Anesthesia Partners	$3,799.00
		$69,611.87

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of $8,728.59 for an ATI medical bill not evidenced by the record is hereby stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,463.71 per week, for 15 1/7 weeks, for the period of November 2, 2019 through December 1, 2019, and from April 8, 2021 through June 22, 2021, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for payments made under the Public Employee Disability Act (PEDA) in the amount of $6,279.32.

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.

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

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

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

December 27, 2021
CAH/pm

O: 12/16/2021
052

Christopher A. Harris
Christopher A. Harris

Carolyn M. Doherty
Carolyn M. Doherty

Marc Parker
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001202
Case Name	PUCCINI, FABIO v. VILLAGE OF SCHAUMBURG
Consolidated Cases	
Proceeding Type	19(b-1) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	56
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	Patrick Serowka
Respondent Attorney	Robert Ulrich

DATE FILED: 9/1/2021

THE INTEREST RATE FOR THE WEEK OF AUGUST 31, 2021 0.05%

/s/ David Kane, 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)
XX None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b-1)

Fabio Puccini
Employee/Petitioner
v.

Case # 21 WC 001202

Consolidated cases:

Village of Schaumburg
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **3/29/2021**. Respondent filed a *Response* on **5/17/2021**. The Honorable **David Kane** Arbitrator of the Commission, held a pretrial conference on **5/19/21 & 7/14/21**, and a trial on **7/27/21**, in the city of **Chicago**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

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

K. ☐ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

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

N. ☒ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, **11/1/2019**, 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 the Respondent.

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

In the year preceding the injury, Petitioner earned $**114,169.40**; the average weekly wage was $**2,195.56.**.

On the date of the accident, Petitioner was **47** years of age, with **2** dependent children.

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

ORDER

MEDICAL BENEFITS

Respondent shall pay reasonable and necessary medical services, in the amounts adopted by the arbitrator as determined pursuant to the medical fee schedule in the following sums, ATI ($20,173.66), HOASC ($21,768.87), Salt Creek Surgery Center ($22,270.34), American MRI Diagnostics ($1,600.00) and Midwest Anesthesia Partners ($3,799.00) as provided in Sections 8(a) and determined under 8.2 of the Act. Further, Respondent shall pay to Petitioner's attorney the ATI balance of $8,728.59 as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator awards this medical award to the Petitioner payable to Petitioner's firm, Serowka Law.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,463.97/week for 16-1/7 weeks, commencing from November 2, 2019 through December 1, 2019, February 24, 2020 through March 4, 2020 and April 8, 2021 through June 22, 2021

totaling $23,628.53 to be paid to Petitioner's attorney, Serowka Law as provided in Section 8(b) of the Act.

Penalties

Penalties and attorney's fees are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of 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 $450.00 for the *final* cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

David A. Kane

Signature of Arbitrator

SEPTEMBER 1, 2021

STATEMENT OF FACTS

Petitioner's Work History with the Village of Schaumburg

Petitioner joined the Schaumburg Fire Department in 2002 and in November of 2019, was employed as a fire lieutenant by the Village of Schaumburg. (TA 12-13). He enjoys his job and especially likes helping people, the action of the job, and the camaraderie of his fellow department members. (TA 13). In October of 2019, Petitioner was performing the duties of a firefighter at full capacity, and his salary that year was about $115,000. (TA 14). In late June/early July of 2020, Petitioner was promoted from the rank of lieutenant to captain. (TA 53).

History of the Accident

Prior to November 1, 2019, Petitioner never had an injury to his left elbow or left shoulder while in the fire service. (TA 14). On November 1, 2019, Petitioner was assigned as the engine officer and was working his normal duties. (TA 15). He was dispatched to an activated fire alarm in a four story building, a multi-family occupancy. (TA 15). Upon arrival, Petitioner exited the apparatus wearing his full structural firefighting gear. (TA 15). This is common for this type of incident and full gear consists of his coat, pants, and a breathing apparatus. (TA 15). He walked to the rear and got the tools that he normally carries, a Halligan bar and a flat head axe, and approached the

front of the building. (TA 15). As he walked towards the building, he surveyed the scene and sized up the building for any indication of a legitimate fire. (TA 15). As he was walking, he slipped on some ice. (TA 15). He then fell backwards, striking his left elbow on the ground. (TA 15). When he got up, he immediately felt pain in his left shoulder. (TA 15-16). After he got up, Petitioner immediately felt pain at the front portion of the shoulder. (TA 16). He was unable to raise or move [his arm] immediately, and it was hanging towards his side. (TA 16).

Petitioner's battalion chief and the driver of the apparatus, who had both witnessed the fall, came to check on him. (TA 16). Petitioner wanted to check the building first to make sure there was no actual active incident, and would then address the shoulder afterwards. (TA 16).

Later that morning, just before the end of the shift, Petitioner went back to the station to ice and rest his shoulder. (TA 16-17). He notified his battalion chief that he would let him know how his shoulder was feeling. (TA 17). Prior to the end of the shift, Petitioner told the battalion chief that they needed to fill out an accident report due to the shoulder, which they completed together. (TA 17).

Petitioner's Post-Injury Medical Treatment in 2019

On November 1, 2019, immediately following the injury, Petitioner was seen at AMITA Health Occupational Health Center where he related a history of

being at work when he slipped and fell on black ice, while wearing all of his gear, and came down on his left elbow and shoulder. (TA 17; PX 3, p. 1, 8). He complained of pain in his left shoulder that ranged between 3 and 10, pain worsened when he moved his arm above chest level. (PX 3, p. 8). On exam, he had tenderness at the shoulder joint and the deltoid/UE muscles. (PX 3, p. 2, 8). He also had decreased ROM with flexion at 80/180°, extension at 25/50°, adduction at 25/50°, abduction 90/180°, internal rotation 40/90°, and external rotation 40/90°. (PX 3, p. 9). Petitioner was placed on restricted duty with no use of his left hand/arm and he was to wear a sling. (TA 18; PX 3, p. 9). Schaumburg Fire did not accommodate his use of a sling and did not work in a modified capacity at that time. (TA 18).

Petitioner saw Dr. Chehab on November 4, 2019 and related a history of slipping on ice while working as a firefighter and landing directly on his left shoulder. (TA 18; PX 5). He was having difficulty with overhead use since then, with aching and burning pain that interrupted his sleep. (PX 5). On exam, Dr. Chehab found that he had difficulty elevating his arm beyond 90 degrees with abduction and that external rotation was to 20, internal rotation was to buttocks. (PX 5). Dr. Chehab continued work restrictions and ordered an MRI. (TA 18; PX 5). Petitioner was still using a sling at this time. (TA 18). Schaumburg Fire did not accommodate these restrictions on November 4, 2019. (TA 19). Petitioner did receive PEDA pay from November through December 1, 2019. (TA 19).

An MRI of Petitioner's left shoulder was performed on November 11, 2019. (PX 5; PX 4, p. 2). The impression was of bone marrow edema with trace cortical impaction which could represent a Hill-Sachs lesion, mild bone marrow edema in the inferior glenoid with small areas of moderate to high grade chondromalacia, possible labral tear, including involvement of the inferior labrum as well as the posterior labrum, mild supraspinatus tendinosis, and small glenohumeral joint effusion with synovitis/debris in the subscapularis. (PX 5; PX 4, p. 2). Findings that raised the possibility of a labral tear included ill-defined intermediate signal along the course of the anterior inferior labrum with small areas of hyperintense signal along the course of the inferior labrum tracking posteriorly as well. (PX 5; PX 4, p. 2). There also appeared to be a cleft along the base of the posterior labrum. (PX 5; PX 4, p. 2).

Dr. Chehab examined Petitioner on November 13, 2019 and found that the MRI revealed a left shoulder anterior instability episode/subluxation. (TA 19; PX 5). He also found bone marrow edema within the anterior glenoid and Hill-Sachs deformity posteriorly. (PX 5) There was a little bit of capsular stripping anteriorly without significant displacement of his labrum. (PX 5). He kept Petitioner in the sling and continued his work restrictions. (PX 5).

Petitioner next saw Dr. Chehab on November 25, 2019. (TA 20; PX 5; PX 13). He was still using the sling and was doing pendulum exercises and supine elevations. (TA 20; PX 5; PX 13). He was overall still sore and achy. (TA 20; PX 5; PX 13). Petitioner was concerned about the labral tear that

was seen on the MRI report. (TA 20; PX 5; PX 13). Dr. Chehab counseled him that every shoulder dislocation results in some injury to the labrum, but he was really most concerned about recurrent instability. (PX 5; PX 13). Petitioner testified that when he asked Dr. Chehab about the tear on the MRI, he said that he would expect to see a tear given the nature of his injury and that if they did an MRI of his other shoulder, he would expect to see tears there too given the nature of his job. (TA 20-21). Petitioner noticed continued achiness, pain, and a sensation of popping and snapping in his left shoulder. (TA 21-22). Dr. Chehab continued his work restrictions and recommended physical therapy. (TA 22; PX 5; PX 13).

Petitioner began physical therapy at IBJI on November 29, 2019. (TA 22; PX 5). He related a history of an injury to shoulder following a fall on ice while at work. (PX 5). He was wearing all his gear and fell back on the ice, and landed on his left elbow on the ground. (PX 5). It felt like it popped out. (PX 5). He reported popping and snapping in his shoulder, mostly with rotational movement. (TA 22; PX 5). He also reported pain with reaching overhead and felt limited with his ability to reach in all planes and was not able to lift or carry anything. (TA 22-23; PX 5). He had significant limitations with active range of motion, any movement above shoulder height or reaching back due to weakness and pain. (TA 23; PX 5).

Petitioner returned to light duty work on December 2, 2019. (TA 23). He was assigned to the fire marshal in the fire prevention bureau and his job duties

consisted of conducting follow-up inspections for occupancies and validating/following up on code violations. (TA 23).

At therapy on December 9, 2019, Petitioner complained of soreness and achiness and found that since he had returned to work, his shoulder was weaker than he had expected. (PX 4, p. 8). He had mild PROM deficits into flexion and was limited by pain near end range. (PX 4, p. 8). On December 11, 2019, Petitioner went to therapy and reported that the day before, his shoulder had started to ache a little more than it had been. (PX 4, p. 9). He had difficulty and fatigue during S/L abduction and pain at 90°. (PX 4, p. 9).

Petitioner continued to attend therapy. On December 16, 2019, Petitioner continued to complain of shoulder pain. (PX 4, p. 11). On exam, his therapist found increased tenderness along the posterior rotator cuff muscles and along the medial border of the scapula and he continued to fatigue quickly with exercise. (PX 4, p. 11). At therapy on December 18, 2019, Petitioner had tenderness and irritation if his resistance was too high on the arm bike, as well as some cracking during S/L ER with weight. (PX 4, p. 13). He was limited with PROM into flexion due to increased pain at approximately 120° of flexion and continued to fatigue during the session due to remaining UE weakness. (PX 4, p. 13). On December 20, 2019, Petitioner told his therapist that he thought his continued achiness was because he was using his arm more. (PX 4, p. 15). The therapist noted that he was challenged with keeping arm overhead for prolonged periods of time due to increased fatigue. (PX 4, p. 15).

At therapy on December 24, 2019, Petitioner reported constant pain in the left shoulder, with occasional painful cracking, and he almost never had relief. (TA 23; PX 14). He was tender at the lateral shoulder and limited into shoulder flexion and ER because of pain. (PX 14). There were mild limitations reaching into shoulder abduction. (TA 23; PX 14). He had significant limitations in scapular stabilizers which contributed to the remaining functional mobility deficits and altered mechanics with functional activities. (PX 14). His ability to lift 1-15 lbs. was tested and he was found to have moderate difficulty with these tasks. (TA 23; PX 14). Petitioner continued to fatigue and demonstrated left upper extremity weakness. (PX 14). He was unable to do heavier lifting/carrying or overhead work for return to prior level of job duties. (PX 14). Petitioner stated that he had not attempted essential job tasks, but would have severe difficulty if he attempted them. (TA 24; PX 14).

At his December 27, 2019 therapy session, Petitioner reported more painful clicking in his shoulder. (PX 4, p. 20). The shoulder PROM remained limited due to pain at the joint. (PX 4, p. 20). He had tightness of laterals with flexion and pain limits full shoulder flexion and has significant limitations into ER. (PX 4, p. 20). He demonstrated significant increase in pain, weakness and fatigue with prolonged shoulder elevation in scaption or abduction planes. (PX 4, p. 20). He continued to report scapular musculature fatigue due to significant stabilizer weakness. (PX 4, p. 20). Petitioner was visibly fatigued with carrying weight overhead for full minute rounds. (PX 4, p. 21).

Petitioner saw Dr. Chehab on December 27, 2019. (PX 5). He had clicking and pain at the end range of motion and restricted motion. (TA 24; PX 5). On exam, he was restricted with abduction and his external rotation was limited to 20° compared to 50° and internal rotation was to the buttocks compared to T10. (TA 24-25; PX 5). Dr. Chehab was concerned about adhesive capsulitis and prescribed a Medrol Dosepak to help minimize inflammatory changes. (TA 24; PX 5). He also prescribed continued physical therapy. (PX 5). Dr. Chehab planned to consider further options including an injection. (PX 5).

Petitioner returned to therapy at IBJI on December 30, 2019. (PX 4, p. 21). The record reflects that he fatigued quickly with planking with BOSU taps and was again noted with visible fatigue with carrying weight overhead. (PX 4, p. 21). He also had pain at end range S/L ER rotation. (PX 4, p. 21). On December 31, 2019, Petitioner stated that he still had the same constant pain in his shoulder. (TA 25; PX 4, p. 22). He had discomfort lying on left shoulder and pain at end ranges of PROM at all planes, which limited ROM of shoulder. (TA 25; PX 4, p. 22). The treatment was focused on ROM and capsular stretching and joint mobilization to address the pattern associated with the adhesive capsulitis pattern that was now present. (PX 4, p. 22). He continued to fatigue with prolonged overhead activities due to pain. (PX 4, p. 22).

Petitioner continued to work modified duty for the Schaumburg Fire Department in December of 2019 and January 2020 doing similar duties to what he described earlier, i.e. conducting follow-up inspections for occupancies and validating/following up on code violations. (TA 23, 25).

Petitioner's Post-Injury Medical Treatment in 2020

Petitioner continued to attend therapy at IBJI. On January 2, 2020, Petitioner reported that he took the last of the prednisone that day but had not noticed much of a difference in pain levels or function. (PX 4, p. 23). He remained limited with all PROM and AROM due to pain at end ranges, and was most limited with shoulder ER ROM. (PX 4, p. 23). He had a tendency to roll at the trunk to compensate for lack of capsular mobility. (PX 4, p. 23). Petitioner told his therapist on January 8, 2020 that he had not noted any differences over the past several days. (PX 4, p. 24).

At therapy on January 10, 2020, Petitioner's symptoms prevented participation in overhead work and he had moderate difficulty reaching behind his back. (PX 5; PX 14). There were no significant changes with passive or active AROM/PROM since last re-evaluation although he had been active in his treatment. (PX 5; PX 14). Strengthening was placed on hold to focus on mobility restrictions. (TA 25-25; PX 5; PX 14).

On January 13, 2020, Petitioner told his therapist that there were minimal changes to his symptoms from day to day and remained achy and sore. (PX

4, p. 26). He fatigued quickly and had difficulty keeping his upper extremity overhead for extended periods of time. (PX 4, p. 26). His treatment on January 15, 2020 focused on restoring PROM in all planes without an increase of pain and although he was able to complete both directions without exacerbation of symptoms, his ROM remained limited. (PX 4, p. 27).

Petitioner saw Dr. Chehab on January 17, 2020 who noted that Petitioner, who had been able to work light duty, had not had any significant change in symptoms despite the Medrol Dosepak and therapy increasing to three times a week. (TA 26; PX 5). He still had some stiffness. (PX 5). On exam, he was restricted in external rotation which was still at about 20°, and likewise with abduction to 90°, internal rotation to the buttocks compared to T10. (PX 5). In a 90° abducted position, external rotation was limited to 30° by the capsulitis and not by apprehension. (PX 5). Dr. Chehab did not recommend manipulation under anesthesia because thought it would be fraught with potential complications due to the inciting injury being instability. (TA 26-27; PX 5). Additionally, Dr. Chehab told Petitioner that because of his dislocation, his body would naturally tighten up and hold it into place, and he was concerned that if he performed the manipulation, there was greater risk of instability and the shoulder being dislocated again. (TA 27). Petitioner understood this to mean that if he was to move forward with manipulation, he would have a greater risk of his shoulder dislocating due to the risk of the procedure, and he felt he had no other options. (TA 29-30). Instead, Dr. Chehab performed a cortisone injection. (TA 57; PX 5). He continued him on restricted duty with no lifting greater than 5 lbs. and no repetitive

pushing/pulling or crawling/climbing. (TA 30; PX 5). He also recommended continued physical therapy. (PX 5).

Petitioner continued physical therapy at IBJI throughout January 2020, but only noticed minimal changes to his symptoms. (PX 4, p. 23-37). At his January 23, 2020 visit, Petitioner stated that he was unable to sleep on his left side due to pain. (PX 4, p. 29). Significant capsular tightness remained and contributed to ROM limitations. (PX 4, p. 29). Lumbar and thoracic extension noted during overhead bodyblade activity due to lack of shoulder flexion mobility. (PX 4, p. 29). At his January 27, 2020 therapy visit, Petitioner fatigued quickly with increased weight during S/L flexion and abduction. (PX 4, p. 31). As he was 10 days post-shoulder injection, Petitioner noted that his shoulder was feeling better. (TA 57). At therapy on January 29, 2020, Petitioner had ROM limitations with reverse sleeper stretch due to capsular tightness, limited endurance during planks due to UE weakness, and became fatigued with overhead carry. (PX 4, p. 33).

At his January 31, 2020 therapy session, Petitioner reported continued pain and difficulty reaching behind his back. (PX 4, p. 35; PX 5). External rotation was still stiff and limited functionally. (PX 4, p. 35; PX 5). He would wake up from the pain if he slept on his left side. (PX 4, p. 35; PX 5). He had mild difficulty lifting 6-10 lbs. and moderate difficulty lifting 5 to 15 lbs. and significant strength deficits with scapular stabilizers. (PX 4, p. 35-36; PX 5). He remained limited with reaching behind back and overhead for functional activities, lifting and carrying, and all pushing and pulling activities as

required for return to work. (PX 4, p. 36; PX 5). Continued therapy was recommended. (PX 4, p. 36; PX 5).

Petitioner continued to attend physical therapy during February of 2020. (PX 4). On February 7, 2020, Petitioner was still limited with job tasks. (PX 4, p. 42). He demonstrated significant thoracic compensations during overhead carry due to lack of shoulder flexion range of motion. (PX 4, p. 42).

At therapy on February 14, 2020, Petitioner reported continued difficulty sleeping on his left side due to pain, that he had not tried to lift much more than 20 pounds, and was only able to do light overhead work (PX 4, p. 48; PX 5; PX 14). He had continued mild difficulty lifting 16-25 pounds and reaching behind his back, and moderate difficulty with overhead work. (TA 31-32; PX 4, p. 48; PX 5; PX 14). He remained limited with lifting and carrying weight prior to injury and had limitations with muscular endurance for overhead work. (TA 36; PX 4, p. 48; PX 5; PX 14). The note indicated overhead lifting. (PX 4, p. 48; PX 5; PX 14). Petitioner testified that the only overhead lifting he recalled performing at therapy was taking little plastic cones weighing under a pound off of a stack and unstacking them in a row above a locker. (TA 33-34). His ability to reach behind his back with his left arm was tested by asking him to put his hand back to see how far he could reach, and he had mild difficulty with this movement. (TA 34).

At this February 14, 2020 session, Petitioner did some pushing and pulling. (TA 36). Part of the exercise program included a bar that was chained to a

machine with weights and he was to push several steps forward with controlled walking back. (TA 37). After doing several repetitions, he turned around, grabbed the bar, and walked backwards with it. (TA 37). He was pulling with his body weight and pushing it, but did not recall the amount of weight he was moving. (TA 37).

While the February 14th therapy note indicates that the therapist simulated Petitioner's job duties with carrying, lifting, and chopping activities, he does not remember doing any job-simulated lifting. (PX 4, p. 50; TA 36). His ability to lift anything over 25 lbs was not tested. (PX 4, p. 50; PX 5; PX 14). In fact, Petitioner testified that he did not even lift anything between 16-25 pounds that day. (TA 31). The only lifting he recalled was in an exercise where he was lying prone on a bench with a weight between 3-7 pounds in his left hand that he lifted above and out to his side. (TA 31-32). Petitioner was able to do it with some difficulty, but it was ugly. (TA 32). As a full duty fireman, Petitioner is required to have the ability to lift the weight of a person and could be in excess of 100-150 pounds or more. (TA 35). Petitioner did not recall performing any lifting activities similar to his firefighting job duty tasks. (TA 37). He also did not recall doing any chopping activities consistent with his job duties. (TA 38).

Ten days following this February 14th therapy session, Dr. Chehab released Petitioner to return to work without restrictions on February 24, 2020. (TA 38, PX 5). He recommended that Petitioner continue with stretching and strengthening of his shoulder on a home basis. (PX 5). He also told Petitioner

to follow up with him on an as needed basis, but he did not find him to be at MMI. (PX 5). Petitioner testified that, at that time, he still had discomfort and pain in the left shoulder as well as a popping and cracking sensation, and pain with overhead reaching. (TA 39). Petitioner was discharged from physical therapy on March 20, 2020. (PX 5).

Petitioner's Return to Full Duty Work in 2020

Petitioner did return to work as a firefighter per Dr. Chehab's release at the end of February 2020 and worked full duty until his surgery on April 8, 2021. (TA 38, 52; PX 5).

Due to the COVID-19 pandemic, in March and April of 2020, the call volume at the firehouse had slowed down dramatically and they were not as busy as years prior. (TA 40). Although the residential population is about 70,000, on a normal day they average around 200,000. (TA 40). Due to the pandemic, the daytime population was pretty much null since everything in town, including the mall, retail, and businesses, was shut down. (TA 40-41).

In May, June, July and August of 2020, Petitioner noticed that his left shoulder was easily fatigued when he was working. (TA 39). He essentially babied it and compensated with his right hand for any overhead work. (TA 39). He carried things of heavier weight in a suitcase kind of carry, but overhead extension continued to be difficult. (TA 39-40). He was only doing minimal lifting with his left shoulder at this time. (TA 40).

During this period of time, fire companies were approaching their calls differently. (TA 41). On medical calls, because of the fear of COVID and the unknown, they would still get dispatched with an ambulance company. (TA 41). The paramedics would make contact with the patient, leaving the fire engine crew outside. (TA 41). If they weren't needed, they were directed to release the engine crew right away to minimize the exposure of crews to potential sick patients. (TA 41). They would wait outside the door by the sidewalk, the ambulance crew would go in and check the patient, and then would come out and allow the engine crew to leave. (TA 42). They would not even go into the home. (TA 42). Their training also changed during this time. (TA 41). They did not do multi-company training, which involved meeting with other stations, so that members could isolate themselves within their own station. (TA 41).

Towards the end of the summer of 2020, Petitioner had good days and bad days with his left shoulder. (TA 42). He certainly had more bad days with more pain. (TA 42). By September and October, Petitioner's left shoulder pain became more significant and more frequent. (TA 42). Petitioner thought his pain increased because he began using his left shoulder more as their call volume started to increase. (TA 43). He did not have a new injury. (TA 43). He finally decided to seek more treatment for his left shoulder because his wife got tired of hearing him complain about it and told him that he needed to get it checked out. (TA 43). In early January, Petitioner spoke with the

chief of the department and informed him that his shoulder was bothering him and that he was going to seek medical attention. (TA 43-44).

Petitioner's Post-Injury Medical Treatment in 2021

Petitioner first saw Dr. Giridhar Burra of Hinsdale Orthopedics on January 27, 2021. (TA 44; PX 4, p. 51). Petitioner heard about him from his colleagues at the Romeoville Fire Academy who had had success with him. (TA 53-54). The history reflects that he injured his left shoulder on a call when he slipped and fell backwards onto his left elbow on November 2, 2019. (PX 4, p. 51). Petitioner told Dr. Burra that although he had been working full duty since February of 2020, over the last ten months he had increased left shoulder pain that had significantly worsened since October [2020]. (TA 44; PX 4, p. 51). He continued to have difficulty with overhead activity and reaching away from his body. He localized pain to his anterior and lateral aspect of his left shoulder. (TA 44; PX 4, p. 51). Petitioner told Dr. Burra that he did not feel he had ever regained his full range of motion in the left shoulder after the initial injury. (PX 4, p. 51). Dr. Burra performed an x-ray which revealed a Hill-Sachs lesion in the posterolateral humeral head. (PX 4, p. 54). He also reviewed the 12/11/20 MRI and found evidence of a traumatic dislocation of the left shoulder with extensive labral pathology involving the anterior-inferior labrum with a SLAP lesion, Bankart lesion, and Hill-Sachs lesion. (PX 4, p. 54). He noted a type II acromion, residual capsular contracture and biceps tendinitis. (PX 4, p. 54).

Dr. Burra found that treatment to this point was appropriate. (PX 4, p. 55). On exam, he identified discrepancy in the left shoulder range of motion as compared to the right with continued capsular contracture. (PX 4, p. 55). Dr. Burra suspected that despite the course of physical therapy, Petitioner was never able to successfully regain his normal range of motion. (PX 4, p. 55). The majority of his pain was localized to the superior labrum biceps tendon complexes with tenderness over the biceps groove and reproduction of his pain with Speed's and O'Brien's, as well as pain at end ROM consistent with a residual capsular contracture. (PX 4, p. 55). Dr. Burra found it notable that he continued to work despite his pain and limited range of motion. (PX 4, p. 55). He recommended physical therapy. (TA 45; PX 4, p. 55). Dr. Burra planned to proceed with a diagnostic biceps groove injection to identify pain generators and a left shoulder arthroscopy with biceps tendon tenodesis and labrum debridement if Petitioner's symptoms did not improve by follow-up the next month. (PX 4, p. 55).

Petitioner began physical therapy at ATI on February 2, 2021. (TA 46; PX 6, p. 3). He related a history of injuring his shoulder on November 1, 2019 when he slipped on ice and reached back, hitting his left elbow on the ground. (PX 6, p. 3). He got released to go back to work in February/March of 2020 but had worsening pain that got fairly intense this fall. (PX 6, p. 3). The therapist documented decreased ROM, strength, flexibility, joint mobility, soft tissue mobility, and increased pain. (PX 6, p. 3). His primary complaint was of a dull constant ache in the shoulder, occasional sharp/stabbing pain, instability and weakness in the shoulder, as well as fatigue with repetitive use. (PX 6,

p. 3). Although previously he was unlimited with all activities, he currently had limitations with carrying, cleaning, crawling, dressing, driving, overhead tasks that were repetitive or involved lifting or reaching, shoveling, exercising, pulling/pushing tasks, reaching into his back pocket, sleeping longer than 6 hours, and using heavy machinery/power tools. (PX 6, p. 3). On exam, he had rounded shoulders with guarding on the left side and there was hypermobility of the sternoclavicular and acromioclavicular joints. (PX 6, p. 3).

Petitioner continued therapy through February. (PX 6). At his February 5, 2021 session, he reported that he had been sore since getting back into shoulder strengthening and he demonstrated increased fatigue with progressive band exercises. (PX 6, p. 6). On February 9, 2021, Petitioner had soreness in the anterior shoulder and parascapular area, tenderness in the left shoulder, and demonstrated significant fatigue with banded exercises. (PX 6, p. 7). On February 11, 2021, his therapist noted that he fatigued quickly with progressive weight bearing tasks. (PX 6, p. 8). On the 12th, Petitioner complained of soreness since the previous session but explained that pain was not any worse than normal, and he continued to experience fatigue with weight-bearing. (PX 6, p. 9).

The therapy record of February 18, 2021 reflects that Petitioner demonstrated signs and symptoms consistent with left shoulder adhesive capsulitis, SLAP lesion, and tendinitis/tendinosis of the biceps. (PX 6, p. 15). His biggest complaints were pain, instability, and limited ROM. (PX 6, p. 15).

There was little improvement since his initial visit with only slight increases in flexion and abduction and a minimal improvement in strength. (PX 6, p. 15).

On February 23, 2021, Petitioner was seen by Dr. Burra's assistant. (PX 4, p. 56). His shoulder was not better, even though he had attended physical therapy for the last month. (PX 4, p. 56). In fact, he thought it might be worsening. (TA 46; PX 4, p. 56). On exam, Petitioner was tender over the long head of the biceps tendon and Speed's and O'Brien's tests were positive. (PX 4, p. 57-58). A majority of his pain seemed to be coming from the superior labrum biceps tendon complex and was worse with activity. (PX 4, p. 56, 58). There were no significant improvements in ROM since the last visit. (PX 4, p. 58). Given his lack of response to conservative treatment, Petitioner opted to explore additional treatment options with Dr. Burra. (PX 4, p. 58).

Petitioner returned to see Dr. Burra on February 24, 2021 to address his continued left shoulder complaints. (PX 4, p. 60). Although he had been compliant with therapy, he thought it had actually worsened his symptoms. (PX 4, p. 60). Dr. Burra found him to be extremely motivated in that he continued to work without restrictions as a captain in the firefighting force. (PX 4, p. 60). Dr. Burra found him to be significantly limited with any biceps loading activities, reaching behind back, and sleeping on his left side. (PX 4, p. 60). His opinion was that this was a fairly complex problem and that his clinical examination showed that his range of motion had improved. (PX 4,

p. 60). Dr. Burra noted Petitioner's history of adhesive capsulitis following a traumatic dislocation, but opined that his present problems were primarily coming from the long head of the biceps tendon/superior labral complex. (PX 4, p. 62). The absence of an apprehension clearly indicated that the inferior and anterior instability was not the primary symptom generator, and he instead felt that the symptoms were predominantly coming from the long head of the super biceps tendon/superior labral complex. (PX 4, p. 62). Dr. Burra recommended a CT of the left shoulder with 2D and 3D reconstructions with humeral head substractions to visualize any bony pathology. (PX 4, p. 63). Upon evaluation of the results of the CT, Dr. Burra would consider a diagnostic injection into the long head of the biceps tendon, and possibly surgery. (PX 4, p. 63). Dr. Burra felt that a long head of the biceps tendon tenodesis might be necessary, and at that time, he would also evaluate the remainder of the labral pathology. (TA 46; PX 4, p. 63). Dr. Burra continued to allow Petitioner to work with no restrictions. (PX 4, p. 63).

Petitioner was discharged from therapy at ATI on February 26, 2021 in preparation for surgery. (PX 6, p. 1). At that time, his biggest complaint was of pain, instability, and limited ROM. (PX 6, p. 1). His pain levels had actually increased from when he began therapy on February 2, 2021 when they were 2/10 at rest and 4/10 with activity to 4/10 at rest and 5/10 with activity at this last visit. (PX 6, p. 1).

A CT of the left shoulder was performed on March 8, 2021 and there were no acute bone abnormalities demonstrated. (PX 8, p. 1). The glenohumeral

joint, humeral head, and proximal humeral shaft were intact. (PX 8, p. 1). The glenoid and scapula were intact as was the AC joint. (PX 8, p. 1).

Dr. Burra saw Petitioner on March 8, 2021 and documented that he was very symptomatic but continued to work with no restrictions. (PX 4, p. 65). There was no significant change in the qualitative or quantitative nature of his symptoms. (PX 4, p. 65). Dr. Burra reviewed the CT and found a Hill-Sachs deformity. (PX 4, p. 67). He performed an u/s guided injection to the left bicep. (TA 46; PX 4, p. 67-68). Petitioner testified that following the injection, he experienced immediate relief and the ability to resist forces that he wasn't able to before (applied force). (TA 46-47). Dr. Burra found that Petitioner's presentation continued to demonstrate zero apprehension, relocation or surprise and that pain continued to be localized to the long head of the biceps tendon-superior labral complex. (PX 4, p. 68). Petitioner's subjective relief, resolution of biceps tenderness, and a correction of the O'Brien's test following the diagnostic injection confirmed this. (PX 4, p. 68). Dr. Burra also noted that while he clearly had an undisputed traumatic instability which was confirmed by the Hill-Sachs lesion visualized on the CT, his present problem was localized clearly to the long head of the biceps tendon superior labral complex. (PX 4, p. 68). Dr. Burra found that he had failed conservative treatment. (PX 4, p. 68). Due to the absence of symptomatic instability, Dr. Burra recommended an arthroscopic evaluation of the shoulder and biceps tendon long head tenodesis or tenotomy. (PX 4, p. 68). Dr. Burra also noted that because of the history of traumatic instability, he would also assess his entire capsular labral complex including the anterior-inferior labrum as well

as the superior labrum, and would consider a repair if necessary. (PX 4, p. 68). He was also going to assess the rotator cuff and outlet. (PX 4, p. 68). Dr. Burra found the entirety of his condition of ill being of the left shoulder to be causally related to his work related injury of November 10, 2019. (PX 4, p. 69). Dr. Burra remarked that because of his position, Petitioner was able to manage to work without restrictions and he would allow him to continue to do so. (PX 4, p. 69).

Although Petitioner experienced immediate relief from the injection, the pain relief did not continue. (TA 47). Dr. Burra advised that it would only last several hours. (TA 47). Surgery was recommended at that time. (TA 47). Petitioner took the first available opening for surgery because of the amount of shoulder discomfort he was experiencing, and was contacted at the end of March to schedule. (TA 47-48, 54). Petitioner had been living with the shoulder for a while and the pain was getting worse, and he wanted the surgery to get his shoulder fixed. (TA 48). Petitioner received notice of the scheduling of a medical exam by Dr. Grant Garrigues, but the surgery was already scheduled before this exam. (TA 48). He did not recall the date that he was told about the exam with Dr. Garrigues. (TA 54).

On April 8, 2021, Petitioner underwent a left shoulder arthroscopy with biceps tendon tenodesis and extensive debridement to include removal of the loose body and debridement of the chondral defects from the humeral head and the glenoid and debridement of the frayed labrum inferiorly, that was performed by Dr. Burra. (TA 47; PX 7, p. 3). The postoperative

diagnosis was: left shoulder SLAP lesion, biceps tendinitis and pain, osteochondral loose body in the axillary recess, Hill-Sachs deformity of the humeral head, focal chondral injury of the anterior inferior glenoid and posterior humeral head. (PX 7, p. 3).

The arthroscopic findings of Petitioner's April 8, 2021 surgery included a significant peel of the superior labrum with fraying of the biceps tendon with a component of entrapment. (PX 7, p. 3). There was an osteochondral loose body in the axilla recess. (PX 7, p. 3). There was a constellation of findings suggestive of traumatic instability which included a Hill-Sachs defect and some labral peel anterior inferiorly. (PX 7, p. 3). There were 2 chondral erosions posteriorly in the humeral head and then anterior inferiorly on the glenoid. (PX 7, p. 3). There was also some fraying of the anterior inferior labrum. (PX 7, p. 3). The weight bearing portion of the glenohumeral articular cartilage was fairly intact except for the anterior inferior glenohumeral pathology on the glenoid side. (PX 7, p. 3). Based on his arthroscopic findings, Dr. Burra proceeded with a biceps tendon tenodesis as well as extensive debridement. (PX 7, p. 4). In the areas of the focal chondral defect of the glenoid rim, a chondroplasty and abrasion chondroplasty was performed by stabilizing the chondral lesions and debriding down to bleeding bone. (PX 7, p. 4).

Post-Surgical Treatment

Following his surgery, Petitioner returned to ATI on April 9, 2021 for a 4 week course of physical therapy. (PX 6, p. 17). He presented with decreased ROM, strength, flexibility, joint mobility and increased edema, pain, as well as impairments with posture and lifting mechanics. (PX 6, p. 17). His primary complaints were of constant pain and limited motion prior to surgery. (PX 6, p. 17). The therapist noted a protruded head and rounded shoulders. (PX 6, p. 17).

Petitioner continued therapy through April 2021. (PX 6). By April 12, 2021, he reported that he was sleeping good at night and his left shoulder PROM was improving with manual stretching with only mild pinching at end range flexion, but external rotation and passive ROM was limited with capsular end feel noted. (PX 6, p. 20). His left shoulder PROM was improving in all directions with PROM ER of 62°, flexion to 152°, and abduction to 162°. (PX 6, p. 21).

Petitioner returned to Hinsdale Orthopedics on April 20, 2021 and his shoulder was feeling well and he wasn't taking pain medication. (PX 4). He was attending physical therapy and doing a home exercise program. (PX 4). The record reflects that he was showing appropriate post-operative progress and was to discontinue the sling. (PX 4) Petitioner was to remain off work. (PX 4).

At therapy on April 23, 2021, Petitioner's shoulder was a little sore since he stopped wearing the sling and even though had been careful not to use it too

much. (PX 6, p. 25). The therapist found less crepitus with stretching into flexion with a capsular end feel into flex/ER that improved with manual stretching. (PX 6, p. 25).

Petitioner reported that he tried not to use the left shoulder too much through the end of April 2021 and into May 2021. (PX 6). At his May 4, 2021 therapy visit, he noted that his shoulder had been feeling good, but he tried not to use it too much during the day and was not gripping or lifting. (PX 6, p. 29). Although his ROM continued to improve, glenohumeral capsular tightness remained at end range flex/ER with manual stretching. (PX 6, p. 29). His range of motion was measured on May 5, 2021 and AROM with flexion was 150°, 160° with abduction, and PROM with abduction was 170° and PROM with flexion was 160°. (PX 6, p. 30).

Petitioner attended therapy regularly throughout May. (PX 6, p. 29-44). A May 7, 2021 progress note documented Petitioner's continued impairments with ROM, soft tissue and joint mobility, strength, flexibility, and pain. (PX 6, p. 32). He continued to experience intermittent left shoulder pain. (PX 6, p. 32).

Petitioner returned to Hinsdale Orthopedics on May 18, 2021 and Petitioner's shoulder was feeling well and he was happy with his progress. (PX 4). He was not using any pain medications and was compliant with physical therapy. (PX 4). He was allowed to progress to bicep strengthening per protocol and was to remain off work. (PX 4).

He continued therapy through June and by June 9, 2021, Petitioner was feeling stronger and was tolerating increased weight for further strength per job demands. (PX 6, p. 53). By June 16, 2021, Petitioner's shoulder was sore but felt like therapy was working it out. (PX 6, p. 59). When shoulder stabilization was increased, it caused fatigue secondary to weakness. (PX 6, p. 59).

On June 21, 2021, Petitioner reported 60% improvement since starting therapy. (PX 6, p. 63). While he was able to return to light activity and moderate household chores, he was unable to resume lifting and carrying for full demands of work. (PX 6, p. 63). Petitioner's current PDL was light-medium, but prior to his injury, he was working as a firefighter which required a PDL of heavy. (PX 6, p. 63). Continued therapy and work hardening/conditioning was recommended. (PX 6, p. 63).

Petitioner returned to Hinsdale Orthopedics on June 22, 2021, and his range of motion was progressing well. (PX 4). He did have some overall deconditioning in his rotator cuff and scapular stabilizers that would benefit from continued therapy. (PX 4). He was released to return to work as of June 23, 2021, with restrictions of no pushing, pulling or lifting greater than 10 pounds with the left arm and no repetitive or overhead use of the left arm. (TA 48; PX 4). He was to continue therapy with possible transition to work conditioning if he showed continued improvement by the time of his next follow up in a month. (PX 4).

On June 23, 2021, Petitioner attended therapy and reported that his doctor prescribed 4 more weeks of therapy followed by work conditioning and he performed with full effort. (PX 6, p. 67). Petitioner continued to attend therapy through the end of July and beginning of July. (PX 6).

By July 19, 2021, Petitioner reported 90% improvement since starting therapy and was able to lift, reach and carry greater weights to work towards demands. (PX 6, p. 71). He was still limited in full return of heavy demands and lifting overhead. (PX 6, p. 71). He was not able to carry 100 lbs. or lift from the floor or overhead. (PX 6, p. 71). His current level was medium-heavy and his therapist recommended work hardening/ conditioning. (PX 6, p. 71).

At the time of trial, Petitioner was working modified duty. (TA 48-49). He was doing strictly administrative work and was acting as the interim training officer for the department. (TA 48-49). He was still in physical therapy at ATI. (TA 48).

Deposition of Dr. Grant Garrigues

On June 24, 2021, Dr. Grant Garrigues, independent medical examiner for Respondent, testified on their behalf. (RX 1). Dr. Garrigues is the team physician for the Chicago White Sox and the Chicago Bulls. (RX 1, p. 8; RX 1 at Res. Dep. Ex. 1). He is board certified in orthopedic. (RX 1, p. 8). He

does somewhere between 400 and 425 shoulder surgeries in a year. (RX 1, p. 7-8). Dr. Garrigues could not independently remember when he saw the Petitioner and had to refer to his notes to find the exact date of the exam. (RX 1, p. 9-10).

Dr. Garrigues generated a report on April 14, 2021 and issued an addendum on June 13, 2021. (RX 1, p. 10). In preparing the report, he reviewed records from AMITA Health, Illinois Bone and Joint Institute (IBJI). (RX 1, p. 11). Dr. Garrigues testified that he summarized the November 1, 2019 record from Amita Health and explained that FF is forward flexion and means how far the shoulder can raise in this plane. (RX 1, p. 12). Dr. Garrigues reviewed the February 24, 2020 record from IBJI and testified that Dr. Chehab found Petitioner to have 170° of forward flexion, which was normal. (RX 1, p. 14). External rotation was at 40°, which was within the normal range. (RX 1, p. 14-15). He noted that internal rotation was recorded as T10 which records how far he can reach up his back. (RX 1, p. 15). This meant he could reach to the 10th thoracic vertebrae and this was kind of an average level of internal rotation as well. (RX 1, p. 15).

When Dr. Garrigues examined Petitioner, he was only able to do a very cursory exam as he recently had surgery. (RX 1, p. 17). He documented this in his report and noted that “examination of the left shoulder was significantly limited due to the fact that the patient just had surgery approximately one week ago.” (RX 1, p. 18).

Dr. Garrigues did not test the strength of Petitioner's left upper extremity nor his range of motion, but he did review his MRI report. (RX 1, p. 21). He testified to a reasonable degree of medical and surgical certainty that an individual can have MRI findings similar to Petitioner's and be asymptomatic. (RX 1, p. 21-22). Dr. Garrigues was not able to correlate the MRI findings with the physical exam of Petitioner since he was not able to perform a thorough physical exam. (RX 1, p. 22).

Dr. Garrigues agreed that part of the examination process is to determine whether the patient needs surgery, conservative treatment, or injections, and helps focus the treatment in terms of what is appropriate. (RX 1, p. 23). He was not able to make any of these assessments because he had no ability to perform a physical exam. (RX 1, p. 23). Even if he had been able to make them, the surgery had already been performed. (RX 1, p. 23). Dr. Burra testified as to Deposition Exhibit 3, which was his addendum of June 13, 2021. (RX 1, p. 24). As a result of his review of some additional diagnostics and films, some of his opinions were changed. (RX 1, p. 24). This was because he wasn't able to form some opinions previously due to the difficulties with not performing a physical exam. (RX 1, p. 24-25).

Dr. Garrigues referred to his records (Respondent's Deposition Exhibit 3, Interrogatory 2) and testified that his diagnosis of Petitioner's condition was SLAP lesion, bicipital tendonitis, osteochondral loose body in the axillary recess, Hill-Sachs deformity of the humeral head, chondral injury of the anterior inferior glenoid, with fraying of the anteroinferior labrum. (RX 1, p.

25). SLAP stands for superior labrum anterior posterior. (RX 1, p. 25). The labrum is a fibrocartilaginous structure that surrounds the socket, it's similar to the meniscus in the knee, and it can be torn where it attaches to the top of the labrum. (RX 1, p. 25-26). Dr. Garrigues testified that the SLAP lesion was unrelated to the alleged work-related event. (RX 1, p. 26). He opined that it was a normal finding and part of the aging shoulder, and not something that happens with a fall. (RX 1, p. 26).

Dr. Garrigues testified that bicipital tendonitis usually is a chronic condition of rubbing over the bony pulley. (RX 1, p. 27). It can happen as a traumatic event, but then it returns to baseline in a few weeks with some anti-inflammatories. (RX 1, p. 27). Thus, if he had bicipital tendonitis, he did not think it would have been caused by the work-related event. (RX 1, p. 27).

Dr. Garrigues diagnosed an osteochondral loose body in the axillary recess, and he based this diagnosis on the MRI and Dr. Burra's operative report. (RX 1, p. 27). This is basically a little piece of bone and cartilage that is in the bottom of the shoulder that can come loose from somewhere and then flow down or sink down to the bottom of the shoulder. (RX 1, p. 27-28). He testified that, in terms of causation, this one was a little more cloudy. (RX 1, p. 28). They can be caused as part of the chronic degenerative change, like an arthritic joint where little bits of cartilage can rub away. (RX 1, p. 28). They can also occur after a trauma. (RX 1, p. 28). There is no way to know in this case what caused those. (RX 1, p. 28). They are typically asymptomatic and

not something they would typically perform shoulder surgery for, but it was hard to know what caused that. (RX 1, p. 28).

Dr. Garrigues testified that based on the radiology report, his independent review of the MRI and on Dr. Burra's intraoperative findings, he diagnosed a Hill-Sachs deformity of the humeral head. (RX 1, p. 29). This is basically an impaction of the posterior part of the humeral head that can happen after a traumatic event. (RX 1, p. 29). In terms of causation, Dr. Garrigues testified that the timing and appearance of the condition would be consistent with Petitioner's history of a traumatic event. (RX 1, p. 29). It is more just a sign that he had a trauma. (RX 1, p. 30).

Dr. Garrigues also diagnosed a chondral injury of the anteroinferior glenoid based on the radiology report, his independent reading of the MRI, and Dr. Burra's operative report. (RX 1, p. 30). When the cartilage of the socket (glenoid) chips off, it is called a chondral injury, and it creates a small bare spot on the articular surface. (RX 1, p. 30). He testified that it was possible for this condition to be from a degenerative change or from a traumatic event, but it was not possible for him to determine between the two based on the information he had. (RX 1, p. 30). Dr. Garrigues opined that if he had been able to examine Petitioner, he could have determined whether it was symptomatic or asymptomatic based on the physical exam maneuvers--pain in certain positions is a sign they are having pain from the chondral injury. (RX 1, p. 30-31).

Dr. Garrigues testified that fraying is what is seen with chronic attritional changes to the labrum. (RX 1, p. 31). It's not the same kind of tear that you would see with a trauma, but is more the sign of a degenerative change. (RX 1, p. 31). It was his opinion that it was not causally connected to the accident that Petitioner described to him. (RX 1, p. 32).

Dr. Garrigues also testified that the labrum acts as a bumper to help with stability of the shoulder and it also acts as an attachment site of the various stabilizing ligaments. (RX 1, p. 32). The superior labrum acts as an attachment site for the biceps tendon. (RX 1, p. 32). It also helps make a suction seal of the head by surrounding it, and this also helps the stability of the glenohumeral joint. (RX 1, p. 32). Dr. Garrigues testified that a dislocation can be associated with a labral tear, as the labrum has multiple stabilizing functions in the shoulder. (RX 1, p. 32-33).

Dr. Garrigues testified that he had not received information that Petitioner had not been working at full duty before the fall. (RX 1, p. 35-36). Dr. Garrigues reviewed the Petitioner's November 11, 2019 left shoulder MRI and found high signal in the posterior superior humeral head consistent with a Hill-Sachs lesion. (RX 1, p. 36). There was also a corresponding high bone marrow signal in the anteroinferior glenoid consistent with an anterior instability event. (RX 1, p. 36). There was some question of labral tearing as well. (RX 1, p. 36). A CT scan showed an ossified posterior labrum and humeral head deformity consistent with a Hill-Sachs lesion. (RX 1, p. 36-37).

Based on his review of the Petitioner's medical records and the history of the injury, Dr. Garrigues was confident that he had an injury that caused the Hill-Sachs fracture and the time course was consistent with the November 1 date. (RX 1, p. 37).

In his addendum, Dr. Garrigues found that Petitioner's complaints of shoulder pain documented in the medical records as well as those related by Petitioner during his initial independent medical exam could correlate with the objective findings seen on the MRI as well as those in the operative report. (RX 1, p. 37). Further, he testified that the operative report findings, the radiographic findings, and Petitioner's story of having a fall do correlate. (RX 1, p. 38).

Based on his review of Dr. Chehab's records, Dr. Garrigues found that Petitioner had a work-related fracture that healed with closed treatment and then developed a frozen shoulder related to the fracture. (RX 1, p. 39). He related both conditions to the work-related incident of November 1, 2019. (RX 1, p. 39-40). Dr. Garrigues found some edema of the inferior glenoid in the radiology report and he saw the same findings when he reviewed the images. (RX 1, p. 40). He also found overlaying irregularities of moderate to high chondromalacia. (RX 1, p. 40). Based on his review of the MRI, he found a labral tear anterior and inferiorly and then posteriorly, the labrum was ossified. (RX 1, p. 40). Dr. Garrigues agreed with Dr. Chehab's initial

diagnosis of an anterior instability episode with subluxation of the left shoulder. (RX 1, p. 40).

Dr. Garrigues reviewed the February 14, 2020 summary progress report from IBJI (Petitioner's Deposition Exhibit 3) that was prepared following the Petitioner's 29th therapy visit. (RX 1, p. 42-43). Dr. Garrigues agreed that in the column that discussed the current left shoulder measures, the record reflected that Petitioner was still not able to sleep on the left side, and this was a mild problem. (RX 1, p. 43). Dr. Garrigues also agreed that this record reflected mild difficulty with lifting 16 to 25 lbs. (RX 1, p. 43). Dr. Garrigues agreed that there was no written indication that the physical therapist at IBJI tested Petitioner's ability to lift above a 25 pound limit. (RX 1, pp. 44-45). Dr. Garrigues found that the record reflected mild limitations of internal rotation of the left shoulder reaching behind his back. (RX 1, p. 45-46). Dr. Garrigues testified that it was his understanding that Petitioner returned to full duty work shortly thereafter. (RX 1, p. 46). Further, he agreed it reflected limited with lifting and carrying weight and limitations with muscular endurance (RX 1, p. 46)

Dr. Garrigues reviewed the November 2019 MRI and found that it included a high bone marrow signal in the anterioinferior glenoid consistent with an anterior instability event. (RX 1, p. 46). He agreed that all of the findings were consistent with Petitioner's description of a fall and his report of the alleged work-related event. (RX 1, p. 46-47).

Dr. Garrigues reviewed Dr. Burra's April 2021 operative report that recorded a constellation of findings consistent with traumatic anterior instability. (RX 1, p. 47). He testified that the two findings that seem to be related to the instability event would be the Hill-Sachs impaction fracture, possibly the chondral defect of the glenoid, and possibly the osteochondral loose body in the axillary pouch. (RX 1, p. 47). He testified that the Hill-Sachs is definitely related to an instability and the other two could be related to an instability event, could be degenerative. (RX 1, p. 47).

Dr. Garrigues agreed that in order to restore stability and use of the shoulder, repairing any fraying labrum anterior inferiorly would be appropriate. (RX 1, p. 48). However, Dr. Garrigues stated that Petitioner did not have an instability problem at this point, instead, he had one instability event and then became stiff. (RX 1, p. 48).

Dr. Garrigues has had patients who had an instability event and then a period of time passed before there was operative intervention. (RX 1, p. 48). He agreed that if there is fraying of the labrum anterior inferiorly that was peeling, it would be medically appropriate to shave that back if it was a source of pain. (RX 1, p. 48-49). He agreed that Dr. Burra, in his operative note, perceived a significant peel of the superior labrum with fraying of the biceps tendon with the component of entrapment. (RX 1, p. 54-55). If he made these findings, Dr. Garrigues agreed that a biceps tenodesis would be an appropriate way to treat that situation. (RX 1, p. 55).

In his June 3 report, Dr. Garrigues concluded that, based on his review of the records, Petitioner's diagnosis might or could have been caused by acute trauma on top of chronic changes. (RX 1, p. 49). The loose body and chondral defects on the humerus and glenoid are described by Dr. Burra were consistent with a traumatic anteroinferior instability event and thus might or could have been caused by the alleged work-related incident in question. (RX 1, p. 49-50). Further, he opined that the fraying of the anterior inferior labrum is typically not the way we describe a traumatic labral tear in the setting of a dislocation. (RX 1, p. 50). This is more consistent with a degenerative change. (RX 1, p. 50). Yet, in the setting of the MRI being consistent with the instability event, this might or could have been caused by the anteroinferior instability event. (RX 1, p. 50).

Dr. Garrigues reviewed Dr. Burra's operative report and found that he debrided the chondral defect from the humeral head and glenoid and debrided the frayed labrum. (RX 1, p. 51). He wasn't sure if Petitioner was symptomatic from that, but he did do some surgical management of those two things. (RX 1, p. 51). This intervention related to Dr. Burra's findings at the time of surgery, but he had no idea if those were symptomatic or not. (RX 1, p. 51). He also testified that those findings might or could have been caused by an anterior instability event which is consistent with the patient's story of his fall. (RX 1, p. 51). This was also consistent with his diagnosis by Dr. Chehab. (RX 1, p. 52-53).

Dr. Garrigues agreed that the fall described by Petitioner did occur as his history has been consistent throughout and imaging findings are consistent with the mechanism as he described. (RX 1, p. 52). He also agreed that the findings of the torn labrum on the MRI might or could be consistent with the instability event. (RX 1, p. 52).

Issues in Dispute

At the hearing, the issues in dispute were: causal connection, lost time for TTD benefits, whether Respondent is entitled to an 8(j) credit, and whether Petitioner is entitled to penalties/attorney's fees under §19(k), §19(1), and or §16 (Arb. Ex. 1, TA, p. 7-8). The arbitrator takes judicial notice that Petitioner's counsel made an oral motion at the outset of proceedings to amend the filings to conform to the proofs adduced at trial. (TA, p. 10-11) Respondent agrees to the occurrence of accident and notice. (Arb. Ex. 1). Petitioner's earnings in the year preceding the injury were $114,169.40 and his AWW $2,195.56, and Respondent agrees. (Arb. Ex. 1). He is 47 years of age with two dependent children. (Arb. Ex. 1). Petitioner claims $69,611.87 in unpaid bills and Respondent disputes liability on the basis of causation. (Arb. Ex. 1). Respondent claims it paid $0 in medical expenses and Petitioner Agrees (TA; Arb. Exh. 1). Petitioner claims an entitlement to TTD from November 2, 2019 through December 1, 2019, February 24, 2020 through March 4, 2020, and April 8, 2021 through June 22, 2021, representing 16 1/7 weeks. (Arb. Ex. 1). Respondent agrees Petitioner was

disabled from November 2, 2019 through December 1, 2019 but denies all lost time thereafter on the basis of causation. (Arb. Ex. 1).

Further, Respondent claims it paid $20,441.09 in sick time and $8,873.00 in PEDA benefits and seeks a credit under Section 8(j). (Arb. Ex. 1). Petitioner denies this credit, asserting that the Section 8(j) credit, per statutory language, is only allowed for Group Health Plan benefits and does not afford Respondent credit for petitioner's use of a personal sick time benefit made necessary by Respondent's denial nor does it allow a credit for payments made pursuant to PEDA. (TA, p. 6-7; Arb. Ex. 1). Respondent claims Petitioner obstructed its right to have an examination under Section 12. (TA, p. 8-9). The nature and extent of the injury is not in dispute at this time. Further, Petitioner is seeking to be held harmless by Respondent for any actions in recovery taken by Blue Cross Blue Shield for medical bills found related to the work injury should a causal connection be found. (Arb. Exh. 1).

CONCLUSIONS OF LAW

The respondent is not disputing employment, the occurrence of accident, or notice.

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

The Arbitrator notes the occurrence of the accident is not in dispute. The issue is whether this November 1, 2019 work injury was a causative factor in

the petitioner's subsequent condition of ill being of the left shoulder and the need for the surgery conducted on April 8, 2021 by Dr. Burra.

Under the Illinois Workers' Compensation Act, the work accident does **not** have to be the sole precipitating factor of a condition, for the current condition of the injured worker to be found related to the work injury. Accordingly, it is not necessary that the employee demonstrate that the injury was "the sole or principal causative factor, as long as it was **a** causative factor in the resulting condition of ill-being." *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n (Nichols),* 2007 Ill. App. LEXIS 155, *1, 309 Ill. Dec. 400, 402(1st. Dist. 2007). Further, the Illinois Supreme Court ruled in *Sisbro v. Industrial Comm'n,* that if there is an adequate basis for finding that an occupational activity aggravated or accelerated a pre-existing condition, then an employee's current condition of ill-being can be said to have been causally connected to the work related injury and not simply the result of a normal degenerative process. *Sisbro v. Industrial Commission* 2003 Ill. LEXIS 776. The guiding principle of the Illinois Workers' Compensation Act is that employers take their employees as they find them. *Baggett v. Indus. Comm'n.,* 2002 Ill. LEXIS 291. Thus, even where a pre-existing condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Id.* at 205. Further, a need for medical treatment is deemed related to the injury even if only a portion of the surgical findings relate to the aggravation.

The Arbitrator finds that the medical evidence, including the testimony of Respondent's Section 12 expert Dr. Garrigues, supports that the petitioner suffered a left shoulder anterior instability episode/subluxation, chondral injury of the anteroinferior glenoid bone marrow edema, Hill-Sachs deformity (post fracture) posteriorly of the humeral head and frozen shoulder causally related to the November 1, 2019 work injury.

The Arbitrator finds it noteworthy that Dr. Garrigues did not have an opportunity to examine the pre-surgical condition of Petitioner's left shoulder as surgery occurred prior to the Section 12 examination. The Arbitrator finds it noteworthy that although Dr. Garrigues denied causal connection to the SLAP tear, he opined that a dislocation can be associated with a labral tear, as the labrum has multiple stabilizing functions in the shoulder. Further, Section 12 Examiner Dr. Garrigues found that Petitioner's complaints of shoulder pain documented in the medical records as well as those related by Petitioner during his initial independent medical exam could correlate with the objective findings seen on the MRI as well as those in the operative report. Further, the arbitrator finds that Dr. Garrigues testified that the operative report findings, the radiographic findings, and Petitioner's story of having a fall do correlate. The Arbitrator finds the testimony of Dr. Garrigues to be supportive of a causal connection between the November 1, 2019 work injury and the petitioners' need for left shoulder surgery on April 8, 2021. Further, to the extent Dr. Garrigues' testimony is not directly supportive of a causal connection; they are equivocal on any defense of the need for surgery.

The arbitrator finds the reasoning of the Appellate Court in *Residential Carpentry* to be applicable to this matter. In *Residential Carpentry,* the Respondent authorized a repair of the rotator cuff tear but denied portions of the surgery on the basis they weren't directly caused by the trauma. The treating surgeon had testified treatment of these aspects of the shoulder were reasonable and medically necessary to enable the overall repair of the shoulder. The Appellate court affirmed the decision of the Commission, adopting the reasoning of the arbitrator, expressly found that respondent's suggestion that claimant "try and have a doctor perform surgery on a rotator cuff repair [*sic*] but not on the clavicle when the clavicle is also in need of surgery" was not reasonable. It found further that a work-related accident caused additional injuries and exacerbated the condition of his shoulder. The arbitrator correctly observed that it would not be reasonable to have a doctor operate on one part of claimant's shoulder, but not on another part that could be addressed during the same procedure. In essence, it was not reasonable for the respondent to attempt to subdivide a region of claimant's body in a manner contrary to how it would be treated in the normal course of medical practice. *Residential Carpentry, Inc. v. Workers' Comp. Comm'n*, 2009 Ill. App. LEXIS 258, *20-21. In this matter, the preponderance of the medical evidence causally relate the need for surgery to the November 1, 2019 work injury. Further, although Dr. Garrigues denied causal connection to the SLAP tear, he opined that a dislocation can be associated with a labral tear, as the labrum has multiple stabilizing functions in the shoulder and that the work injury caused the dislocation. Further, Dr. Garrigues found that

Petitioner's complaints of shoulder pain documented in the medical records as well as those related by Petitioner during his initial independent medical exam could correlate with the objective findings seen on the MRI as well as those in the operative report. Further, the arbitrator finds that Dr. Garrigues testified that the operative report findings, the radiographic findings, and Petitioner's story of having a fall do correlate. In light of the medical evidence and testimony of Dr. Garrigues in support of the accident causing the need for surgery it is not reasonable for the respondent to attempt to subdivide a region of claimant's body in a manner contrary to how it would be treated in the normal course of medical practice.

Further, after reviewing the treatment records of Dr. Chehab, the treatment records of Dr. Burra, and the operative findings from the April 8, 2021 surgery, the Arbitrator finds that they reflect a continuity of treatment for the condition for which Petitioner ultimately had surgery. These records also establish that this condition for which he had surgery was present following the work injury of November 1, 2019. Further, only upon the prompting of Petitioner did Dr. Chehab address the labral tear present on MRI. The Arbitrator finds it notable that Dr. Chehab would not even attempt a manipulation, under anesthesia, of the left shoulder for fear of creating instability, leaving the petitioner with no other option than to return to work despite his well-documented complaints and the lack of strength in the left shoulder that is documented in the records of therapy. The arbitrator finds that Dr. Chehab's reluctance to perform the manipulation demonstrates the ongoing precarity of the shoulder condition when he was released to full duty

in February 2010. The Arbitrator finds that the petitioner's ability to work from March 2020 through 2021 was enabled by the slowdown at work caused by the COVID-19 pandemic and his large body habitus of 6 feet 4 inches and his weight of 280 pounds. The Arbitrator further finds Petitioner's testimony credible, as corroborated by the records of Dr. Burra, that once call volume was restored to normal and he began to use the left arm again, the symptoms of a November 1st 2019 injury became so severe as to require him to seek further care with Dr. Burra in January 2021.

The Arbitrator finds that based on a preponderance of the evidence, the petitioner's current condition of the left shoulder and need for surgery relate to the November 1, 2019 work injury.

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

Both Respondent's Section 12 examiner, Dr. Garrigues, and Dr. Burra opined that the medical treatment was both reasonable and necessary. The Arbitrator finds there was no evidence submitted which disputed the reasonableness or necessity of medical care. Consonant with the Arbitrator's finding on causation, the reasonable and necessary medical expenses are related to Petitioner's employment for the respondent. The Arbitrator finds that Petitioner's exhibit #10 reflects the unpaid bills which correlate to the

treatment records as reflected in Petitioner's exhibits 3, 4, 5, 6, 7 and 8. Further, the Arbitrator finds an adequate evidentiary foundation for admission of these exhibits is supported as they were received in response to Commission subpoena and contain signed documents from records' custodians.

The Arbitrator finds that the medical and testimonial evidence reflecting the therapeutic benefit of treatment including surgery, pre and post operative orthopedic care and physical therapy to the petitioner's left shoulder are found to be reasonable and necessary to cure the effects of the injury.

Based upon the foregoing, the Arbitrator awards the medical expenses/unpaid bills from ATI ($20,173.66), HOASC ($21,768.87), Salt Creek Surgery Center ($22,270.34), American MRI Diagnostics ($1,600.00) and Midwest Anesthesia Partners ($3,799.00) pursuant to the fee schedule of Section 8.2 of the Act.

Section 8 of the Act provides, in pertinent part, the amount of compensation [for medical care] which shall be paid to the employee. Further, Section 8(a) of the Act only allows payment directly to a provider "If the employer does not dispute payment of first aid, medical, surgical, and hospital services, the employer shall make such payment to the provider on behalf of the employee." 820 ILCS 305/8(a) (West 2011). In this matter, Respondent disputed causation and liability for medical expenses. The Arbitrator awards

this medical award to the Petitioner payable to Petitioner's firm, Serowka Law.

ISSUE (K) ***What temporary benefits are in dispute? (TTD)***

Temporary total disability compensation is to be awarded for the "period of time between the injury and the date the employee's condition has stabilized." *Caterpillar Tractor Co. v. Industrial Com.,* 1983 Ill.LEXIS 409. An employee is temporarily and totally disabled from the time that an injury incapacitates him from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990). According to our supreme court, the dispositive inquiry is whether the claimant has reached MMI. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 2010 Ill. LEXIS 12, *1, *Sharwarko v. Ill. Workers' Comp. Comm'n,* 2015 Ill. App. LEXIS 128, *20.

The Arbitrator finds the medical evidence reflects Petitioner was restricted from work as of November 2, 2019 through December 1, 2019, February 24, 2020 through March 4, 2020, and April 8, 2021 through June 22, 2021, a period of 16-1/7 weeks. Based upon the forgoing and consonant with its finding on causation the Arbitrator awards temporary total disability benefits from November 2, 2019 through December 1, 2019, February 24, 2020 through March 4, 2020 and April 8, 2021 through June 22, 2021, a period of

16-1/7 weeks at a rate of $1,463.97 totaling $23,628.53 to be paid to Petitioner's attorney, Serowka Law.

ISSUE "O" Whether §8(j)of the Act allows Respondent to claim a credit for Petitioner's sick time benefits or payments pursuant to "PEDA" and whether Respondent met its burden of proof on the existence of an insurance contract pursuant to §8(j) of the Act.

Respondent alleges without any analysis of the language or §8(j) of the Act or applicable case law that it should receive a credit under Section 8(j) of the Act for the personal sick benefits taken by Petitioner in lieu of their denial of TTD benefits payments pursuant to the Public Employees Disability Act "PEDA."

Section §8(j) of the Act: Benefits Received Under Group Health Plan states as follows:

1. 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 this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation

> payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act.
>
> 820 ILCS 305/8(j)(1) (West 2002).

The right to credits, which operates as an exception to liability created under the Act, is narrowly construed. *World Color Press v. Industrial Comm'n,* 466 N.E.2d 270 (1984). Further, in *Hill Freight Lines,* the Supreme Court found that the burden is upon the employer to establish the fact that it is entitled to credits under section 8(j) of the Workmen's Compensation Act. *Hill Freight Lines, Inc. v. Indus. Comm'n*, 36 Ill. 2d 419 (1967).

In this case, Respondent argues it is entitled to a credit because claimant opted to take personal sick time benefits (a benefit inured by his collective bargaining agreement) taken in lieu of Respondent's denial of TTD benefits. However, a plain reading of Section 8(j) of the Act reveals a credit is only allowable for "a group plan covering non-occupational disabilities." Under that basis alone, benefits conferred under the employee's collective bargaining agreement do not provide the employer a legal basis for any credit under a plain reading of §8(j) of the Act. The language of §8(j) clearly contemplates credits only for a "group plan" contributed to by the employer. As such, Respondent's claim of credit under §8(j) for the personal sick benefits taken by Petitioner is denied under §8(j) as a matter of law.

PEDA

Respondent's argument that they should be entitled to credit for payments made pursuant to "PEDA" is inconsistent with the express language of Section 8(j) of the Illinois Workers' Compensation Act.

In this case, Respondent argues it is entitled to a credit because claimant received full salary under PEDA. However, a plain reading of Section 8(j) of the Act and the "PEDA" statute reveals the Public Employees Disability Act is not "a group plan covering non-occupational disabilities," but a statute that does not provide any health benefits and only provides benefits for "line of duty disability." Under that basis alone, benefits conferred under the PEDA statute do not provide an employer credit under a plain reading of Section 8(j) of the Act as 8(j) clearly contemplates credits only for health insurance benefits provided under a group health plan. Further, a plain reading of the PEDA statute reveals it only confers a benefit when a public employee suffers a "line of duty injury" 5 ILCS 345/1(b)(January 1, 2011). By definition, a "line of duty injury" must be related to a public employee's occupation. A plain reading of Section 8(j) of the Act provides an employer credit only for "a group plan covering non-occupational disabilities." Petitioner received compensation under PEDA only when the Respondent determined he had suffered a "line of duty injury." The basis for receiving PEDA benefits only arises following a "line of duty injury" where the employer's credit under Section 8(j) of the Act only arises for a plan covering "non-occupational disabilities."

Therefore, under the rules of statutory construction of Section 8(j) of the Act, the Respondent does not qualify for a credit for benefits paid only following the occurrence of a required "line of duty injury" under the PEDA statute as 8(j) provides credit only when a disability is "non-occupational."

Further under either benefit, it is incumbent upon the employer to see that sufficient evidence of the insurance contract itself was introduced in order to determine if it fell within the provisions of section 8(j). *Hill Freight Lines, Inc. v. Indus. Comm'n*, 36 Ill. 2d 419, 424 (1967). In *Flavin,* the Commission found that Respondent failed to produce sufficient evidence that it was entitled to Section 8(j) credit because it failed to prove that it contributed in whole or in part to the pension benefits that Petitioner receives. *Julie Flavin, Petitioner v. Blue Island Police Dep't, Respondent,* 09 IL. W.C. 28220 (Ill. Indus. Comm'n Nov. 28, 2011). Respondent puts forth a copy of the PEDA Act and payment summaries for 2014 and 2015 to establish its entitlement to credit under the PEDA Act and Section 8(j) of the Act. These summaries do not indicate the source of payment or that they relate to any insurance contract. As stated above, the basis for receiving PEDA benefits only arises following a "line of duty injury" where the employer's credit under Section 8(j) of the Act only arises for a plan covering "non-occupational disabilities." Further, the payment summaries tendered do not reflect they were made according to any contract of insurance. Further, under the rules of statutory construction of Section 8(j) of the Act and *Hill Freight Lines,* the Respondent has failed to provide sufficient proof of the existence of an insurance contract,

failed to provide sufficient proof that payments were made, and failed to provide sufficient proof that its payments qualify for credit under Section 8(j) of the Act.

Respondent fails to proffer any evidence of the existence of an insurance contract to meet its burden of production under §8(j) of the Act. Based upon the forgoing, the Arbitrator denies Respondent any further credit under §8(j) of the Act.

Respondent's argument that Petitioner having reasonable and necessary medical treatment is an obstruction of their rights under Section 12.

Respondent mounts an argument that Petitioner obstructed the Respondent's Section 12 rights in having the surgery prior to the setting of the IME examination. However, Petitioner had been using an injured shoulder for sixteen months, since November 1, 2019. Further, Petitioner attended and cooperated with the April 14, 2021 examination. Petitioner's need to remediate his pain and regain his functional use of the shoulder to return to his career in having surgery on April 8, 2021 is not an obstruction of Respondent's Section 12 rights but necessary medical treatment, as agreed in the testimony of Respondent's Section 12 examiner Dr. Garrigues. There is no case law that makes subservient the injured party's right to obtain reasonable and necessary medical care to the Respondent's right to acquire an examination by their physician. An argument to the contrary is rebutted

by the central purpose of the Act; to remediate the effects of injury caused by industry. Further, the Respondent cannot reasonably argue any prejudice was suffered due to the timing of surgery as Dr. Garrigues agreed with the treating doctor's diagnosis in his April 2021 report. The purpose of the examination is to ascertain the diagnosis and Dr. Garrigues had available all medical records and diagnostic imaging to formulate a diagnosis. Further, there is no evidence in the record that would lead a reasonable person to conclude if he had examined the pre-operative condition, his diagnosis would have been altered. Notably, Dr. Garrigues reviewed the operative report, the most accurate examination of diagnosis, and his diagnosis remained unchanged. Further still, any reasonable argument for prejudice is conclusively rebutted as Dr. Garrigues ultimately testified to the findings and that multiple aspects of the need for surgery relate to the work injury.

Penalties

Based 9n the testimony of Respondent's examining physician, the Arbitrator finds that there was a reasonable dispute on the issue of causation. Therefore, the Petition for penalties and fees is Hereby denied.

1

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC021703
Case Name	CLEVENGER, BRUCE E v. PRAIRIE FARMS DAIRY
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0612
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Matthew Terry

DATE FILED: 12/27/2021

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRUCE CLEVENGER,

Petitioner,

vs. NO: 20 WC 21703

PRAIRIE FARMS DAIRY,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 17, 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 $11,100.00. 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.

December 27, 2021
o: 121721
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	20WC021703
Case Name	CLEVENGER, BRUCE v. PRAIRIE FARMS DAIRY
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Matthew Terry

DATE FILED: 6/17/2021

INTEREST RATE FOR THE WEEK OF JUNE 15, 2021 0.04%

/s/ Adam Hinrichs, 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)

BRUCE CLEVENGER
Employee/Petitioner

v.

PRAIRIE FARMS DAIRY
Employer/Respondent

Case # **20** WC **21703**

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 **ADAM HINRICHS**, Arbitrator of the Commission, in the city of **PEORIA**, on **04/20/2021**. 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. ☒ 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, **07/02/2020**, 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 $**45,905.60**; the average weekly wage was $**882.80**.

On the date of accident, Petitioner was **43** years of age, ***single*** 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 $**13,507.43** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**13,507.43**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $588.54 per week from 07/02/2020 to 04/20/2021 as provided in Section 8(b) of the Act. Respondent shall be given a credit of $13,507.43 for TTD payments made.

Respondent is ordered to provide and pay for reasonable and necessary medical care pursuant to Section 8(a) and 8.2 and subject to the medical fee schedule, as prescribed by Petitioner's treating physician, Dr. Brent Johnson, to cure and relieve Petitioner's current condition of ill-being in his right shoulder.

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 17, 2021

ICArbDec19(b)

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 14, 2020 Petitioner filed an Application for Adjustment of Claim ("Application") which was assigned case number 20WC 21703. The Application alleges Petitioner sustained injuries to his right arm while lifting a milk crate on July 2, 2020, 2018 (Px 1). On November 16, 2020, Petitioner substituted attorneys. (Px 1). Petitioner's counsel filed a duplicate Application for Adjustment of Claim, 20WC 24252, alleging the same injury and date of accident. At hearing Petitioner's counsel made a motion to dismiss the duplicate filing 20WC 24252. Respondent had no objection. Petitioner's motion to dismiss 20WC 24252 was granted. (Tx p. 6)

The parties stipulated that Bruce Clevenger ("Petitioner") was employed by Prairie Farms ("Respondent") on July 2, 2020; timely notice of an accident was given; Petitioner earned an average weekly wage of $882.80, was 43 years old, single, with one dependent child; that all medical bills have been paid by Respondent; and Respondent is entitled to a credit of $13,507.43 for temporary total disability ("TTD") benefits paid.

The parties proceeded to hearing on the following disputed issues: Accident, Causal Connection, Temporary Total Disability, and Prospective Medical.

FINDINGS OF FACT

Petitioner was employed by Respondent as a jug side picker. Petitioner started working for Respondent in late 2017. Petitioner's job consisted of using a milk hook, *See* Px. 3 Dep. Ex. 2c, to pull crates filled with jugs of milk. To pull the crates of milk, Petitioner would attach the milk hook underneath the stack of crates and grasp the milk hook with his right hand. Petitioner then uses his right hand to pull the stack of milk to the jug side line for the milk to be shipped out. The jug side line is a track system that runs throughout the plant. The track system consists of a conveyor belt with two chains running down its center that is used to carry the milk out of the plant. (Tx. 20-22). When pulling the stack of milk crates, the Petitioner places his left hand, which is holding a clipboard, on top of the stack of milk to guide the stack. (Tx. pp. 13-16, Px. 3 Dep. Ex. 2b).

On July 2, 2020, Petitioner was working second shift as a jug side picker. Petitioner was pulling crates of milk jugs, stacked six crates high, weighing approximately 240 pounds. As Petitioner pulled the milk, the bottom crate broke, causing the stack to topple, and Petitioner fell back into the jug side line track system. Petitioner testified that he went "flying into the track…twisted my body…landed all kinds of funky in the track system" with some the stacks hitting him in the elbow. Petitioner testified that he put his right hand out to break his fall, and his right hand landed in the track system, which is three to four inches lower than floor level, noticing immediate pain in his right shoulder. (Tx. 28-20).

Petitioner testified his supervisor, Fred Richardson, witnessed the accident. Respondent offered into evidence the "workers' compensation claim form" completed by Fred Richardson. (Rx. 7). The report indicates that Petitioner injured his right arm when a case broke causing the milk to fall over. Mr. Richardson did not testify at hearing. Respondent called Manager Bruce Johnson to testify. Mr. Johnson had no direct knowledge of the accident or the completion of the accident report. Mr. Johnson testified that the accident report was kept in the ordinary course of business.

The milk stack with the broken crate on top of the stack is shown in Px. 3, Dep Ex. 2a. Petitioner testified that the broken crate was placed on the top of the stack by his supervisor after the incident. (Tx. 23).Petitioner testified that, at Mr. Richardson's request, he finished his shift that evening with the assistance of a co-worker.

On July 3, 2020, Petitioner presented at OSF Glen Park Urgent Care. Petitioner presented to Benjamin Korte, PAC, reporting a work accident wherein he was pulling a stack of milk crates, when the bottom crate cracked, and 200 pounds of milk fell onto him. The note indicates Petitioner denied hitting his head or falling to the

ground. Petitioner complained of right shoulder, right elbow, right knee and right lower back pain. Petitioner rated his right shoulder pain at 8/10 and complained of popping and cracking in the shoulder. Petitioner denied numbness, was taken off work, given a sling and recommended heat and ice.

A second OSF chart note from Petitioner's July 3, 2020 visit was completed by Jordan Tanner, RN. This note indicates that Petitioner suffered a work injury when the Petitioner slipped after the case of milk ripped, falling onto his right side, with 200 pounds of milk crates falling onto him.

On July 6, 2020, Petitioner presented to Dr. Adam Colem, DO, at Midwest Orthopedics complaining his right arm was yanked when a stack of milk he fell on it. The history indicates that 200 pounds fell onto Petitioner's right shoulder and arm. Petitioner complained of pain in his right shoulder and lateral elbow. Petitioner was released to return to work with restrictions and an MRI was ordered.

At Petitioner's initial visit to Midwest Orthopedic he completed a "Medical History Form" indicating an injury at work occurred from a "twist," "bend," and "pull." Petitioner did not check the box that the injury occurred from a "fall." Petitioner testified that he was probably "flying through the form" and that's why the box for "fall" was not checked. (Tx. 75).

On July 24, 2020 Petitioner underwent the MRI to his right shoulder. The MRI revealed a 25-50% tear of the supraspinatus attachment, with less partial tearing of the infraspinatus and subscapularis, and regions of partial thickness interstitial tearing involving the supraspinatus and less of the infraspinatus and subscapularis.

On August 3, 2020, Petitioner followed up with Dr. Colen. Dr. Colen reviewed the MRI with Petitioner, performed a cortisone injection and prescribed physical therapy ("PT").

On August 24, 2020, Petitioner followed up with Dr. Colen reporting improvement in his right shoulder from the injection, but that he was unable to get into PT. Petitioner testified that the injection to his shoulder did help partially alleviate his pain complaints. Petitioner underwent PT at Midwest Orthopedics from September 4, 2020 through September 23, 2020. Petitioner testified that he was only able to go to a few PT visits due to COVID restrictions, and was given a home exercise program to complete instead.

On October 30, 2020, on a referral from Dr. Colen, Petitioner presented to Dr. Brent Johnson, M.D., an orthopedic surgeon. Petitioner gave Dr. Johnson a history of moving milk containers, when one container broke while he was dragging the containers, Petitioner lost control and his shoulder bent and twisted awkwardly causing immediate pain. Petitioner complained of having pain and weakness with overhead reaching with his right arm. Dr. Johnson performed a physical exam, reviewed the MRI film, and diagnosed Petitioner with a partial thickness tear and rotator cuff impingement with AC joint issues. As conservative measures had failed cure and relieve the Petitioner's symptomatic right shoulder, Dr. Johnson recommended surgery, and released Petitioner to return to work with restrictions pending surgery. Respondent did not accommodate Petitioner's work restrictions.

On January 29, 2021, the parties deposed Dr. Johnson. Dr. Johnson testified that he is a board-certified orthopedic surgeon specializing in knee and shoulder issues. Dr. Johnson testified he was given a history of a work incident occurring on July 2, 2020, when Petitioner was moving milk containers, and one of the containers broke, causing Petitioner to fall back onto his right arm with the crates falling on top of him. (Px 3 p. 16). Dr. Johnson testified it was the force of Petitioner falling onto his arm that most concerned him. (Id. pp. 13-14)

Dr. Johnson testified that Petitioner's MRI revealed significant rotator cuff tendinopathy and bursitis, as well as some partial thickness tearing of the supraspinatus tendon extending into the infraspinatus. Dr. Johnson testified that the MRI demonstrated the tear was between 25-50% in the area of the rotator cuff. (Px. 3, pp. 7-8). Dr. Johnson testified the MRI findings were consistent with the physical examination. (Id. pp. 9-10). As

conservative measures had failed to alleviate Petitioner's symptoms, Dr. Johnson reiterated his treatment recommendation of a right shoulder arthroscopy with subacromial decompression, distal clavicle excision and rotator cuff repair. (Px 3, pp. 7, 10-11). Dr. Johnson testified to a reasonable degree of medical certainty that the mechanism of injury described caused or aggravated the partial thickness rotator cuff tear, causing Petitioner's pain in the right shoulder, and the necessity for surgery. (Px 3, pp. 11, 34).

On February 17, 2021, Petitioner presented for a Section 12 exam with Dr. William Christopher Kostman, M.D. Dr. Kostman testified he was a board-certified orthopedic surgeon and focuses his treatment on the upper and lower extremities. Dr. Kostman testified he took a history from Petitioner wherein Petitioner was using his right arm to pull a hook underneath a stack of cases of milk with his left arm holding a clip board on top of the cases. Petitioner described the stack of milk to be six feet tall and between 240 and 250 pounds. Dr. Kostman reported that Petitioner stated that his right arm held the milk hook, and stayed with the bottom crate, and that the hook became stuck, causing the crates to fall and strike his body. (Rx 1, p. 7). One of the crates struck just above the Petitioner's right elbow. (Rx 1, p. 7). Dr. Kostman noted Petitioner initially reported pain in his right shoulder, elbow, right knee, and lower back. (Rx. 1. p. 25). Dr. Kostman testified that Petitioner fell backward hitting the wall behind him, then slumped to the ground. (Rx 1, p. 23). Dr. Kostman did not know what Petitioner did with his right hand when he fell, and denied that Petitioner told him that he fell back on his outstretched right hand. (Rx. pp. 21-22). Dr. Kostman noted that Petitioner gave multiple differing histories to his providers. (Rx. 1 p. 24).

Dr. Kostman testified he performed a physical exam and reviewed the diagnostic imaging studies. Dr. Kostman testified his physical exam did not indicate a partial thickness tear. (Rx 1, p. 14). Dr. Kostman interpreted the MRI to show "findings of signal within the supraspinatus at its insertion which may be consistent with rotator cuff tendinitis or partial thickness tear." (Rx 1, p. 13). After the physical exam and review of diagnostic studies, Dr. Kostman diagnosed Petitioner with a contusion involving the right elbow and distal humerus. (Id).

Dr. Kostman testified that Petitioner received no relief from a shoulder injection, indicating that a tear was not causing Petitioner's complaints. (Rx. 1, p. 14). Dr. Kostman felt this was a critical factor in making his diagnosis of the partial thickness tear. (Rx 1, pp. 13-14). Dr. Kostman stated the lack of improvement for the diagnostic injection of the subacromial space was crucial for diagnostic purposes and any recommendation for surgery. (Rx. 1, p. 15).

Dr. Kostman testified that he would not recommend surgery because (a) the mechanism of injury of a milk carton striking the lower humerus does not correlate to the MRI findings, and (b) Petitioner's had no improvement from the injection. Dr. Kostman testified that if the Petitioner had a fall from height onto his shoulder or hand that could cause a traumatic rotator cuff tear. (Rx. 1 p. 43).

Respondent offered surveillance video in evidence. (Rx 3). The Arbitrator has reviewed all of the video submitted at hearing. Of note, the surveillance video demonstrates Petitioner doing yard work below shoulder level and shooting a basketball above shoulder level. On the 3/11/2021 video, Petitioner is seen at one point awkwardly using only his left arm to dig with a shovel while keeping his right arm immobile at his side. Petitioner testified at trial as long as he works below shoulder level, he does not have much of an issue. Petitioner testified that he can work above shoulder level with very minimal weight. Petitioner is also seen shooting a basketball with his right elbow slightly above shoulder level and his right hand well above shoulder level when he releases the ball. Petitioner stated at trial the weight of a basketball, in a small quantity, is something he can manage above shoulder level. Petitioner testified it is very similar to his home exercise program that was given to him by his physical therapist.

Petitioner continues to complain of pain in his right shoulder, especially with overhead activities. Petitioner testified that he had no shoulder problems before the incident of July 2, 2020. Petitioner testified that were surgery authorized with Dr. Johnson, he would undergo the prescribed course of care.

CONCLUSIONS OF LAW

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

While some histories in the record differ as to the mechanism of injury, it is clear in the record that the Petitioner suffered a traumatic work injury on July 2, 2020. At hearing, a significant portion of testimony was taken to determine exactly whether the Petitioner fell, and if so, onto and/or into what, and, if he fell, how did he break his fall. The Petitioner is a poor historian and had difficulty describing events clearly and simply.

After significant amounts of testimony regarding the accident, Petitioner was able to plainly state that he was putting his right arm out to try to stop himself from falling after a stack of milk crates fell onto him. (Tx. 28-29). Petitioner testified that when he put his right hand out to break his fall, his right hand landed in the jug side line track system, which is three to four inches lower than floor level, noticing immediate pain in his right shoulder. (Tx. 28-20) Petitioner's testimony was unrebutted.

Respondent did not call their employee, Supervisor Fred Richardson, to testify. Mr. Richardson witnessed the accident and completed the accident report for Respondent. Respondent called Manager Bruce Johnson to testify. Mr. Johnson had no direct knowledge of the accident or the completion of the accident report.

On July 3, 2020, there are two histories recorded at OSF Urgent Care. One of these histories was recorded by Jordan Tanner, RN. In that history, Petitioner reported that he injured himself in a fall at work. Specifically, the chart note indicates that Petitioner suffered a work injury when the Petitioner slipped after the case of milk ripped, falling onto his right side, with 200 pounds of milk crates falling onto him. This initial history is consistent with Petitioner's testimony.

Petitioner's treating orthopedist, Dr. Johnson, testified that he relied on a history of a work incident occurring on July 2, 2020, when Petitioner was moving milk containers, and one of the containers broke, causing Petitioner to fall back onto his right arm with the crates falling on top of him. (Px 3 p. 16). This history is consistent with Petitioner's testimony and the initial report of Jordan Tanner, RN, at OSF.

Respondent's Section 12 examiner Dr. Kostman testified he took a history from Petitioner wherein Petitioner stated his right arm was holding the milk hook, that the milk hook became stuck, causing the stack of crates to fall and strike Petitioner's body, with one of the crates striking just above the right elbow. (Rx 1, p. 7). Dr. Kostman testified did not know what Petitioner did with his right hand when he fell, and denied Petitioner told him that he fell back on his outstretched right hand. (Rx. pp. 21-22). This history is inconsistent with Petitioner's testimony.

Despite some inconsistent and incomplete histories in the record, the Arbitrator observed the Petitioner and found him to be sincere and credible. It is clear in the record that the Petitioner suffered a traumatic work injury on July 2, 2020. Crucially, the initial medical history at OSF, as well as the history Dr. Johnson relied upon in reaching his conclusions, supports the Petitioner's testimony that while he was pulling crates of milk, the bottom crate broke causing the crates to fall, pushing Petitioner backwards, and causing him to fall onto his right arm.

The Arbitrator finds that the Petitioner has proven by a preponderance of the evidence that on July 2, 2020, he sustained an accident that arose out of and in the course of his employment for Respondent.

Regarding Issue (F) Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds as follows:

Incorporating the above, the Arbitrator finds that the Petitioner's current condition of ill-being in his right shoulder is causally related to his work accident on July 2, 2020.

Petitioner received a reasonable and necessary conservative course of care following this initial visit, including PT, a home exercise program, and a subacromial shoulder injection that provided temporary relief. This conservative course failed to cure and relieve the Petitioner's complaints of ill-being in his right shoulder.

Petitioner presented to Dr. Brent Johnson following his failed course of conservative care. Dr. Johnson reviewed the MRI, which showed partial tears, and correlated those findings on physical exam. Dr. Johnson testified he was given a history of a work incident occurring on July 2, 2020, when Petitioner was moving milk containers, and one of the containers broke, causing Petitioner to fall back onto his right arm with the crates falling on top of him. (Px 3 p. 16). Dr. Johnson testified it was the force of Petitioner falling onto his arm that most concerned him. (Id. pp. 13-14)

As conservative measures had failed to alleviate Petitioner's symptoms, Dr. Johnson recommended a right shoulder arthroscopy with subacromial decompression, distal clavicle excision and rotator cuff repair. (Px 3, pp. 7, 10-11). Dr. Johnson testified to a reasonable degree of medical certainty that the mechanism of injury caused or aggravated the partial thickness rotator cuff tear, causing Petitioner's pain in his right shoulder, and the need for surgery. (Id. pp. 11, 34).

Respondent's Section 12 examiner Dr. Kostman testified he took a history from Petitioner wherein Petitioner was struck by milk crates just above the right elbow, and subsequently fell backward into a wall. (Rx 1, pp. 7, 23). Dr. Kostman did not know what Petitioner did with his right hand when he fell, and denied Petitioner told him that he fell back on his outstretched right hand. (Rx. pp. 21-22). Dr. Kostman diagnosed an elbow contusion.

Dr. Kostman further testified that Petitioner received no relief from the shoulder injection indicating that a tear was not causing Petitioner's complaints. (Rx. 1, p. 14). Dr. Kostman felt this was a critical factor in making a diagnosis of a partial thickness tear. (Rx 1, pp. 13-14). Dr. Kostman testified the lack of improvement from the injection was crucial for diagnostic purposes and making a determination as to whether surgery was necessary. (Rx. 1, p. 15). Dr. Kostman testified that if Petitioner had a fall from height onto his shoulder or hand that could cause a traumatic rotator cuff tear. (Rx. 1 p. 43).

The Petitioner's testimony, his initial medical history to Jordan Tanner, RN, at OSF, and the testimony of Dr. Johnson all relate an accident history of pulling cases of milk, when the bottom case broke causing the cases to fall back towards him pushing him backwards, and causing him to fall onto his right arm. Dr. Johnson relied on this history in reaching his conclusions. Respondent's Section 12 examiner, Dr. Kostman, agreed that a fall from height onto a shoulder our outstretched hand can cause a rotator cuff tear. Petitioner's MRI indicates a rotator cuff tear. Dr. Johnson's physical exam correlates this finding. Moreover, Petitioner failed a course of conservative care, including a subacromial injection in his right shoulder that provided only temporary relief. Dr. Kostman testified that temporary relief from a subacromial injection is crucial in diagnosing a rotator cuff tear and determining the need for surgical intervention.

The Arbitrator finds the opinions of Petitioner's treating physician, Dr. Johnson, persuasive on the issue of causation. Dr. Johnson's opinions are supported by the record. Petitioner sustained a fall at work, and tried to break his fall by outstretching his right arm and hand. He immediately felt pain in his right shoulder and reported the same in his initial hospital visit. Petitioner's MRI and physical exam findings indicate a rotator cuff tear. Petitioner failed a course of conservative care. Petitioner's injection in his right shoulder provided temporary relief, indicating a rotator cuff tear and need for surgical intervention. Dr. Johnson testified to a reasonable degree of medical certainty that the mechanism of injury described caused or aggravated the partial

thickness rotator cuff tear, causing Petitioner's pain in the right shoulder, and the necessity for surgery. (Px 3, pp. 11, 34).

The Arbitrator finds that Petitioner's current condition of ill-being in his right shoulder is causally related to Petitioner's work accident on July 2, 2020.

Regarding Issue (K): Is Petitioner entitled to any prospective medical care? The Arbitrator finds as follows:

Incorporating the above, the Arbitrator finds that the Petitioner is entitled to prospective medical treatment.

The Arbitrator is persuaded by the treatment recommendations of Petitioner's treating physician, Dr. Brent Johnson, and finds that the Petitioner has yet to reach maximum medical improvement. Respondent is ordered to provide and pay for the reasonable and necessary medical care pursuant to Section 8(a) and 8.2 and subject to the medical fee schedule, as prescribed by Dr. Johnson, including a right shoulder surgery, to cure and relieve Petitioner's current condition of ill-being in his right shoulder.

Regarding issue (L): What temporary benefits are in dispute? The Arbitrator finds as follows:

Incorporating the above, the Arbitrator finds that the Petitioner is entitled temporary total disability benefits from July 2, 2020 to April 20, 2021.

The evidence in the record demonstrates Petitioner is restricted from full duty work as a consequence of his work accident. Respondent is not accommodating Petitioner's work restrictions. Therefore, the Petitioner is entitled to temporary total disability benefits from July 2, 2020 to April 20, 2021, as provided in Section 8(b) of the Act, at the rate of $588.54 per week. Respondent is given a credit of $13,507.43 for temporary total disability benefit payments made.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC040251
Case Name	FLIS, JAN v. BELMONT HEIGHTS HOMEOWNERS ASSOCIATION
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0613
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Christopher Buchcar
Respondent Attorney	Joseph Haffner, Charlene Copeland, Rachel Peter

DATE FILED: 12/27/2021

/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

JAN FLIS,

Petitioner,

vs. NO: 13 WC 40251

BELMONT HEIGHTS HOMEOWNERS ASSOCIATION,
AND ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE
INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 19, 2019 is hereby affirmed and adopted.

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

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

The 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.

December 27, 2021
o: 121721
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
NOTICE OF ARBITRATOR DECISION

21IWCC0613

FLIS, JAN
Employee/Petitioner

Case# **13WC040251**

BELMONT HEIGHTS HOMEOWNERS ASSOCIATION ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 9/19/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0084 CHRITOPHER BUCHAR LAW OFFICE
6245 W BELMONT AVE
CHICAGO, IL 60634

0664 JOSEPH G HAFFNER LAW OFFICE
800 WAUKEGAN RD
SUITE 200
GLENVIEW, IL 60025

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

Jan Fils
Employee/Petitioner

v.

Belmont Heights Homeowners Association; Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **13** WC **40251**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **05-23-19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **10-30-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **6,732.00**; the average weekly wage was $**129.50**.

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

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

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

Respondent shall be given a credit of $**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

Denial of benefits

All benefits are denied because an employee-employer relationship did not exist. Further, Petitioner's injuries did not "arise out of" his employment.

Injured Workers' Benefit Fund

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

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

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

Signature of Arbitrator

09-18-19
Date

SEP 19 2019

STATEMENT OF FACTS

Petitioner was a sixty-one year old mechanic at the time of the accident. He testified that he worked for Belmont Heights Homeowner's Association from March 11, 2011 through October 30, 2013. Prior to that, he was employed by a cabinet factory. He was asked how he obtained the job at Belmont Heights and he responded that he met the President of the Homeowner's Association in the parking lot after one of the meetings and that he understood that the Association did not have a janitor. Petitioner indicated that he was available. According to him, the meeting lasted 25 minutes and a salary of $525.00 a month was discussed with the job duties to include cleaning the hallway, as well as attending to plumbing and electrical issues. He stated that he was also responsible for mowing the lawn and for snow removal. He explained that he would clean the hall twice a week and mow the grass every other week. Obviously, snow removal was done as needed.

Petitioner testified that he was paid by check and that payment was based on the invoices he would prepare monthly indicating what work he had performed. Those invoices were turned in to the Homeowner's Association, signed off by the Petitioner and then reviewed and signed off by the Association. According to Petitioner, the Association would reimburse him for any supplies he purchased but that he needed approval from the Association prior to making any purchases. He noted that the same was true of any machinery he bought.

He stated that he was advised by the Board that he needed to purchase General Liability insurance and that the Association would increase his salary in order to cover the cost of the insurance premiums. He later discovered that the insurance policy did not cover his injuries. A review of the insurance policy refers to him as a "contractor" providing janitorial services and

the policy is entitled a Commercial Liability policy. Petitioner was given 1099's for the time he worked as a janitor.

On October 30, 2013 he was raking leaves when his foot slipped and he fell. He attempted to walk but could not place any pressure on his foot. He called his son-in-law and asked him to send an ambulance. The ambulance took him to Gottlieb Hospital where he was given a shot of morphine. He was then transferred to Loyola Hospital where he was diagnosed with a displaced left bimalleolar ankle fracture.

On October 31, 2013 Petitioner underwent surgery which included the insertion of hardware which had not been removed as of the date of trial. He testified that he treated until the middle of 2015. After the surgery he utilized a walker. He was asked whether he ever returned to work to which he responded that he "tried to at the end of 2014" but he continued to experience pain and swelling after four hours. He is presently receiving retirement benefits.

Iwona Malachawiejew testified for the Homeowner's Association and indicated that she was previously Vice President of the Association and then President. She stated that after one of the monthly meetings, Petitioner, who was her neighbor, came up to her and said that he learned that the Board did not have a janitor and he advised her that he could do the job. On direct examination, she testified that she never had to request him to do work since he was already doing it. When questioned as to who formulated the Proposal enumerating the tasks to be performed, she explained that Petitioner's daughter gave it to her. She added that although she was checking his invoices, she never physically went out to check Petitioner's work. She did concede that the Board hired Petitioner. She testified that Petitioner did not contact her about his fall.

With respect to whether Respondent falls under the automatic coverage provisions of § 3 of the Act, the Arbitrator finds as follows:

The only provision of §3 of the Act which might be applicable would be Paragraph 15 which states *"any business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof."*

There was never any dispute about whether Petitioner performed the enumerated duties listed in Petitioner's Exhibit #3. Petitioner cut the grass once a week. (PX #3) The Arbitrator takes judicial notice that power mowers are commonly used to cut grass, which brings it within the parameters of the Act. Belmont Heights Homeowner's Association falls within the automatic coverage of the Act.

With respect to earnings, the Arbitrator finds as follows:

Petitioner offered into evidence a 1099 from 2013 which reflects total earnings of $6,859.94 for 44 weeks. (Petitioner did not work the full 52 weeks.) He also submitted a 1099 from 2012 totaling $7,221.21, which represents 52 weeks. Adding 8 weeks from the end of 2012 reflecting a total of $8,172.89 for the 52 weeks preceding the accident. This total divided by 52 indicates an AWW of $157.17. Under the statute, Petitioner's AWW would be the minimum of $220.00. Therefore, Petitioner's earnings should reflect an AWW of $220 with an annual salary of $8,172.89.

With respect to whether or not an employer/employee relationship existed, the Arbitrator finds as follows:

The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test for determining whether an employer/employee exists. A case by case analysis is required. There are multiple factors to consider when assessing the nature of the relationship between the parties. *Ware v. Industrial Commission* 318 Ill. App. 3d 1117, 1122, (1st Dist. 2000). Among these are: 1) whether the employer may control the manner in which the person performs the work; 2) whether the employer dictates the person's schedule; 3) whether the employer pays the person hourly; 4) whether the employer withholds income and social security taxes from the person's compensation; 5) whether the employer may discharge the person at will; 6) whether the employer supplies the person with materials and equipment; and 7) whether the employer's general business encompasses the person's work. *Roberson v. Industrial Commission* 866 N.E. 2d 191, 200 (Ill. 2007). Other relevant factors include the label the parties place on their relationship and whether the parties' relationship was "long, continuous and exclusive." *Ware at. pg. 1126.* No single factor is determinative and such determination of the employee-employer relationship rests on the totality of the circumstances. *Roberson at p. 200.*

In the instant case, as to the issue of control, there was no testimony that anyone from the Homeowner's Association reviewed Petitioner's work. In fact, the President of the HOA testified that while she did review invoices, she never physically inspected his work. (T. 103-4) Secondly, as to whether the employer directed the person's schedule, there was no testimony from any witness that Petitioner was to adhere to any set schedule. It appears that the Petitioner could work his own hours to perform the routine task required by the condominium association.

Third, as to how Petitioner was paid, he testified that he was paid monthly. The evidence submitted by Petitioner demonstrates the fact that the employer did not withhold income and social security taxes and instead, provided Petitioner with 1099's during the time Petitioner performed janitorial tasks.

Turning to the issue of whether the employer supplies the person with materials and equipment, the Petitioner testified that he purchased any materials needed and was reimbursed. Except for the vacuum cleaner, Petitioner appeared to obtain the supplies needed to complete his tasks, but the Homeowner's Association would reimburse him.

In looking at the entire picture of employment, it appears to the Arbitrator as though the Petitioner volunteered to be a part-time janitor/handyman for the condominium association in which he lived in order to earn some extra money and save the condominium association from having to pay a higher price to a less responsive third-party vendor. The fact that Petitioner was paid by 1099, had limited duties and was required to obtain his own insurance is proof of this understanding.

Nevertheless, considering the totality of the evidence, the Arbitrator finds that no employer/employee relationship existed and that instead, Petitioner was an independent contractor.

Assuming arguendo, that the Petitioner is deemed an employee by a reviewing court, the Arbitrator specifically finds that his injuries were caused by falling off a ladder as stated to his treating physicians and first responders. To wit, the River Grove Fire Department records state that Petitioner was "working on an air conditioner unit when he slipped off and landed on his left foot. (RX #1 p.6) The Gottlieb records state that Petitioner was repairing an air conditioner unit and fell five feet from a ladder. (PX #5 p.16) The Loyola records state a history of falling 3-4

feet from a windowsill (PX #6 p.22) Petitioner's injuries seem more consistent with a ladder fall. In light of the above, the Arbitrator does not find that Petitioner's accident history to be credible. Under oath, Petitioner stated that "he got his foot stuck between a wall a parking stop." There is no version of that story in any of the medical records to corroborate the Petitioner.

Likewise, there is nothing in Petitioner's employment agreement that includes servicing air conditioner units. (PX #3) Petitioner testified that any repairs to air conditioning units were the condo owners' responsibility and not the Home Owners' Association. (T. p.66) Each homeowner had two air conditioners for their condo (T. p.67) and their maintenance was the responsibility of the condo owner. (T. p.68) As a result of the above, the Petitioner's injury did not arise out of his employment with Respondent. To be compensable, the employee must be performing some task in furtherance of his employer's business or that his activity is reasonably related to such a task. The mere fact that he is at the place of injury because of employment will not suffice. The Act was not intended to ensure employees against all injuries Quarant v. Industrial Commission, 38 Ill.2d 490, 3231 NE2d 397 (1967). In the present case, Petitioner's injuries did not "arise out" of his employment. The Petitioner did not have a history of repairing air conditioner units, nor was he ever paid for such work. (PX #1) In this case, he might as well have injured himself repairing another homeowners' automobile in the parking lot.

All remaining issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC011303
Case Name	SLAGLEY, LEONARD ALAN v. BENIACH CONSTRUCTION
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0614
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Neil Giffhorn

DATE FILED: 12/27/2021

/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

LEONARD ALAN SLAGLEY,

Petitioner,

vs. NO: 20 WC 011303

BENIACH CONSTRUCTION,

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 temporary total disability, causal connection, permanent partial disability, medical expenses, prospective medical, and subrogation interest, 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 July 12, 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 $34,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

December 27, 2021
o: 121721
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	20WC011303
Case Name	SLAGLEY, LEONARD ALAN v. BENIACH CONSTRUCTION COMPANY INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	James Ruppert
Respondent Attorney	Neil Giffhorn

DATE FILED: 7/12/2021

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2021 0.05%

/s/ Linda Cantrell, Arbitrator

Signature

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
PETITIONER'S PROPOSED 19(b)
ARBITRATION DECISION

Leonard Alan Slagley
Employee/Petitioner

v.

Beniach Construction Company, Inc.,
Employer/Respondent

Case No.: **20-WC-011303**

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, Illinois**, on **April 12, 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 **Subrogation Interest**

FINDINGS

On the date of accident, **October 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 $**26,179.46**; the average weekly wage was $**1,339.10**.

On the date of accident, Petitioner was **49** years of age, ***single,*** with ***no*** dependent children.

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

Respondent shall be given a credit of $**0.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as itemized in Petitioner's group exhibit 9, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any amount previously paid under Section 8(a) of the Act for medical benefits.

Respondent shall further pay directly to the Petitioner **$678.21** for satisfaction of the subrogation interest held by Petitioner's group health plan out of the union hall, Cigna Health Insurance, as set forth in Petitioner's Exhibit 9, as Respondent disputed liability for said medical bills prior to and at the time of arbitration.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Matthew Gornet, including, but not limited to, diagnostic testing, until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of **$892.73**/week for **10-4/7ths** weeks, commencing **June 4, 2020 through August 16, 2020**, as provided in Section 8(b) of the Act.

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

JULY 12, 2021

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LEONARD ALAN SLAGLEY,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case. No. 20-WC-011303
	)	
BENIACH CONSTRUCTION COMPANY, INC.,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACTS

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on April 12, 2021 pursuant to Section 19(b) of the Act. The parties stipulate that on October 22, 2019, Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, subrogation interest, and prospective medical care or the nature and extent of Petitioner's injuries if the Arbitrator finds Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner was 49 years old, single, with no dependent children at the time of accident. Petitioner was employed by Respondent as a Foreman Cement Finisher and his job duties included overseeing the work performed at the job site, setting forms, and pouring and finishing concrete. Petitioner testified he has been a member of the Local 143, Cement & Plasters, Cement Masons union for 12 years. He stated his position is seasonal and he was generally laid off between mid-November through April and received unemployment benefits.

Petitioner testified that on 10/22/19 he and a co-worker lifted a plate tamper that weighed approximately 200 pounds into the back of a pickup truck. Petitioner stated he felt immediate low back pain that went down his right leg. He reported his injury and completed his shift. He testified that by the end of his work shift he was bent over and unable to stand up straight. Petitioner explained he had to finish his shift that day because they were short staffed. Petitioner testified he called Respondent the morning of 10/23/19 and advised he was in pain and not able to work. He was instructed to take a few hours and see how he felt, but Petitioner called Respondent and advised he was going to the emergency room.

Petitioner testified he followed up with a chiropractor in late October 2019 and did not receive treatment again until 4/14/20 when he went to his primary care physician, Dr. Brummer. He testified he tried to get an appointment with Dr. Brummer in February or early March 2019 but was not able to be seen due to COVID. Petitioner testified he did not seek treatment during that period because he was hoping the pain would go away and his body would heal itself. He purchased an inversion table to alleviate his symptoms. Petitioner testified that although Dr. Brummer's office note stated his pain went away after the 10/22/19 incident, his pain never fully resolved. He testified his pain would wax and wane between October 2019 and April 2020 and he would have good and bad days. Some days his pain woke him at night and prevented him from getting out of bed in the morning. Dr. Brummer ordered an MRI and referred him to Dr. Gornet.

Petitioner testified that from the date of his accident until he was seen by Dr. Brummer he was laid off by Respondent and worked a total of four weeks for other contractors. Petitioner's wage records support he worked for short spans of time for other contractors between October 22, 2019 and April 14, 2020, including work for Howell Paving, Inc., Kinney Contractors, Inc. and Shore Builders, Inc., for a total of 141.5 hours.

Petitioner testified he underwent physical therapy and injections as ordered by Dr. Gornet that did not resolve his symptoms. It is his understanding that Dr. Gornet wants to perform additional testing to determine if surgery is necessary. Petitioner testified he currently has low back and right leg pain with tingling/numbness/burning down his leg into his big toe. He is able to work full duty but if he stops working for more than ten minutes his back tightens up and he has difficulty moving. He has difficulty doing "curb work" which requires him to bend over and shape curbs. Petitioner testified he has used his position as a foreman to avoid the more "grunt labor". He stated that when he gets home from work he is in a lot of discomfort, that he is unable to act as he had in the past, and he rests with heat on his back to loosen it up. He is taking medications prescribed by Dr. Gornet.

Petitioner testified he wants to undergo the testing recommended by Dr. Gornet because he wants to feel better and get back to living life without pain. He testified one month before October 22, 2019 he stepped backwards while working and fell onto his butt which caused him back and buttock pain. He testified that his symptoms lasted one day, he did not seek medical treatment, and he did not have any symptoms in his legs from the fall. Petitioner testified he did not have any back or leg symptoms prior to 10/22/19 and had not sought treatment for his back in the past.

On cross examination, Petitioner confirmed that he worked for other contractors following his work injury and that such work included overtime hours. Petitioner agreed that Dr. Gornet's records were not accurate as to the amount of time he worked after working for Respondent. Petitioner testified he declined an MRI before seeing Dr. Brummer because he was hoping to heal and before he saw Dr. Brummer he "felt better to a point". Petitioner testified he could not work as hard as he did prior to 10/22/19 and that any work made his back hurt. He testified he worked out of his union hall for another contractor, Kieffer Brothers, from 8/24/20 through November, 2020 after being released to full duty work without restrictions by Dr. Gornet.

Petitioner testified he is a Lieutenant Fireman and did not stop performing his duties following the 10/22/19 incident. He testified that as a Lieutenant he does have to do "anything".

Respondent called Jerry Schmidt as a witness. Mr. Schmidt is the Vice President of Operations. His job duties included visiting job sites once a week and he is familiar with the work performed at each site. Mr. Schmidt testified that all union hall employees work full duty and are laid off during the winter. Mr. Schmidt testified that all of their employees worked regardless of their title. Mr. Schmidt testified that the job Petitioner was working when he was allegedly injured was substantially completed in October or November 2019. On cross-examination, Mr. Schmidt was asked what Respondent does all winter and he responded that other than four office workers their employees draw unemployment.

MEDICAL HISTORY

On 10/23/19, Petitioner presented to the emergency department at St. Anthony's Memorial Hospital. There are three histories of present illness in Petitioner's emergent care records. It was noted Petitioner complained of lower back pain that had been constant since yesterday morning. He reported his pain became so severe that it woke him at 3:30 a.m. on 10/23/19. It was noted that Petitioner's job required frequent heavy lifting and he strained his back at work roughly one month prior, but that severe pain did not begin until yesterday. It was recorded that Petitioner was concerned he "may have exacerbated the strain two days ago while lifting a heavy machine". It was lastly noted that Petitioner's pain shot down the back of his right leg, wrapped around the knee and into his right great toe.

The second history of present illness was charted by RN Leoneil B. Tajores. RN Tajores noted Petitioner's pain started yesterday, got worse today, that he was working when "this happe[ed]" and that they were carrying a "plate compact?" RN Tajores noted Petitioner fell a month ago at work on his back and had back pain. His pain was a 10/10 and work-related. The third history was noted by RN Claire M. Mayfield. RN Mayfield charted Petitioner's pain started yesterday with his back pain radiating to his legs. RN Mayfield recorded that his pain was worse when moving and only dull when resting. Physical examination was remarkable for tenderness to palpation in the bilateral lumbar paraspinals and a positive straight-leg raise on the right. X-rays showed degenerative changes in the lumbar spine. Ms. Miller provided Toradol, Dilaudid, and Decadron injections and prescribed Zofran. He was diagnosed with lumbar disc disease with radiculopathy and prescribed Cyclobenzaprine, Hydrocodone, and Prednisone upon discharge. He was ordered to follow-up with his primary medical doctor, avoid heavy lifting until his symptoms improved, and remain off work through 10/27/19.

On 10/25/19, Petitioner presented to Mr. Joseph Kirk, DC who recorded Petitioner injured himself in a workplace incident on 10/22/19 while lifting a plate compactor. Mr. Kirk noted a sudden onset of symptoms in the lumbar region and right leg. Physical examination revealed pain in the right sacroiliac and sciatic notch with a straight leg raise test, dermatomal hypo-esthesia at right L4 and L5, and muscle spasms and tenderness to palpation in the lumbar spine. Mr. Kirk diagnosed segemental and somatic dysfunction of the lumbar region, intervertebral disc disorders with radiculopathy in the lumbar region, lumbago with sciatica on the right, spinal stenosis in the lumbar region, and sprain of ligaments of lumbar spine. He recommended chiropractic care.

On 4/14/20, Petitioner was examined by Dr. Jeffrey Brummer where he complained of back pain radiating into his right leg behind his knee and his left leg to his foot after "lifting something heavy in October". Dr. Brummer documented Petitioner has some relief in symptoms after using an inversion table but it was no longer helping. Physical exam revealed a positive straight leg raise on the left, diminished knee jerk and limp on the left, and sitting with a straight left leg. Dr. Brummer diagnosed radiculopathy due to lumbar intervertebral disc disorder and acute left-sided low back pain with left-sided sciatica. He prescribed a Medrol Dosepak and ordered a lumbar spine MRI. Dr. Brummer opined Petitioner's symptoms were consistent with a L5 dermatome issue.

Petitioner underwent the lumbar MRI on 4/20/20 that revealed a broad-based disc protrusion in the center and right side with narrowing of the lateral recesses and central canal, more pronounced compromise of the right lateral recess and bilateral moderate stenosis of the neural foramen at that level; degenerative changes and facet disease at L4-5 with a mild bulge and mild narrowing of the central canal; and degenerative changes in the lower lumbar spine including at the facets of L4-5 and L5-S1. Dr. Brummer referred Petitioner to Dr. Matthew Gornet.

Petitioner presented to Dr. Gornet on 6/4/20 and complained of low back pain into both buttocks, hips, and down both legs to his anterolateral calves. Dr. Gornet recorded Petitioner hurt his back at work on 10/22/19 while lifting a plate tamper with a co-worker into the back of a vehicle. Dr. Gornet noted Petitioner's symptoms were immediate and he obtained emergent care the following day due to the severity of his symptoms. Dr. Gornet noted Petitioner took about a week off before working approximately three weeks before being laid off during the winter. Dr. Gornet documented Petitioner tried to get into Dr. Brummer in March but COVID delayed his appointment. Dr. Gornet noted Petitioner's pain was initially limited to his right leg, but progress to his left leg, with the right leg pain being worse. Dr. Gornet noted Petitioner did not recall any prior problems of significance concerning his low back and had no intervening trauma.

Dr. Gornet's physical exam showed evidence of decreased sensation with paresthesia in the L5 distribution bilaterally. Lumbar x-rays showed mild disc loss height at L5-S1. Dr. Gornet reviewed the MRI of 4/20/20 and opined it showed an "obvious disc lesion with a smaller protrusion at L4-5 and larger at L5-S1 with associated annular tear". Dr. Gornet opined Petitioner injured his disc at L5-S1 and probably at L4-5 that was consistent with his symptoms. Dr. Gornet opined Petitioner's current symptoms and requirement for treatment were causally related to his work injury of 10/22/19. Dr. Gornet imposed light duty work restrictions and prescribed Meloxicam, Cyclobenzaprine, Calcium citrate, Vitamin D3, and physical therapy. He recommended steroid injections at L4-5 and L5-S1 and additional diagnostics if Petitioner's symptoms did not improve.

Dr. Helen Blake performed an interlaminar ESI on the left at L4-L5 on 6/16/20 and an interlaminar ESI on the right at L5-S1 on 6/30/20. Petitioner completed twelve sessions of physical therapy from 6/10/20 through 7/17/20. Petitioner returned to Dr. Gornet on 8/17/20 and reported the ESIs provided relief. Dr. Gornet recorded Petitioner's symptoms were still affecting his quality of life but released Petitioner to full duty work to see if his symptoms continued to be problematic. He recommended a new MRI if his symptoms persisted. Dr. Gornet's working diagnosis was disc

injury at L4-5 and L5-S1 that was predominantly at L5-S1. He considered discography and MRI spectroscopy depending on the results of the repeat MRI.

On 10/26/20, Dr. Gornet reexamined Petitioner with essentially unchanged symptoms despite having returned to work. Examination showed decreased EHL and ankle dorsiflexion on the right side only. Dr. Gornet recorded that Petitioner's job caused him to stiffen up if he took more than a 10-minute break and he had significant pain after work. Dr. Gornet recommended a new MRI and continued Petitioner on full duty work. He prescribed Meloxicam, Cyclobenzaprine, Calcium citrate, and Vitamin D3.

Petitioner was last examined by Dr. Gornet on 1/28/21 at which time Petitioner's back and legs symptoms persisted. Physical examination revealed decreased sensation and paresthesias at L5 bilaterally. Petitioner underwent an MRI that day that revealed a herniation on the right at L5-S1, a "fairly large central herniation" at L5-S1, and an annular and central disc protrusion at L4-5. Dr. Gornet wanted to see how Petitioner reacted to full duty work when the construction season picked up to determine if he required further care or could be placed at MMI. Dr. Gornet continued to prescribe Meloxicam and Cyclobenzaprine.

Dr. Matthew Gornet testified by way of evidence deposition on 11/19/20. Dr. Gornet is a board-certified orthopedic surgeon devoted solely to spine surgery for 30 years and performs five to ten surgeries per week. Dr. Gornet testified he reviewed all of Petitioner's medical records from 10/23/19 to present, as well as the Section 12 report of Dr. R. Peter Mirkin. He testified that his initial exam showed decreased sensation in the L5 distribution bilaterally indicative of a problem at L4-5 or L5-S1. Dr. Gornet testified that the MRI of 4/20/20 showed an obvious lesion with a smaller protrusion at L4-5 and larger at L5-S1 with associated tear. He identified the disc lesion at L5-S1 where the dark disc protruded outward evidencing structural loss of integrity.

Dr. Gornet opined that the findings at L4-5 and L5-S1 as shown on the April 2020 MRI were causally related to the 10/22/19 work accident. His opinion is based on Petitioner's pain diagram showing pain his low back and both buttocks, hips, and legs which support obvious central disc pathology at L5-S1 and a strong suggestion of pathology at L4-5 consistent with a disc injury. He opined Petitioner's history of illness was consistent with a disc injury at those levels. Lastly, Dr. Gornet opined the MRI findings were consistent with avulsions of his endplate which become persistently painful. Dr. Gornet further testified that the herniation at L5-S1 was central and lateralized to the right which was consistent and correlated well with Petitioner's initial complaints in the emergency room of right lower extremity symptomatology.

Dr. Gornet testified he did not believe the disc injuries at L4-5 and L5-S1 were causing nerve root compression but were causing nerve irritation which produced decreased sensation/paresthesias. He explained the symptoms in Petitioner's leg were an inflammatory process because when the disc tears it releases disc proteins and acid that cause inflammation and these proteins and acid are close to the nerves. Dr. Gornet stated this inflammation process was analogous to the situation where if something is very hot, one does not need to actually touch it to be burned. Dr. Gornet testified a MRI spectroscopy is used to detect acidic changes in the disc. He explained that a disc tear is made up of two components, an annular tear and disruption of the disc material itself. An annular tear is anything that exceeds what the disc can handle and Petitioner's

mechanism of injury was consistent with one that would cause an annular tear. Concerning the mechanism of injury, Dr. Gornet testified his initial note should have said Petitioner was lifting several hundred pounds instead of "several pounds" based on review of his handwritten office notes.

Dr. Gornet testified that when he saw Petitioner on 8/17/20 Petitioner had some improvement in his symptoms from the injections and his examination returned to normal, and at that point, the question was whether this was short-term relief. Dr. Gornet opined he wanted to see if Petitioner could return to normal and therefore released him to full duty work. Dr. Gornet testified that when Petitioner returned on 10/26/20 he had significant impairment in his quality of life due to his return to work. He also noted a difference in Petitioner's physical examination since the last visit in that his exam was non-focal but had progressed to causing strength issues with EHL and ankle dorsiflexion.

Dr. Gornet recommends additional diagnostic testing consisting of a new MRI, CT discography, and MRI spectroscopy. Dr. Gornet testified a new MRI was necessary because the prior MRI was of moderate quality. The CT discogram evaluates structural back pain and identifies tears/concordant pain. Dr. Gornet testified that a CT discogram is often a requirement in any FDA clinical trial for patients involving structural back pain treatment. Dr. Gornet testified that the MRI spectroscopy is an FDA approved evaluation of chemicals and acids in the disc that helps determine which discs are healthy enough to hold up with the treatment plan. Dr. Gornet testified that if there is good correlation between MRI spectroscopy and CT discogram then an operative patient's success rate rises to 90-97%. Dr. Gornet testified the CT discogram would only test the L4-5 disc because the L5-S1 disc is pretty objectively injured. Dr. Gornet testified that the MRI, discography, and MRI spectroscopy are reasonable and necessary to treat Petitioner for his injuries. He testified he would not make a surgical recommendation until Petitioner underwent these diagnostics.

Dr. Gornet opined that Petitioner's ongoing low back and lower extremity symptoms related to the disc injuries at L4-5 and L5-S and were caused by the 10/22/19 incident. Dr. Gornet opined that all of Petitioner's care to date and the MRI, MRI spectroscopy, and discography was reasonable, necessary, and casually related to the 10/22/19 lifting accident. He found Petitioner to be credible and did not see any sign of malingering or symptom magnification.

On cross-examination, Dr. Gornet testified that just because he suspects a disc lesion is symptomatic does not mean it is confirmed on further workup. He admitted that people can have herniations, annular tears, and other disc pathology and be asymptomatic. Dr. Gornet testified he was aware Petitioner had worked following his 10/22/19 injury and did not believe his spine condition was being changed by his performance of full duty cement finisher work. Dr. Gornet did not believe that Dr. Brummer's records indicated Petitioner's symptoms completely resolved in the period of time between 10/23/19 and 4/14/20. Dr. Gornet did not believe that the normal activities of a cement finisher would cause Petitioner's current symptoms and felt that the mechanism of injury on 10/22/19 was more consistent with the disc injuries at L4-5 and L5-S1.

Dr. R. Peter Mirkin testified by way of evidence deposition on 12/18/20. Dr. Mirkin is a board-certified orthopedic spine surgeon that performs two to six spine surgeries per week. Dr.

Mirkin performed a Section 12 examination of Petitioner on 8/5/20 and Petitioner reported to him he had worked for several other employers after 10/22/19, one of which was for a three-week period where Petitioner did relatively heavy work. Dr. Mirkin testified that a doctor is not able to make a diagnosis simply by looking at MRI findings but compares the results with the patient's symptoms and physical examination findings to form an anatomical opinion. Dr. Mirkin opined the 4/20/20 MRI showed mild degenerative disease, the lowest two lumbar levels were dark, and a slight bulge was shown at L5-S1 on the right. Dr. Mirkin testified that his examination of Petitioner was essentially normal and the MRI possibly supported a backache because some people have backaches when they have degenerative disease. He opined Petitioner may have sustained a lumbar strain on 10/22/19 and that Petitioner quickly recovered and returned to heavy work for a period of time. Dr. Mirkin testified that Petitioner's degenerative disease pre-existed the work incident and the only way to determine if the disc bulge at L5-S1 was caused by the work injury is if Petitioner had a prior MRI. Dr. Mirkin opined it did not matter if the disc bulge was caused by the work accident because Petitioner did not require any further care.

Dr. Mirkin opined that the only care Petitioner should have received following the 10/22/19 incident was an evaluation, a short course of therapy, and anti-inflammatory medication. He opined surgery was not reasonable or necessary because Petitioner had reflexes with a straight leg raise and a fusion or disc replacement was only appropriate for a massive rupture or advanced degenerative disease. Dr. Mirkin did not believe Petitioner required any work restrictions as a result of the 10/22/19 work injury. He testified that Petitioner's return to full duty work after 10/22/19 proved he could work in a heavy capacity. Dr. Mirkin testified that since Petitioner was first placed on a 10-pound restriction the catalyst for the symptoms he sought treatment for in April 2020 was the work he performed after he worked for Respondent. Dr. Mirkin opined the temporal gap in care between October 2019 and April 2020 was very significant to his causation opinion because Petitioner worked for a long period of time following 10/22/19 and only then sought care. Dr. Mirkin opined Petitioner reached MMI when he returned to work.

On cross-examination, Dr. Mirkin testified that Petitioner's complaints have been consistent throughout his medical care. He believed Petitioner was lifting a plate tamper by himself at the time of the injury that weighed several pounds. Dr. Mirkin testified he did not know what Petitioner was doing at work or how many hours he worked following the 10/22/19 incident. He testified he did not know if reviewed Dr. Brummer's records. Dr. Mirkin testified that the L5 dermatome goes to the anterior part of the leg and part of the great toe and fourth toe and that Petitioner complained of great toe symptoms in the emergency room on 10/23/19. He testified that the bulging disc at L5-S1 could be old or acute and was primarily on the right. He agreed Petitioner consistently reported his history of present illness to his treating doctors. He did not see an annular tear on Petitioner's MRI. Dr. Mirkin stated it is possible to suffer an annular tear by overloading, with twisting or repetition. He testified that the only history of prior back pain with respect to Petitioner was a car wreck in 2003. He was not aware of Petitioner having symptoms as a result of a lumbar spine condition or that Petitioner was getting care for a lumbar spine condition prior to 10/22/19. Dr. Mirkin stated Petitioner did not exhibit malingering, symptom magnification, or exaggeration of symptoms.

CONCLUSIONS OF LAW

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident and decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill.2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96-97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 666 Ill.Dec.347, 442 N.E.2d 908 (1982).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of normal degenerative process of the preexisting condition." *Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill.App.3d 882, 864 N.E.2d 266, 272-273 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 672 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill.App.3d 582, 834 N.E.2d 583 (2005).

Employers are to take their employees as they find them *A.C. & S. v. Indus. Comm'n*, 304 Ill.App.3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill.2d 432, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Const. v. Indus. Comm'n*, 37 Ill.2d 123, 227 N.E.2d 65, 67-68 (1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill.2d 234, 362 N.E.2d 339 (1977). A compensable aggravation occurs when a claimant's need for surgery is accelerated. *Judith Wheaton v. State of Illinois/Choate Mental Health Center*, 13 I.W.C.C. 0467; *Bowman v. Gateway Reg'l Med. Ctr.*, 14 I.W.C.C. 1022; *Clutterbuck v. UPS*, 15 I.W.C.C. 0046; *Howard v. St. Clair Hwy. Dept.*, 16 I.W.C.C. 0187, modified 16 MR 106.

The Arbitrator finds Petitioner's current condition of ill being is causally related to the accident that occurred on October 22, 2019. The medical evidence supports Petitioner's back and lower extremity were asymptomatic prior to 10/22/19 but for the fall incident approximately one month prior that resolved within one day without care. There is no evidence to suggest Petitioner was actively treating a back or lower extremity issue leading up to his work injury. Immediately after his injury, Petitioner began to complain of back and right lower extremity pain and sought treatment for same. The Arbitrator recognizes Petitioner did not obtain medical care for his back injury from late October 2019 through 4/14/19, but the Arbitrator finds it reasonable Petitioner was hoping that his symptoms would resolve during the winter months when he was laid off work. The testimony and records support Petitioner was using an inversion table during this time to

combat his symptoms, and his care was delayed in part due to COVID. Further, the medical records and Petitioner's testimony support his back and extremity symptoms never subsided during this five (5) month window when he did not obtain formal care.

Dr. Gornet and Dr. Mirkin agreed Petitioner sustained an injury at work on 10/22/19 but disagree as to the extent of his injuries. The Arbitrator finds Dr. Gornet's testimony to be more credible than the testimony of Dr. Mirkin. Dr. Mirkin diagnosed a lumbar strain that resolved shortly after the injury based on Petitioner's return to work for other contractors. Since Petitioner's symptoms have lasted approximately eighteen months since the date of injury, it makes the diagnosis of strain less credible. Petitioner's medical records from the emergency room to present support Petitioner has consistently had back and predominantly right lower extremity symptoms that correlate with a disc injury causing some radiating symptoms in the L5 dermatome. The MRI shows a disc injury at L5-S1 that is lateralized to the right and Dr. Gornet's opinions correlating the disc injury to Petitioner's symptoms is compelling. Dr. Mirkin opined the L5-S1 pathology shown on MRI could be caused by an acute incident. The Arbitrator also concludes that the Petitioner's mechanism of injury of lifting an approximately 200-pound piece of equipment would be significant enough to cause a disc injury as opined by Dr. Gornet. While Dr. Mirkin did not appreciate disc injuries on the 4/20/20 MRI, Dr. Gornet identified the specific injury at L5-S1 by reference number. The Arbitrator does not find Dr. Mirkin's suggestion of an intervening cause because he continued to work as a concrete finisher to be compelling as no intervening accident was identified. Consistent with Dr. Gornet's testimony, the only reasonable explanation is that Petitioner's lumbar spine pathology as shown on both MRIs is the etiology of Petitioner's ongoing lumbar and lower extremity symptoms. There is no evidence to suggest the annular tears or disc injuries were symptomatic or present prior to 10/22/19.

Petitioner's wage records with Respondent leading up to 10/22/19 further support Petitioner was working full duty without issue. There is no evidence to suggest that any care for Petitioner's lumbar spine was recommended prior to 10/22/19. The Arbitrator finds Petitioner has met his burden of proof and finds Petitioner's current condition of ill-being in his lumbar spine is causally related to the work accident of October 22, 2019.

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

ISSUE (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mrg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co., v. Indus. Comn'n*, 785 N.E.2d 18 (1st Dist. 2001). Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Dye v. Illinois Workers' Comp. Comm'n*, 2021 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193, 1198.

The Arbitrator concludes that Petitioner's medical services to date have been reasonable and necessary. Based on the above findings as to causal connection, the Arbitrator finds the Petitioner is entitled to medical benefits. Respondent shall therefore pay the medical bills contained in Petitioner's group exhibit 9 as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amount previously paid under Section 8(a) of the Act for medical benefits.

The Arbitrator finds Petitioner has not reached maximum medical improvement as conservative treatment has not relieved the effects of Petitioner's work injury. Respondent shall authorize and pay for the treatment, including, but not limited to, diagnostic testing, as recommended by Dr. Matthew Gornet until Petitioner reaches maximum medical improvement.

ISSUE (L): What temporary benefits are in dispute.

Dr. Gornet imposed light duty work restrictions on Petitioner from 6/4/20 through 8/16/20 which were not accommodated by Respondent. Further, wage records contained in Petitioner's Exhibit 10 and Respondent's Exhibit 3 do not show Petitioner worked for any other contractor through the union hall during this period of time. Respondent shall pay Petitioner temporary total disability benefits of $892.73/week for 10-4/7th weeks, commencing June 4, 2020 through August 16, 2020, as provided in Section 8(b) of the Act.

ISSUE (O): Subrogation Interest.

Respondent shall further pay directly to the Petitioner $678.21 for satisfaction of the subrogation interest held by Petitioner's group health plan out of the union hall, Cigna Health Insurance, as set forth in Petitioner's Exhibit 9, as Respondent disputed liability for said medical bills prior to and at the time of arbitration.

Linda J. Cantrell, Arbitrator

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC001115
Case Name	KIELY, GARY v. CITY OF ROCKFORD
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0615
Number of Pages of Decision	26
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Brad Reynolds
Respondent Attorney	Kevin Luther

DATE FILED: 12/30/2021

/s/Stephen Mathis, 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

Gary Kiely,

Petitioner,

vs. NO. 19W001115

City of Rockford,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the both parties herein and notice given, the Commission, after considering the issue(s) of medical expenses, causal connection, temporary disability, 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 July 8, 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.

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

December 30, 2021

o- 12/22/21
SJM/sj
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	19WC001115
Case Name	KIELY, GARY v. CITY OF ROCKFORD
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Brad Reynolds
Respondent Attorney	Kevin Luther

DATE FILED: 7/8/2021

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2021 0.05%

/s/ Paul Seal, 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

Gary Kiely
Employee/Petitioner

v.

City of Rockford
Employer/Respondent

Case # **19** WC **001115**

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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **May 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 **9-14-2018**, 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 $**92,664**; the average weekly wage was $**1,782**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

Respondent ***has 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 $**68,482** for other benefits, for a total credit of $**68,482**.

Respondent is entitled to a credit of $**94,366.74** under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY TTD FROM 9-15-2018 THROUGH 2-11-19 AND THEN AGAIN FROM 12-19-19 THROUGH 4-19-20 AT THE WEEKLY TTD RATE OF $1,187.88 WITH A CREDIT FOR ALL PEDA PAY AND/OR SICK PAY RECEIVED PURSUANT TO 8(J).

RESPONDENT SHALL PAY ALL RELATED MEDICAL BILLS CONTAINED IN PX 3 AND PX 6 PER THE ILLINOIS FEE SCHEDULE.

RESPONDENT SHALL REIMBURSE PETITIONER FOR OUT-OF-POCKET EXPENSES IN THE AMOUNT OF $1,902.86.

RESPONDENT SHALL PAY 17.5% LOSS OF USE OF THE RIGHT LEG FOR PERMANENT PARTIAL DISABILITY SUSTAINED UNDER SECTION 8(E) OF THE ACT.

RESPONDENT SHALL PAY 17.5% LOSS OF USE OF THE LEFT LEG FOR PERMANENT PARTIAL DISABILITY SUSTAINED UNDER SECTION 8(E) OF THE ACT.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

JULY 8, 2021

Signature of Arbitrator

STATEMENT OF FACTS

Petitioner Officer Gary Kiely works for Respondent City of Rockford as a dayshift patrol officer since June 16, 2003. On September 14, 2018, Officer Kiely and his partner responded to a welfare check at Auburn Manor. Upon arrival, Officer Kiely discovered a male lying on the ground with drug needles near his feet. The suspect was arrested. The suspect resisted arrest and then fled from the scene on foot outside. Officer Kiely pursued the suspect on foot. During the foot chase, Petitioner testified at the hearing that he jumped over two fences. The first fence was described as a chicken wire fence which was cleared easily. The second fence was a chain link fence 5 feet high. Officer Kiely jumped over the second fence while landing awkwardly. Officer Kiely chased down the suspect who was detained and taken into custody. Officer Kiely experienced pain in his right quad and hamstring area as well as his right hip following the foot chase. A police report was completed. Officer Kiely's injuries were reported to his supervisor. Thereafter, Officer Kiely sought treatment at Ortho Illinois Injury Express on the date of injury.

Respondent does not dispute accident nor timely notice of an injury. See Arb. Ex.1.

DISPUTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Respondent City of Rockford does not dispute causation between the 9/14/18 injury and Petitioner's right hip labral tear and surgery. See Arb. Ex.1. See also RX 1-Dr. Lieber's deposition – attached EX 2 wherein Dr. Lieber noted the 9/14/18 event caused an injury to the Petitioner's right hip with appropriate treatment as indicated per review of the records.

Initially, Petitioner was seen at Injury Express by Dr. Robin Borchardt on 9/14/18 where he reported pain in the right quadriceps and buttock following a foot chance and jumping over a fence to catch a suspect. PX 3. Physical exam revealed that Petitioner walked with an antalgic gait. Right hip exam was positive for tenderness of the proximal hamstring insertion. Diagnosis included injury of right quadriceps muscle and strain of right hamstring. PX 3. MRI of the right femur and right hip were ordered at that time. Dr. Borchardt felt Petitioner's physical exam was consistent with a possible quadriceps tear of the vastus medialis and possible right proximal hamstring tear. PX 3. MRI of the right femur dated 10/3/18 was normal with no quadriceps tendon tear identified. MRI of the right hip dated 10/3/18 showed right acetabular labral tear, small right hip effusion, CAM-type impingement due to subtle femoral head – neck junction bump. PX 3.

When seen in follow-up by Dr. Borchardt on 10/5/18 MRI results were explained and physical therapy was recommended. Petitioner commenced physical therapy on 10/8/18. It was **first** noted by physical therapist Monica Hall on 10/23/18 (5 of 12 therapy sessions) that Petitioner reported that his right hip pain fluctuated daily and the location fluctuates as well, ***groin*** or in the anterior hip. Then on 10/25/18 (6 of 12 therapy sessions) again physical therapist Monica Hall noted that Petitioner was reporting hip pain that fluctuated daily and the location fluctuates as well, groin or in the anterior hip. PX 3.

Petitioner was then re-evaluated by Dr. Borchardt on 10/26/18. At that visit, Dr. Borchardt noted that Petitioner continued to have right-sided buttock pain and pain in the groin and lateral hip. It was further noted that the patient **"reports a new complaint of pain in the groin since his last visit".** Right hip exam on 10/26/18 revealed positive Patrick Faber test. Diagnosis included strain of muscle of the right thigh, injury of right

quadriceps muscle, right hamstring muscle strain, and pain in the right thigh. Dr. Borchardt noted that Petitioner was having pain in his groin at the insertion of the rectus abdominus. Dr. Borchardt was concerned for a sports hernia. PX 3. Dr. Borchardt ordered a pelvic MRI to evaluate for sports hernia. Dr. Borchardt recommended that Petitioner continue physical therapy if the MRI ruled out a sports hernia. PX 3. MRI of the pelvis dated 11/9/18 revealed **bilateral** CAM-type femur acetabular impingement and left and right labral tears without para labral cysts. PX 3.

Physical therapist Monica Hall again noted on 11/1/18 (8 of 12 therapy sessions) that Officer Kiely mostly had soreness in the groin area. When re-evaluated by Dr. Borchardt on 11/14/18 Dr. Borchardt noted that the MRI of the pelvis showed no sports hernia but does show tears to the left and right hip labrums. Dr. Borchardt then referred Officer Kiely to his colleague Dr. Geoffrey Van Thiel for definitive surgical treatment. PX 3. Petitioner was seen by Dr. Van Thiel on 11/26/18 for complaints of right hip pain. Dr. Van Thiel noted at that time that the MRI dated 11/9/18 of the pelvis demonstrated bilateral CAM-type femoral acetabular impingement and bilateral labral tears of the hips. Dr. Van Thiel found that Petitioner failed conservative treatment and recommended right hip surgery. PX 3. Petitioner was then taken to right hip surgery on 1/3/19. PX 3. According to the operative report, the post-operative diagnosis was right hip femur acetabular impingement, right hip labral tear, and right hip capsular laxity. PX 3. Following right hip surgery, physical therapy was re-commenced on 1/8/19. When seen by physical therapist Rachael Viel on 1/8/19 the therapist noted that Officer Kiely reported along with post-operative right hip pain that he was having left hip and groin pain. PX 3.

On 1/22/19 Rachael Viel reported that Officer Kiely had been weaned from crutches. Therapist Viel noted Officer Kiely reported that he continued to experience right hip, left hip, and some low back pain. PX 3. On 2/6/19 physical therapist Matthew Zanzinger noted that the Petitioner reported his right hip was gradually feeling better but the left hip was starting to feel like the right hip did prior to his surgery. PX 3. On 2/25/19 physical therapist Rachael Viel noted that Officer Kiely reported that he has general stiffness in both hips. Again on 3/1/19 physical therapist Rachael Viel noted Officer Kiely was reporting stiffness in both his hips. PX 3. On 3/12/19 physical therapist Rachael Viel noted that Officer Kiely reported he more often has left hip pain versus right hip pain. PX 3. On 3/21/19 Officer Kiely reported left hip pain to physical therapist Rachael Viel and that he felt like pain in his left hip compared to his right hip was equaling out. On 3/26/19 Officer Kiely was transitioned to work conditioning. PX 3.

On 4/16/19 Officer Kiely reported to therapist Rachael Viel that his right hip was feeling good but his left hip has been bothering him a lot. On 4/18/19 (29th visit out of 30 approve visits) Officer Kiely reported to therapist Viel that with recent increases in activity his left hip/groin pain has become very frequent and intense. PX 3. Officer Kiely reported he feels confident about his right hip but was concerned with increasing left-sided symptoms. He reported that his left hip feels a lot like how his right hip felt before surgery. PX 3. It was noted throughout work conditioning sessions that Petitioner's left hip pain was a limiting factor with activities. PX 3. Work conditioning was completed on 6/5/19. At that time, Petitioner reported to his therapist that he planned to follow up with Dr. Van Thiel regarding his left hip. Petitioner was discharged by Dr. Van Thiel concerning his right hip without restrictions on 6/10/19. PX 3.

Petitioner was seen by Dr. Borchardt on 6/11/19 with complaints of left hip pain. Dr. Borchardt noted the September 2018 foot chase involving jumping over some fences. Dr. Borchardt referred Officer Kiely back to Dr. Van Thiel on 6/11/19 for definitive treatment concerning the left hip. PX 3. Officer Kiely then saw Dr. Van Thiel on 7/1/19. An updated left hip MRI taken on 6/27/19 at Summit Radiology was reviewed which demonstrated a small tear of the left hip labrum along with decreased offset at the femoral head neck junctions with small herniation at the femoral head neck junction. Dr. Van Thiel recommended left hip arthroscopy with labral repair and femoroplasty. On physical exam, the Petitioner had a positive impingement sign with radiographic confirmation of a CAM type lesion. PX 3. Dr. Van Thiel noted at that time that there was a high probability that this CAM lesion had caused damage to the acetabular labrum and articular cartilage. PX 3.

Dr. Van Thiel performed left hip surgery on 12/19/19 at the Ortho Illinois Surgery Center. PX 3. Dr. Van Thiel performed left hip arthroscopy with acetabuloplasty, left hip arthroscopic labral repair, left hip arthroscopy with femoroplasty, and left hip arthroscopy with capsular plication. PX 3. See also PX 2 Dep. Tr. p. 17. Following left hip surgery, Officer Kiely participated in acute physical therapy and a work conditioning program. See PX 3. Officer Kiely was released to return to work without restrictions on 4/20/20. PX 3. Officer Kiely was placed at MMI for his left hip and released from care by Dr. Van Thiel on 6/8/20, PX 3.

Early on in his medical treatment at Ortho Illinois Officer Kiely was excused off work and placed on crutches. PX 3. See also PX 7. Officer Kiely was prescribed Tylenol 3 which is an anti-inflammatory. PX 3. Officer Kiely was instructed by Dr. Borchardt not to weight bear prior to commencement of physical therapy and he testified

he followed those instructions, staying off of his legs as much as possible in the initial treatment before commencement of physical therapy.

Officer Kiely testified at the hearing that he did not experience groin pain immediately following the injury on 9/14/18. Officer Kiely testified that groin pain first appeared at the time he reported the symptoms initially to the physical therapist on 10/23/18. Officer Kiely testified at the hearing that the groin pain felt like tightness and burning and that this was experienced ***throughout his whole groin area***. Officer Kiely testified that the groin pain fluctuated and that he reported the groin pain to Dr. Borchardt in addition to the therapist. Officer Kiely testified that Dr. Borchardt ordered the pelvic MRI due to suspicion for a sports hernia on account of his complaints of groin pain.

Following right hip surgery and while he was participating in acute physical therapy followed by work conditioning, Officer Kiely experienced left hip pain with worsening groin pain although his right hip symptoms were much improved. Officer Kiely testified that although Dr. Van Thiel released him to return to work without restrictions on 6/10/19 that his left hip was bothering him so much that he could not perform the full duties of his job as a patrol officer safely. Officer Kiely testified that his department agreed that it was not safe for him to perform his regular job as a patrol officer so he was placed on light duty by his department at that time. Officer Kiely was instructed by his department to return to Ortho Illinois for additional treatment concerning his left hip where he was seen by Dr. Borchardt on 6/11/19 and then by Dr. Van Thiel on 7/1/19. Officer Kiely testified that PMA authorized these 2 initial visits for his left hip. Further left hip treatment was disputed following the records review report authored by Dr. Lieber dated July 23, 2019.

Officer Kiely testified that his groin pain did not fully resolve until after his second surgery (left hip) was performed by Dr. Van Thiel. Officer Kiely testified that he was released to return to work without restrictions as of 4/20/20 by Dr. Van Thiel regarding his left hip. See PX 7. Officer Kiely then returned to his regular job as a patrol officer which he has continued to perform through the date of the parties' hearing.

Concerning past medical history, Officer Kiely testified that prior to 9/14/18 he never had groin pain nor medical treatment by a medical doctor for groin pain. Officer Kiely testified that he had no previous right hip complaints nor right hip treatment prior to 9/14/18. Officer Kiely testified that he had no previous left hip symptoms nor left hip medical treatment of any kind prior to 9/14/18. Officer Kiely testified that he missed no work due to right hip complaints and/or left hip complaints prior to 9/14/18. Officer Kiely testified further that he had no work restrictions caused by right hip or left hip conditions or complaints prior to 9/14/18. Finally, Officer Kiely testified that he had no previous imaging studies of any kind (X-ray, CT scan, MRI) for either hip prior to 9/14/18.

Respondent disputes that Petitioner's left hip labral tear and surgery are causally related to the 9/14/18 injury. In support of their denial, Respondent offers the opinion of Dr. Lawrence Lieber who completed a records review report at the request of the Respondent as well as a deposition. See RX 1, Tr. p. 5. Dr. Lieber is an orthopedic surgeon who treats hip conditions in his regular office practice. Dr. Lieber testified 30% - 40% of his practice is devoted to the treatment of hip conditions. RX 1, Dep. Tr. pp. 7-8. After reviewing medical records from Ortho Illinois, Dr. Lieber opined Petitioner did not suffer any permanent injury to his left hip as the result of the work

accident on 9/14/18. RX 1, Dep. Tr. p. 12. Dr. Lieber further opined that Petitioner's left hip surgery performed on 12/3/19 was not the result of the 9/14/18 work injury.

Dr. Lieber further opined that Petitioner's condition of ill-being related to his left hip was due solely to a pre-existing degenerative condition. RX 1, Dep. Tr. pp. 12-13. Specifically, Dr. Lieber relied on the MRI of the pelvis dated 11/9/18 which he reviewed. According to Dr. Lieber, there was no evidence of any acute injury that could be related to the alleged 9/14/18 event but only evidence of the prior degenerative condition about the joint and associated CAM type lesion with impingement concerning the left hip. RX 1, Dep. Tr. pp. 12-13. Dr. Lieber opined that *all* abnormalities within Petitioner's left hip were degenerative in nature and could not be related to the 9/14/18 injury. In addition to MRI findings, Dr. Lieber testified that he based his opinion on the absence of any complaints of pain to the left hip by the Petitioner for six months following the injury. RX 1, Dep. Tr. p. 15.

In support of medical causation, Petitioner offers the opinion of orthopedic surgeon Dr. Geoffrey Van Thiel. See PX 2. Dr. Van Thiel is an orthopedic surgeon, licensed to practice medicine in the State of Illinois. PX 2. Tr. p. 5. Dr. Van Thiel practices with a subspecialty in sports medicine. Dr. Van Thiel treats knees, hips, and ankles without replacements. PX 2, Tr. p. 5. Dr. Van Thiel testified that 20% of his patient practice was devoted to treatment of the hip. Dr. Van Thiel performs hip surgeries on a regular basis at OrthoIllinois. Hip arthroscopies included repair of the torn labrum in the hip. PX 2, Dep. Tr. p. 7. Dr. Van Thiel testified that he had performed 125 hip surgeries in the year 2020.

Regarding Petitioner's right hip Dr. Van Thiel's preliminary assessment based on physical exam and review of MRI was right hip pain with femoroacetabular

impingement with labral tear. PX 2, Dep. Tr. p. 10. Dr. Van Thiel performed right hip surgery on 1/3/19. The procedures performed included right hip arthroscopy with acetabuloplasty; labral repair; femoroplasty; and capsular plication along with loose body removal. PX 2, Dep. Tr. p. 11.

Regarding Petitioner's left hip Dr. Van Thiel reviewed the updated left hip MRI dated 6/11/19 (ordered by Dr. Borchardt) which demonstrated tear of the anterior superior left hip acetabular labrum. Dr. Van Thiel noted an abnormal physical exam on 7/1/19 which included an antalgic gait. Subjective complaints were consistent with MRI results. PX 2, Dep. Tr. pp. 15-16. Dr. Van Thiel recommended surgery at that time regarding Petitioner's left hip. Surgery was performed on 12/19/19 at the OrthoIllinois surgery center. PX 2, Dep. Tr. pp. 16-17. Dr. Van Thiel performed an acetabuloplasty which is removing bone on the cup side of the hip joint. This procedure helps decrease impingement and helps healing of the labral repair. PX 2. Tr. p. 17. Dr. Van Thiel performed a femoroplasty which is removing bone on the femur or the leg bone side of the hip joint and this also reduces impingement to help protect the labral repair and prevent future labral tearing. PX 2, Tr. p. 17.

Dr. Van Thiel performed the **same** exact surgical procedures to both of Petitioner's hips with the exception of removal of a lose body (right hip only). PX 2, Dep. Tr. pp. 17-18. When seen on 6/8/20 it was noted by Dr. Van Thiel that Petitioner had some aching pain in his left hip with pain rated at 3 out of 10 with activity and that the patient was placed at MMI at that time.

Dr. Van Thiel authored a narrative report marked as Van Thiel Dep. Ex. No. 2 in addition to providing his deposition. First, Dr. Van Thiel opined that there was a causal relationship between the right hip surgery and Petitioner's injury on 9/14/18. This

opinion was supported by the mechanism of injury (jumping over a fence) followed by initial presentation on the date of injury to their occupational clinic with right hip pain. The opinion was further supported by the MRI in September 2018 showing right hip labral tear. Given the temporal onset of symptoms as well as the MRI confirming the tear of the labrum, Dr. Van Thiel held an opinion to a reasonable degree of medical and surgical certainty that there was a causal relationship between the right hip labral tear, surgery and the work accident on 9/14/18. Tr. pp. 22-23.

Dr. Van Thiel diagnosed left hip labral tear as the final diagnosis concerning Petitioner's left hip. Dr. Van Thiel noted because his initial pelvic MRI from 2018 showed a left hip labral tear as well as a right hip labral tear that considering that the MRI was less than 2 months after the injury and further considering that Officer Kiely began complaining of left hip pain during his recovery from right hip surgery that it was his opinion that the left hip labral tear was most likely directly related to the injury sustained on 9/14/18 to a reasonable degree of medical and surgical certainty. PX 2, Dep. Tr. p. 23. According to Dr. Van Thiel, it was reasonable to assume the right hip labral tear was a worse injury that was causing significantly more pain. Therefore, the focus of treatment was placed on the right hip. As the right hip began to feel better after the injury the left hip became more evident. Dr. Van Thiel stressed that the left hip labrum tear was objectively demonstrated within a short period of time following the September 2018 injury. PX 2, Dep. Tr. pp. 23-24.

Dr. Van Thiel testified that jumping over a fence would be a consistent mechanism of injury to cause a labral tear in the hip. PX 2, Tr. p. 24. When specifically asked whether physical therapy and/or work conditioning caused the labral tear in the left

hip or aggravate/accelerate the left hip pre-existing condition Dr. Van Thiel opined that he did not hold such an opinion. Dr. Van Thiel testified as follows:

> I do believe that the left hip labral tear was present at the time of the injury. However, this was a *less symptomatic condition* than the right hip labral tear. With effective treatment, including surgery as well as physical therapy of the right hip and the right hip pain improving, this then revealed the left hip pain and the symptomatic left hip labral tear. His activities were increasing and the return to work was the goal. Therefore, the increase in activity did not cause the left hip labral tear, but rather made this more evident given the improvement in his right hip. PX 2, Dep. Tr. pp. 24-25.

On cross examination, Dr. Lieber testified that **he did not note any past medical history for either of Petitioner's hips prior to 9/14/18.** RX 1. Dep. Tr. p. 17. On cross examination, *Dr. Lieber testified that jumping over a fence and landing awkwardly is a competent cause of a labral tear*. RX 1, Dep. Tr. p. 18. Dr. Lieber further testified on cross examination that the pelvic MRI obtained on 11/9/18 revealed a left hip labral tear on imaging **as of that date**. RX 1, Dep. Tr. p. 18. Dr. Lieber agreed that patients who have labral tears in their hips *can have symptoms that include groin pain and that groin pain is a common symptom from a labral tear.* RX 1, Dep. Tr. p. 19. On cross examination *Dr. Lieber admitted that he did not review the operative report from the left hip prior to completing his records review because it was not available at that time*. Dr. Lieber denied that Officer Kiely made complaints of left sided groin pain prior to the pelvic MRI dated 11/9/18. RX 1, Dep. Tr. p. 19. On cross examination, Dr. Lieber testified his causation opinion would be different if Officer Kiely had left hip pain on or near the date of injury. RX 1, Dep. Tr. p. 22. Dr. Lieber testified that not all labral tears are degenerative. Dr. Lieber agreed that labral tears can be traumatic. RX 1, Dep. Tr. p. 26. Dr. Lieber testified that 99.9% of his medical legal work was done at the request of an insurance company. Tr. p. 24.

There is no dispute by the parties that Petitioner's right hip condition and right hip surgery are causally related to the 9/14/18 injury. This medical opinion was held by both Dr. Lieber and Dr. Van Thiel.

Concerning Petitioner's left hip, the Arbitrator finds that Petitioner sustained his burden of proving that his left hip and left hip surgery are causally related to the 9/14/18 work injury. There are several reasons to be identified in support of the Arbitrator's finding concerning medical causation to Petitioner's left hip. First, both orthopedic surgeons opined that the mechanism of injury (jumping over a fence and landing awkwardly) is the type of mechanism that could cause a labral tear in the hip. Petitioner's objective imaging revealed bilateral labral tears of his hips. The operative reports of Petitioner's bilateral hips both document labral tears and surgical repair. Second, the Arbitrator places a great deal of emphasis on Petitioner's complete lack of any type of past medical history concerning the left hip before the date of injury. The Arbitrator finds that considering the physical nature of the job as a patrol officer that it is not plausible nor likely that Petitioner worked full duty as a patrol officer prior to the date of injury with an asymptomatic left hip labral tear.

Third, both orthopedic surgeons opined that groin pain is a common symptom in the setting of a labral tear of the hip. Petitioner's medical records demonstrate that although he did not experience groin pain immediately after the accident, it was reported for the first time in his medical records on 10/23/18 which was just slightly more than 5 weeks following the traumatic event. Various treating records describe groin pain which was noted by Dr. Borchardt to be a new symptom when seen on 10/26/18. Significantly, Officer Kiely testified at the hearing that the groin pain that he experienced was **throughout his entire groin (not limited to the right side of his groin only)**. The fact

that groin pain was not confined only to the right side leads the Arbitrator to find that this early on groin pain was a manifestation of bilateral labral hip tears. The pelvic MRI ordered by Dr. Borchardt on 10/26/18 was due to Petitioner's complaints of groin pain. The pelvic MRI dated 11/9/18 objectively confirmed bilateral labral hip tears and was obtained less than 2 months after the original injury.

Fourth, the Arbitrator finds Dr. Van Thiel's opinion regarding Petitioner's left hip more credible than that of Dr. Lieber. Not only did Dr. Van Thiel perform the same surgical procedures for both hips (same mechanism of injury), but Dr. Van Thiel explained why the lack of left leg/hip complaints at the outset of the injury was not definitive proof that Petitioner's left hip was not causally related to the 9/14/18 injury. In review of treating records, it is clear that Petitioner's right hip was more symptomatic immediately following the 9/14/18 injury. However, Petitioner's groin complaints in October of 2018 as well as his early on pelvic MRI, demonstrate the presence of a left hip labral tear not long after the traumatic event. While treating records make clear that left leg and hip symptoms did not fully manifest themselves until after right hip surgery (whereinafter Petitioner's right hip symptoms were improved) this simply leaves the Arbitrator finding that the right hip labral tear was more symptomatic than the left and that full manifestation of left hip labral tear came only after right hip surgery and while Officer Kiely was working hard to return to full duty work as a patrol officer. As Dr. Van Thiel explained, even if there were early on bilateral hip complaints, the focus of treatment would have been placed on the hip that was worse (here Petitioner's right hip). Dr. Van Thiel could not have surgically operated on both hips simultaneously or one surgery in close proximity in time to the other. Petitioner needed the worst hip addressed first. Only then, following full recovery from the right hip surgery and after completion

of rehabilitation would the focus of care shift to the least bad hip. This is exactly what happened here.

Respondent emphasizes that Petitioner made no right hip complaints at his visit with Dr. Borchardt on 10/5/18. In light of the lack of right hip complaints, Respondent insists that if Petitioner had left hip symptoms on account of the 9/14/18 injury that those symptoms could not have been masked by right hip pain which was not reported on 10/5/18. The Arbitrator is not persuaded by this argument. First, Officer Kiely testified that for the first 3 weeks following the injury he was excused off work and placed on crutches with instructions not to weight bear at all. Medical records confirm he was excused off initially and that he was prescribed an anti-inflammatory. See PX 7. Officer Kiely testified at the hearing that he followed Dr. Borchardt's initial instructions and remained non weight bearing. It is not surprising that if there was no weight bearing in the initial 3 week period (and off work completely) that Officer Kiely might have an early doctor visit with no right hip pain when he was non-weight bearing and taking an anti-inflammatory. The groin complaints were not made until 10/23/18 some 18 days *after* the noted 10/5/18 visit. These groin complaints combined with the pelvic MRI findings on 11/9/18 showed Petitioner's left hip labral tear did not become symptomatic until after the 10/5/18 visit. Considering the complete absence of any past medical history or treatment concerning the left hip, the Arbitrator is more persuaded that Petitioner tore his left hip labrum on 9/14/18 but did not become partially symptomatic until groin complaints were first identified on 10/23/18 in the medical records and not fully symptomatic in his left hip until after completion of right hip surgery.

Fifth, Dr. Lieber testified that all of Petitioner's left hip surgical findings were solely degenerative. This testimony was offered despite the fact Dr. Lieber did not

review the actual operative report for Petitioner's left hip which documented an actual tear of the left labrum. This testimony was also inconsistent with Dr. Lieber's testimony on cross examination that not all labral tears are degenerative (some could be traumatic).

Last, Dr. Lieber agreed that if the Petitioner had left-sided complaints near the time of the incident that his medical causation opinion would be different. Petitioner testified that his groin pain was not limited to right-sided groin pain only in October of 2018. Instead following the 9/14/18 incident Petitioner experienced groin pain on both sides/throughout his groin in October of 2018 which he described as a sharp, burning pain. Both Doctors agreed groin pain could be a manifestation of a labral tear.

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?

Respondent paid all causally related medical services concerning Petitioner's right hip with the exception of the Game Ready Device contained at PX 6. Concerning the left hip, Respondent disputed and denied left hip treatment following the records review report of Dr. Lieber dated 7/23/19. After 7/23/19, Petitioner's medical treatment for his left hip was processed and paid by Petitioner's group health plan through the Respondent – BlueCross/BlueShield of Illinois. See RX 2 and PX 4-5.

The Arbitrator finds that Petitioner's left hip and left hip surgery are causally related to the 9/14/18 injury for the reasons stated above. Respondent is entitled to an 8(j) credit for all medical bills paid through their group health plan. Respondent's 8(j) credit is supported by PX 4-5 and RX 2. By operation of the Act, Respondent is to hold Petitioner harmless from a claim for reimbursement of the lien asserted by BlueCross/BlueShield of Illinois contained within PX 5. Petitioner paid out of pocket

medical expenses regarding his left hip in the total amount of $1,902.86 as demonstrated in PX 1. This was a combination of prescriptions, Game Ready Device (ice machine) and co-pays as well as bill balances following application of group health plan benefits. Respondent is ordered to reimburse Petitioner in the amount of $1,902.86. Respondent is further ordered to pay the medical bills contained within PX 3 and PX 6 per the Illinois Fee Schedule.

K. What temporary benefits are in dispute? – TTD.

Regarding Petitioner's right hip he is entitled to an award of TTD from 9-15-18 through 2-11-19 at the agreed upon weekly TTD rate of $1,187.88 less a credit for any PEDA pay received pursuant to 8(j). See PX 7 and Arb. Ex 1. Petitioner testified that he received PEDA pay for all time off work concerning the right hip injury.

Regarding the left hip, Petitioner did not receive PEDA pay. Instead, Petitioner received sick pay through his employer. Petitioner's off work notes concerning his left hip while under the care of Dr. Van Thiel are contained within PX 7. The Arbitrator awards Petitioner TTD benefits regarding the left hip for the period of 12/19/19 through 4/19/20 at the agreed upon weekly TTD rate of $1,187.88. The Arbitrator finds Respondent is entitled to an 8(j) credit for all sick pay paid by Respondent concerning the left hip. The parties' stipulate that the total amount of the 8(j) credit for lost time (PEDA pay sick pay) is $68,482.

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

On 6/8/20 Officer Kiely was seen post-operatively for the left hip by Dr. Van Thiel. At that time, he was some 25 weeks post-surgery. Pain level at rest was 0 out of 10. Pain level with activity was 3 out of 10. At that time Petitioner was performing his regular job and was full weight bearing. Physical examination was

normal. Dr. Van Thiel instructed Petitioner to continue his home exercise program and come back PRN. See PX 3. Concerning residuals regarding his hips following the 9/14/18 injury Officer Kiely testified that his right hip experiences some stiffness occasionally at the time of the hearing. He testified that his right hip was stronger than his left hip. Concerning his left hip Officer Kiely testified that from time to time he experiences left hip stiffness as well. Officer Kiely describes some weather sensitivity especially in cold weather. Stiffness in either hip was mostly noticeable if he sits too long or stands too long. Officer Kiely does frequent stretching as part of a home exercise program.

With regard to Subsections (i) of Section (8.1 (b)). The Arbitrator notes that Respondent offered no impairment rating regarding either Petitioner's right or left hips. The Arbitrator therefore gives no weight to this factor.

With regards to Subsection (ii) of Section 8.1 (b), the occupation of the employee the Arbitrator notes that the record reveals Petitioner was employed as a patrol officer for Respondent and was able to return to work in this capacity following his bilateral hip surgeries. At the time of the hearing Petitioner remained an employee of the Respondent as a patrol officer and was performing his duties without limitations. The Arbitrator gives some weight to this factor.

With regard to Subsection (iii) of Section 8.1(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Although the Petitioner was able to return to work, treating medical records and Petitioner's testimony at the time of the hearing confirm permanent lingering effects to his bilateral hips. Medical records confirm complaints of stiffness in both hips post-surgery. Petitioner testified his right hip is stronger than his left hip following surgery. As a younger employee, Petitioner will

continue to experience the lingering effects of the bilateral hip injuries and Petitioner has a significant work history remaining prior to ordinary retirement age at 65 to 67. The Arbitrator gives some weight to this factor considering Petitioner's youthful age at the time of the injury.

With regard to Subsection (iv) of Section 8.1(b), Petitioner's future earning capacity, the Arbitrator notes Petitioner was able to return to work in his prior capacity. The Arbitrator therefore gives no additional weight to this factor.

With regards to Subsection (v) of Section 8.1(b) evidence of disability cooperated by treating medical records the Arbitrator notes that Dr. Van Thiel performed bilateral hip arthroscopy with acetabuloplasty; hip arthroscopy with labral repair; hip arthroscopy with femoroplasty; hip arthroscopy with capsular plication and hip arthroscopy with loose body removal (only on the right hip). Petitioner testified that following these bilateral surgeries he continues to experience some stiffness in his bilateral hips. Petitioner further testified that prolonged sitting or prolonged standing provokes symptoms. Petitioner testified regarding some weather sensitivity – especially to cold weather. Petitioner testified his right hip feels stronger than his left hip following surgery. Because of the cooperating evidence of disability stemming from the conditions found causally related, 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 17.5% loss of use of the right leg and 17.5% loss of use of the left leg pursuant to Section 8(e) of the Act.

N. Is Respondent due any credit?

The parties stipulate to an 8(j) credit for lost time in the total amount of $68,482 for all PEDA pay and/or sick pay received by Petitioner from Respondent.

Respondent is also entitled to an 8(j) credit for medical bills in the additional amount of $25,884.74 for all medical bills paid by Respondent's group health plan through Illinois BCBS for Petitioner's left hip. See PX 4-5 and RX 2.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC031437
Case Name	NORRIS, KEVIN v. ALLIANCE COAL - HAMILTON COUNTY MINE
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0616
Number of Pages of Decision	22
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	D. Brian Smith, Kevin L. Mechler

DATE FILED: 12/29/2021

/s/Kathryn Doerries, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
X Modify sentence, Issue F, par 8 Change word Issue F, par 8, line 6 Correct accident date Issue F, par 12	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN NORRIS,

Petitioner,

vs. NO: 17 WC 31437

ALLIANCE COAL,

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

The Commission, herein, affirms the decision as to causal connection regarding Petitioner's right shoulder.

The Commission, herein, regarding Petitioner's left shoulder, modifies the Arbitrator's decision under Issue F, paragraph 8 to read: "Consequently, the Arbitrator finds that Petitioner's condition of ill-being in his left shoulder is causally related to the work accident of September 12, 2017 through June 5, 2020. The Arbitrator further finds that Petitioner suffered a subsequent

intervening accident on June 6, 2020 severing the causal connection between Petitioner's current condition of ill-being and the accident of September 12, 2017."

The Commission, herein, in the Arbitrator's decision under Issue F, paragraph 8, line 6 modifies the decision to change "surgical" to "surgery".

The Commission, herein, affirms the award of temporary total disability benefits, medical expenses and prospective medical care.

The Commission, herein, in the Arbitrator's decision under Issue F, paragraph 12, to correct the accident date to September 2017 (not June 2017). The sentence should read as follows: "Dr. Bradley testified that the need for the EMG/NCV was related to Petitioner's first work accident of September 2017 because that is when his symptoms started."

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $915.20 per week for a period of 7-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibits 1 and 3, as provided in §8(a) and §8.2 of the Act, as they relate to Petitioner's left shoulder and pay the reasonable and necessary medical services as they relate to Petitioner's left shoulder for the period September 12, 2017 through June 5, 2020, as well as payment for the EMG/NCV ordered prior to Petitioner's right shoulder surgery ultimately performed on November 23, 2020, as Dr. Bradley recommended this test to diagnostically rule out any lingering cervical spine issues.
Respondent shall be given credit for any amounts previously paid under §8(j) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers for the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.
Respondent is responsible for the reasonable and necessary prospective medical care to Petitioner's right shoulder until Petitioner reaches maximum medical improvement.

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.

December 29, 2021

o- 12/7/21
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0616

NORRIS, KEVIN
Employee/Petitioner

Case# **17WC031437**

20WC017780

ALLIANCE COAL-HAMILTON COUNTY MINE
Employer/Respondent

On 5/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0693 FEIRICH MAGER GREEN RYAN
D BRIAN SMITH
2001 W MAIN ST
CARBONDALE, IL 62903

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)

KEVIN NORRIS
Employee/Petitioner

v.

ALLIANCE COAL-HAMILTON COUNTY MINE
Employer/Respondent

Case # 17 WC 31437

Consolidated cases: **20-WC-17780**

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 **January 11, 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 12, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$68,785.81**; the average weekly wage was **$1,372.80**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$9,487.68 (PPD advance)** for other benefits, for a total credit of **$9,487.68**.

Respondent is entitled to a credit of any medical bills paid through his group health carrier with Respondent Alliance Coal-Hamilton County Mine under Section 8(j) of the Act, if any.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibits 1 and 3, as provided in §8(a) and §8.2 of the Act, as they relate to Petitioner's right shoulder and pay the reasonable and necessary medical services as they relate to Petitioner's left shoulder for the period 9/12/17 through 6/5/20, as well as payment for the EMG/NCS ordered prior to Petitioner's right shoulder surgery ultimately performed on 11/23/20, as Dr. Bradley recommended this test to diagnostically rule out any lingering cervical spine issues.
Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's right shoulder until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of **$915.20** from **October 1, 2020, the date of Petitioner's right shoulder surgery, through November 23, 2020**, a period of **7-5/7** weeks, as provided in Section 8(b) of the Act.

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

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

Signature of Arbitrator

3/29/21
Date

ICArbDec19(b)

APR 5 - 2021

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KEVIN NORRIS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 17-WC-31437
	)	
ALLIANCE COAL-HAMILTON COUNTY MINE,	)	Consolidated Case No. 20-WC-17780
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 11, 2021 pursuant to Section 19(b) of the Act. On December 21, 2018, Petitioner filed an Amended Application for Adjustment of Claim against Respondent Alliance Coal-Hamilton County Mine alleging injuries to his neck, back, bilateral shoulders, and body as a whole as a result of a boulder falling from the roof of a mine on September 12, 2017. (Case No. 17-WC-31437). On July 28, 2020, Petitioner filed an Application for Adjustment of Claim against Respondent Continental Tire North America alleging injuries to his left shoulder, elbow, arm, and body as a whole as a result of tightening a clamp on June 6, 2020. (Case No. 20-WC-17780). The cases were consolidated for the purpose of trial due to an overlapping injury to Petitioner's left shoulder.

On May 7, 2019, Arbitrator William R. Gallagher entered a Decision in Case No. 17-WC-31437 pursuant to Section 19(b) of the Act with regard to temporary total disability benefits, medical expenses, and prospective medical care. On January 23, 2020, the Commission affirmed and adopted the Arbitrator's Decision awarding TTD benefits, medical expenses, and prospective medical treatment, specifically bilateral shoulder surgeries recommended by Dr. Paletta, as well as payment of medical expenses for a cervical disc replacement surgery performed by Dr. Gornet. The Arbitrator takes judicial notice of the Commission's Decision. (Petitioner's Ex. 5).

The parties stipulate that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on September 12, 2017 when a rock fell from the mine ceiling and struck Petitioner in the back of the head. The issues in dispute in Case No. 17-WC-31437 are causal connection with regard to Petitioner's left and right shoulder conditions and his alleged left elbow condition, medical bills, temporary total disability benefits, and

prospective medical treatment. The parties further stipulate that Petitioner is not seeking any benefits at this time related to any other body part, including but not limited to, a cervical condition, and Petitioner is in no way precluded by the stipulation from seeking benefits in the future for said conditions at a future date pursuant to Section 19(b) of the Act. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act in Case No. 20-WC-17780.

TESTIMONY

Petitioner was 29 years old, single, with two dependent children at the time of accident. Petitioner testified he began his employment at Hamilton County Coal in 2013 and worked there until he was discharged in 2018 due to his inability to return to work following his work-related injuries. Petitioner thereafter obtained full duty employment with Continental Tire North America in January 2020.

On 9/12/17, Petitioner sustained injuries when a boulder fell from the ceiling of the mine and struck him while he was down on his hands and knees. Petitioner reported injuries to his head, neck, and upper back with radiation into both shoulders and hands, as well as numbness/tingling in both hands, stiffness, weakness, popping/catching, and limited range of motion.

Petitioner testified that the cervical disc replacement performed by Dr. Gornet improved his symptoms, but he continued to have discoloration/redness in his left arm and advised Dr. Gornet of same. Petitioner was recommended for bilateral shoulder surgery with Dr. Paletta. His shoulder treatment, however, was put on hold pending an appeal of Arbitrator Gallagher's 19(b) Decision. Petitioner testified that following the favorable Commission Decision he contacted Dr. Paletta's staff and attempted to move forward with treatment, but expressed concern over a severe rash he was experiencing on his left arm. He inquired if he needed to have the rash addressed before proceeding with surgery. Petitioner testified that at that time he was having pain in both shoulders and wanted to move forward with treatment. He expressly denied refusing further care. Petitioner testified he always returned phone calls from Dr. Paletta's office and was not allowed to speak to the doctor. After learning that Dr. Paletta would no longer treat him he began looking for another provider. Petitioner came under the care of Dr. Matthew Bradley on 7/1/20 for persistent pain in both shoulders.

Petitioner sustained injuries to his left shoulder and elbow on June 6, 2020 while working for Continental Tire North America. Petitioner testified he was tightening bolts overhead with a four-way lever wrench and felt a pop in his left shoulder and elbow. He testified he had no prior injuries to his left elbow before 6/6/20. Petitioner stated he did not sustain any new injuries to his right shoulder since his injury on 9/12/17 while working for Alliance Coal. He testified that the incident on 6/6/20 worsened his left shoulder symptoms as the pain was sharper, more severe, and in a different location. Petitioner testified that he was primarily focused on treating his left shoulder following the June 2020 accident, but he continued to have right shoulder pain. He agreed that his right shoulder was not mentioned in his initial visit with Dr. Bradley.

Petitioner testified that Dr. Bradley took him off work, ordered a new MRI, and ultimately performed a left and right shoulder surgery that improved his symptoms. Petitioner is currently treating with Dr. Bradley for left elbow pain.

Petitioner testified he reviewed a surveillance video dated 7/7/20 depicting him lifting a bag of ice into the bed of his truck using his left arm. He stated the bag of ice was the smallest bag sold in stores. The video also depicted Petitioner resting his left arm on his truck while pumping gas. He testified he did not injure his shoulders or elbow performing either of these activities and they were not beyond his physical restrictions ordered by Dr. Bradley. He agreed he told Dr. Bradley he could not raise his left arm.

Petitioner testified he is satisfied with the results of his shoulder surgeries. He is currently on light duty restrictions of no pushing greater than 10 pounds and no lifting greater than 5 pounds with his left arm, which is not accommodated by his employer Continental Tire North America.

Petitioner testified he experienced numbness/tingling in his left hand prior to becoming employed by Continental Tire. He agreed that Dr. Bradley did not examine or recommend any testing or treatment for his left elbow at his first two visits on 7/1/20 and 7/14/20. He stated that Dr. Bradley did not address his left elbow symptoms until 9/10/20. He underwent a nerve conduction study in November 2020 that revealed no abnormalities. He underwent an MRI of the left elbow and two injections which did not provide relief. Petitioner testified that his current symptoms are most significant in his left elbow and he has more pain in his right shoulder than the left. He feels he could return to work with his left shoulder condition.

Petitioner agreed that on 7/14/20 Dr. Bradley recommended left shoulder surgery which was performed on 8/7/20, despite Continental Tire scheduling a Section 12 examination with Dr. Gross on 8/13/20. Petitioner admitted he had symptoms in his left elbow prior to the 6/6/20 accident, but they were limited to numbness and discoloration. His left elbow symptoms became much worse. Petitioner testified he intended to undergo shoulder surgery after he qualified for FMLA with his employer Continental Tire. However, following his 6/6/20 accident he could no longer postpone his care and treatment because his symptoms became such that he required surgery on both of his shoulders.

MEDICAL HISTORY

Following the Section 19(b) hearing on March 7, 2019, Petitioner returned to Dr. Matthew Gornet on 3/9/19, at which time Dr. Gornet noted Petitioner was waiting on potential shoulder surgery and carpal tunnel surgery with Dr. Paletta. Dr. Gornet noted Petitioner had a little more redness or discoloration of his left arm compared to his right, possibly caused by increased sympathetics and blood flow. Dr. Gornet placed Petitioner at maximum medical improvement with respect to his neck on 7/29/19. Dr. Gornet noted at that time Petitioner still had discoloration of the left arm. A venous Dopplers ordered by Dr. Paletta showed no evidence of DVT in Petitioner's upper extremities. Dr. Gornet also noted a rash on Petitioner's chest for which he suggested management tips.

Following the January 23, 2020 Commission Decision, Petitioner spoke with the office of Dr. Paletta on 2/6/20. Dr. Paletta indicated Petitioner had no intent of coming in and discharged Petitioner from his care at maximum medical improvement without restrictions.

Petitioner presented to the emergency room at Good Samaritan Hospital on 6/14/20 reporting an injury to his left arm on 6/6/20 while he was putting a press together at work and felt a "pop" in his left shoulder and elbow. Pain and numbness from his shoulder to his left hand was documented, specifically numbness to the little and ring fingers. His pain was noted to be 6 or 7 out of 10 and he had no improvement in symptoms since the injury occurred. Physical examination revealed tenderness to palpation at the ulnar groove on the left upper extremity, as well as a positive Tinels and elbow flex test. Decreased sensation in the fourth and fifth digits was also documented. X-rays of the left shoulder and elbow were taken to rule out fracture. Petitioner was diagnosed with damage to the left ulnar nerve following an injury. He was given Naproxen and advised to follow up with a local orthopedic specialist.

Petitioner thereafter came under the care of Dr. Matthew Bradley on 7/1/20. Petitioner reported his second accident that occurred on 6/6/20 during which he felt a popping sensation with pain in his left shoulder radiating to the anterior aspect of his left elbow. Petitioner reported significant pain in his shoulder since and difficulty lifting objects away from his body, along with significant pain and spasm in his bicep muscle belly. Dr. Bradley noted Petitioner's past bilateral shoulder pain from his prior work injury in the mines for which he received care under Dr. Paletta, who recommended bilateral shoulder surgeries. Petitioner reported that his most recent work injury produced pain in a significantly different location with increased intensity from what it was prior to the June 2020 injury.

Physical examination demonstrated significantly reduced range of motion, positive impingement testing of Neer's and Jobe's, positive bicep exam with provocative maneuvers of Speed's and Yergason's with significant weakness on resisted supination. Dr. Bradley believed Petitioner's exam and mechanism of injury were consistent with a SLAP type injury of the left shoulder and recommended an MRI for comparison. Based on the increased pain and change in character of Petitioner's symptoms, Dr. Bradley believed the injury on 6/6/20 was a causal factor in Petitioner's current condition of ill-being with respect to his left shoulder and elbow. He took Petitioner off work pending the results of the MRI.

Petitioner returned to Dr. Bradley on 7/14/20 and physical examination was mostly unchanged with AC joint pain noted with cross-chest testing. Dr. Bradley reviewed the MRI and noted continued acromioclavicular degenerative disease with undersurface osseous hypertrophy and a subacromial impingement type syndrome, which was not a significant change from Petitioner's previous MRI. However, there was tracking of the contrast into the biceps anchor along with thickening of the bicep tendon near the insertion, which was indicative of tendinopathy vs. a SLAP type tear. Dr. Bradley noted Petitioner was scheduled for bilateral distal clavicle excisions by Dr. George Paletta. Dr. Bradley stated that following Petitioner's second accident his physical examination was consistent with a biceps tendon injury or SLAP type tear. Although the recent MRI was not felt by the radiologist to show a significant labral tear, Dr. Bradley noted extravasation and cleft type formation of the dye into the labrum near the anchor. Dr. Bradley noted Petitioner had significant pain likely related to both acute injury of the

biceps tendon and labrum in combination with subacute/chronic AC joint pain creating some subacromial impingement type syndrome. Dr. Bradley felt Petitioner failed nonoperative treatment with regard to his AC joint under the care and direction of Dr. Paletta and surgery was recommended on both of Petitioner's shoulders prior to his new injury. Dr. Bradley opined continued nonoperative treatment would not be successful and recommended arthroscopic distal clavicle excisions, subacromial decompression and inspection of the labrum for a suspected nondisplaced SLAP type tear. Petitioner was kept off work pending surgery.

Dr. Paletta reviewed the MRI and believed it demonstrated tendinopathy involving the supraspinatus and infraspinatus, but no evidence of a labrum tear. It was his opinion the MRI was unchanged from the previous study he viewed in May 2018.

On 8/7/20, Dr. Bradley performed a left shoulder SLAP repair, subacromial decompression, injection, and manipulation under anesthesia. Intraoperative findings confirmed the presence of a Type II SLAP tear with intraarticular synovitis along with subacromial bursitis. Petitioner was restricted to no use of his left arm following surgery. Petitioner followed up with Dr. Bradley on 9/10/20 and Petitioner had tightness and stiffness to impingement testing of Neer's, Jobe's, and Hawkins, along with some pain. He also noted a positive Tinel's sign at the ulnar nerve of the left elbow. Dr. Bradley also examined Petitioner's right shoulder, noted as "unchanged from previous" examination, which showed reduced range of motion and a significant amount of pain with cross-chest testing directly at the AC joint, which was reproducing Petitioner's chief symptomatology. Dr. Bradley recommended continued restrictions and physical therapy for the left shoulder. With respect to Petitioner's left elbow, Dr. Bradley noted numbness and tingling in the left small and ring fingers which have been present since Petitioner's injury and pop at work. Dr. Bradley noted some radicular symptomatology and cervical etiology in the past. His physical examination was not consistent with that of radicular pain as Petitioner had some numbness in the small and ring fingers and a positive Tinel at the elbow. Dr. Bradley stated it is possible to have a double crush type phenomenon where he does have some cervical and elbow etiology creating an over exacerbation of the symptomatology. Dr. Bradley ordered an EMG nerve conduction study.

With respect to Petitioner's right shoulder, Dr. Bradley agreed with Dr. Paletta's impression of osteolysis of the distal clavicle, which he stated was "not at all typical with the hypertrophic normal degenerative type changes seen with the AC joint." Dr. Bradley noted that Dr. Paletta previously recommended an arthroscopic decompression and distal clavicle excision, and he agreed that said procedure would address Petitioner's complaints and symptomatology. He recommended that the surgery be performed once the diagnostic testing was completed for his left elbow and more recovery time for his left shoulder.

On 10/1/20, Dr. Bradley performed a right arthroscopic subacromial decompression, open distal clavicle excision, labral debridement, and right shoulder injection. Intraoperatively, slight fraying of the anterior labrum was noted without a definitive tear and bursitis with a Type II acromial was appreciated along with undersurface hypertrophy to the distal clavicle. Petitioner was kept on restrictions and referred to physical therapy.

The EMG was performed on 11/23/20 and was negative for cubital tunnel syndrome and cervical radiculopathy, but positive for left carpal tunnel syndrome. On follow up, Dr. Bradley noted complaints of right shoulder catching and clicking with certain movements. Dr. Bradley diagnosed left elbow medial epicondylitis secondary to overuse from the bilateral shoulder surgeries. He recommended home exercises and administered a corticosteroid injection into the left elbow.

Petitioner returned to Dr. Bradley on 12/17/20 with reports of stabbing and burning pain between his shoulder blades near the base of his neck along with continued complaints of medial sided elbow pain and numbness and tingling in his left index and ring fingers. He also reported catching within his neck and pain between his scapulae. He denied any interval trauma or fall. Since Petitioner failed to improve with injection of his elbow, Dr. Bradley recommended a left elbow MRI to evaluate the soft tissues about the medial aspect. Dr. Bradley recommended Petitioner follow up with a spine surgeon to address the stabbing pain between his shoulder blades.

Dr. Bradley last saw Petitioner on 1/6/21 at which time he reviewed the MRI films and identified moderate soft tissue inflammation without obvious tear noted to the medial flexor wad. Dr. Bradley administered another left elbow injection. He referred Petitioner to Dr. Kevin Rutz for continued neck and periscapular pain.

Counsel for Alliance Coal had Petitioner examined by Dr. Richard Lehman, who testified by way of deposition on 11/5/20. Dr. Lehman testified that he reviewed the records provided to him by Respondent subsequent to his last review to determine whether Petitioner's current condition in his bilateral shoulders remains causally connected to his 2017 work injury. He testified that he does not causally relate Petitioner's current left shoulder condition or his current need for treatment to his 2017 work accident. He continued to believe that the mechanism of Petitioner's injury, namely being struck in the head by a rock, was not consistent with his shoulder injuries. He also remained of the opinion that the accident did not aggravate or exacerbate his AC joint hypertrophy. He held the same belief with respect to Petitioner's right shoulder.

Dr. Lehman testified that despite the Commission's findings as to causation and prospective medical care, including bilateral shoulder surgeries recommended by Dr. Paletta, Petitioner's condition was no longer related to the injury given the release by Dr. Paletta, the gap in treatment, and the MRI findings, which he did not believe demonstrated a SLAP tear. Though the operative report of Dr. Bradley identified a SLAP tear, Dr. Lehman neither believed same existed based on the arthrogram study, nor did he believe it related to the 2017 work accident. He testified that Petitioner's left and right shoulder conditions were degenerative in nature which were no longer symptomatic since so much time elapsed until Petitioner had surgery. When asked whether any part of Petitioner's left or right shoulder surgeries were related to the 2017 accident, Dr. Lehman testified that Dr. Bradley did not address Petitioner's left shoulder AC arthritis during his arthroscopy, and that Petitioner's right shoulder surgery addressed longstanding pathology unrelated to his accident.

On cross-examination, Dr. Lehman testified he did not review the Commission's Decision. He testified that the last time he examined Petitioner was in 2018 and he did not examine Petitioner in conjunction with his 2020 report following Petitioner's June 2020 work accident. Dr. Lehman acknowledged that his original opinion with respect to Petitioner's bilateral shoulders following the 2017 accident was based in part on the fact that Petitioner did not see Dr. Paletta until eight months after his injury. He made the same presumption with regard to Petitioner's second accident, stating, "Well, my opinion would be the same, and that is if you go a long period of time and you're not having symptoms, you're not seeking medical care, then your situation has abated. . ." He acknowledged that outside of the subsequent left shoulder injury in June 2020, the records contained no evidence of an intervening accident.

Dr. Lehman acknowledged that various circumstances make it difficult to obtain surgical clearance, such as litigation, and that he lacked any personal information about why Petitioner did not seek treatment until he saw Dr. Bradley. He also acknowledged that AC joint pathology could be asymptomatic. Although he did not appreciate the SLAP tear on the MRI studies, he acknowledged that Dr. Bradley diagnosed and identified same intraoperatively and agreed that such a tear would be related to the June 2020 work accident. He felt that the 2020 accident was a viable mechanism of injury "more in keeping with stressing the shoulder." Dr. Lehman acknowledged that a person can have a SLAP tear that does not show on an MRI. He also acknowledged that preexisting asymptomatic degenerative changes can be made symptomatic by an accident without a concurrent change on imaging studies, though he still believed the condition overall would be the natural history of arthritis. He initially admitted that his opinion that Petitioner got better since there was a gap in treatment was a mere assumption on his part from his records review since he had not seen or spoken to Petitioner since 2018, but later recanted his answer that it was not an assumption since it was based on the medical records. He testified that he was unaware of the events that transpired during Petitioner's treatment gap, such as his termination from Alliance Coal due to prolonged convalescence, his hire date at Continental Tire, and the date of the Commission's Decision.

Dr. Lehman testified he has performed surgery where the operative photos could not be downloaded due to technical issues. Dr. Lehman believed that a SLAP tear could be caused by falling on an outstretched arm or throwing a ball motion. He testified that loosening an object could cause a tear. Dr. Lehman testified that he had no reason to disbelieve Dr. Bradley's operative findings of a SLAP tear of the superior labrum.

Counsel for Continental Tire took the deposition of its retained Section 12 records reviewer, Dr. Lyndon Gross, on 12/10/20. Dr. Gross testified that he completed his report after reviewing records and films on 10/20/20. He testified that his impression of Petitioner's diagnostic films from 7/14/20 was tendinopathy of the rotator cuff without tear, degeneration of the acromioclavicular joint giving rise to impingement of the underlying rotator cuff, a small area of osteolysis of the inferior aspect of the clavicle, and fluid of the AC joint with no discrete labral tear. He appreciated no significant change from Petitioner's 2018 non-arthrogram study.

Dr. Gross reviewed the operative report and photographs from Petitioner's left SLAP repair surgery showing the suture anchor underneath the biceps tendon in the superior labrum. He testified that photos showing the pathology prior to the repair were standard practice. He

acknowledged there were no indications in Dr. Paletta's records that Petitioner had any problem with his labrum prior to 6/6/20. Dr. Gross was also provided with surveillance video clips of Petitioner taken after his 6/6/20 accident but before his surgery with Dr. Bradley.

Dr. Gross testified he did not believe the surgery performed by Dr. Bradley on 8/7/20 was reasonable or necessary or that Petitioner suffered a SLAP tear. Dr. Gross opined that Petitioner's remaining pathologies were preexisting conditions unrelated to his work accident. He did not believe the mechanism of Petitioner's accident was sufficient to cause a superior labral tear. He testified he would not believe Petitioner suffered a labral tear unless there were photographs showing same.

On cross-examination, Dr. Gross admitted he has never met or examined Petitioner. He disagreed with Dr. Bradley's and Dr. Lehman's belief that Petitioner's mechanism of injury in June 2020 was consistent with a superior labrum injury. He acknowledged that his opinion could have been different if he had the opportunity to examine Petitioner and Petitioner had been able to show him something more consistent with a traction type injury. He testified that from his review of Dr. Bradley's examination he believed Petitioner's condition was consistent with adhesive capsulitis.

Dr. Gross admitted that labral tears are not always seen on an MRI scan, though the majority of labral tears would be visible with arthrogram studies. He testified he was not privy to any specific information outside of Dr. Paletta's treatment note as to why Petitioner stopped treating with Dr. Paletta and began treating with Dr. Bradley. He was also unaware of Petitioner's right shoulder surgery and rendered no opinions as to Petitioner's right shoulder.

Dr. Gross did not believe that Dr. Bradley lied about identifying and repairing a SLAP repair, but he hypothesized that perhaps Dr. Bradley mistook a sublabral foramen or a superior labral overhang over the glenoid for a labral tear. He maintained that he did not think there was a labral tear based on the information provided him outside of the operative report. Dr. Gross agreed that the left shoulder arthroscopy and subacromial decompression and distal clavicle resection, which was initially recommended by Dr. Paletta and awarded by the Commission, was a reasonable and necessary procedure based on the objective findings of AC osteoarthritis and impingement. He testified that he also had difficulty in the past retrieving surgical photos but he was able to recover them. Dr. Gross agreed that if a patient refused further treatment, he would place them at maximum medical improvement.

Dr. Bradley testified by way of evidence deposition on 11/4//20. Dr. Bradley testified he is a board-certified orthopedic surgeon with expertise in evaluating and treating both acute and chronic injuries. One-third of his practice is devoted to shoulder injuries. Dr. Bradley testified that Petitioner related the history of his prior shoulder injuries and his continued symptoms therefrom, but noted Petitioner initially presented for treatment on his left shoulder. Dr. Bradley testified that Petitioner described a very different pain in his left shoulder following his 6/6/20 accident and the pain was in a different location that limited his ability to use his shoulder. Dr. Bradley testified that prior to June 2020 Petitioner could move his shoulder around but it was painful.

Dr. Bradley testified that Petitioner never denied treatment for his shoulders and actively pursued surgery. He testified that Petitioner always verbalized he had pain in both shoulders and Petitioner was unable to move the right shoulder around and do activities of daily living. He testified that it was the new injury that debilitated the left shoulder that caused Petitioner concern.

Dr. Bradley stated that his suspicion of a SLAP tear was confirmed by the MR arthrogram that showed a nondisplaced SLAP tear, which was a new finding compared with the MRI performed in May 2018. He testified that SLAP tears, particularly smaller nondisplaced tears, can be very difficult to see on studies given the fact the patient is in the at-rest position when the MRI is performed that does not displace the tear to make it visible. He testified it is not uncommon for a physical examination to suggest a SLAP tear but the MRI is normal. Dr. Bradley opined that the mechanism of Petitioner's June 2020 injury was consistent with the tear visualized on the MRI and the tear was causally connected to Petitioner's accident on 6/6/20.

Dr. Bradley testified he was aware Petitioner was still dealing with symptoms from his previous work injury and they required surgical intervention. He attributed the surgical repair of the SLAP tear to the 2020 injury; the subacromial decompression and manipulation to remedy the loss of range of motion to both injuries, but more so to the older injury; and the subacromial decompression to standard surgical procedure for both injuries. He testified that Petitioner suffered no injuries outside of his work-related accidents in 2017 and 2020, and that he exhibited no signs of exaggerating or malingering. Dr. Bradley testified that as Petitioner's more recent left shoulder injury was treated he was more vocal about his right shoulder injury. He recommended that Petitioner's right shoulder be addressed while he was off work recovering for his left shoulder surgery. He noted that Petitioner's right shoulder symptoms remained unchanged during his course of treatment. Most of Petitioner's restrictions, however, pertained to his SLAP tear in his left shoulder.

With respect to the nerve conduction study, Dr. Bradley testified that he could not opine as to the etiology of the symptoms necessitating same, since he does not treat the spine; but he stated Petitioner reported no such problems prior to his work accident in 2017. Dr. Bradley also attributed Petitioner's need for right shoulder surgery to the first work accident in 2017.

Dr. Bradley disagreed with Dr. Lehman's assessment that Petitioner must have been asymptomatic since he did not return to Dr. Paletta for surgery. He did agree with Dr. Lehman's assessment that the June 2020 accident resulted in Petitioner's SLAP tear. He disagreed with Dr. Gross, who did not believe Petitioner sustained injury to his left shoulder on 6/6/20 because he did not see the tear in intraoperative photos prior to sutures. Dr. Bradley stated that Dr. Gross obviously did not look closely at the picture as a suture is present in the labrum. He stated that Dr. Gross did not discuss that Petitioner's labrum obviously has some tearing that is shown on the photos. He disagreed with Dr. Gross that just because there is no picture that shows a clearly displaced labral tear that that means there was not a labral tear present.

Dr. Bradley testified they were not able to retrieve intraoperative photos due to technical issues. He confirmed that the charges for Petitioner's surgeries were reasonable, necessary, and related to his accidental work injuries.

On cross-examination, Dr. Bradley testified that although he did not begin treating Petitioner's right shoulder immediately on 7/1/20, Petitioner did advise him of his history of bilateral shoulder pain. He was aware of Petitioner's gap in treatment between February 2019 through his current injury in June 2020. When asked whether the fact that Dr. Paletta released Petitioner to work full duty with respect to both shoulders and that Petitioner resumed working full duty until his most recent accident impacted his causation opinion with respect to the 2017 accident, he stated the diagnosis prior to June 2020 was AC joint pain, arthropathy, edema, and inflammation which is typically treated nonoperatively. Dr. Paletta recommended bilateral shoulder surgery. It does not suggest that Petitioner was pain free or that he no longer required surgery when he did not undergo the recommended surgeries.

Dr. Bradley testified he was aware Petitioner was receiving treatment, including injections and surgery with Dr. Gornet, which further compounded his treatment options. He agreed that Petitioner's neck should be fixed before addressing his shoulders which were not as pressing as the AC joint injuries are more of a nuisance and pain than limiting. However, if you tear your rotator cuff or your labrum you are not able to use your shoulder. Dr. Bradley testified that if Petitioner was able to do a full manual labor job it does not change his opinion as to whether he required surgery on his AC joint or his AC joint was symptomatic. He testified that Dr. Paletta related both shoulder injuries to Petitioner's accident and recommended surgery, but now that he performed the surgeries Dr. Paletta has changed his opinion as to causation.

Dr. Bradley opined that the need for the EMG nerve conduction study was related to Petitioner's first work accident because that is when his symptoms started. Petitioner complained of numbness and tingling down his arms following the first accident. Dr. Bradley confirmed that the labral tear in Petitioner's left shoulder was not present on the 2018 MRI taken prior to the 2020 injury. Dr. Bradley testified that the location of Petitioner's tear in the superior labrum lent itself to injury through overhead activities. He stated that if Petitioner had been injured while catching himself with outstretched arms during a fall, he would have anticipated a posterior labral tear rather than tearing of the superior labrum.

CONCLUSIONS OF LAW

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

It is well-settled law that in Workers' Compensation, each §19(b) hearing is a separate proceeding and constitutes a separate and appealable order. *Weyer v. Illinois Workers' Comp. Comm'n*, 900 N.E.2d 360 (1st Dist. 2008) citing *R.D. Masonry, Inc.*, 830 N.E.2d 584 (Ill. 2005); *Elmhurst-Chicago Stone Co. v. Indus. Comm'n*, 646 N.E.2d 961 (2nd Dist. 1995). However, once a specific issue or question of law or fact has been decided in the course of litigation, it cannot be rehashed at a subsequent time. The law-of-the-case doctrine is a fundamental legal principle which provides stability and an equitable means by which parties can proceed through litigation with reasonable expectations as to their burdens of proof. Specifically, the Appellate Court has held that:

> The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation

settles that question for all subsequent stages of the suit. *Irizarry v. Indus. Comm'n*, 786 N.E.2d 218 (2nd Dist. 2003) citing *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 466 N.E.2d 1116 (Ill. 1984).

The Appellate Court has held that the law-of-the-case doctrine applies to the unreversed decision of an Arbitrator or the Commission in Workers' Compensation proceedings. *Weyer* citing *Irizarry v. Indus. Comm'n*, 786 N.E.2d 218 (2d Dist. 2003).

The law also holds that for an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005). "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Id.* 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). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000). Employers are to take their employees as they find them. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

Though the Commission has already determined that Petitioner's condition of ill-being in his bilateral shoulders was causally related to his initial accidental injury on September 12, 2017, Petitioner experienced complications in trying to resume his treatment, including a second work accident resulting in alleged injury to his left shoulder and elbow. Petitioner credibly testified without rebuttal that he did not refuse further treatment. Outside of the role pending litigation played in delaying treatment, Petitioner testified he suffered from a severe rash that had exponentially worsened. The Arbitrator places significant weight on the fact that Petitioner's testimony about his rash was corroborated by the treatment records of Dr. Gornet. Petitioner testified without rebuttal that although he tried to speak to Dr. Paletta about this issue before driving several hours to his office, he was never permitted to do so by staff. The record is clear that Petitioner was not released because his condition had improved or stabilized, but because of a miscommunication between Petitioner and Dr. Paletta. At no point does the record reflect that Petitioner's symptoms had resolved.

"The ultimate issue is not whether there was a gap in treatment but rather, whether the initial accident was a causative factor in the condition of ill-being which was produced." *William Gordon v. State of Illinois DOT Joliet Yard*, 07 I.W.C.C. 1599 (2007). The important issue is whether the symptoms and findings later in the treatment match up to the symptoms immediately following the accident, and whether the gap was logically explained. *Id.* Absent an intervening

accident, whatever miscommunication or loss of confidence occurred between Petitioner and Dr. Paletta has little to no impact on the issue of causal connection. Petitioner testified that although his care and treatment focused on his left shoulder and left elbow following the June 2020 accident, he continued to have right shoulder pain.

The Arbitrator finds it significant that Dr. Paletta causally related Petitioner's condition of ill-being in both of his shoulders to the accident in September 2017 prior to the misunderstanding between him and Petitioner and the subsequent left shoulder injury in June 2020. The Commission found Dr. Paletta's opinion persuasive and concluded that Petitioner's current condition of ill-being in his bilateral shoulders was causally related to his accidental work injury of September 2017; and Petitioner sustained no intervening accidents with respect to his right shoulder. Although surveillance of Petitioner was presented, Petitioner testified without rebuttal that he neither exceed any restrictions placed upon him nor injured himself any further. Additionally, no physician opined that said activity of lifting a bag of ice was a factor in Petitioner's condition of ill-being. The only physician to comment on the surveillance was Dr. Gross who had no opinion whatsoever with regard to Petitioner's right shoulder. Dr. Bradley testified that Petitioner's right shoulder symptoms remained unchanged during his course of treatment. Petitioner sustained no intervening accidents with regard to his right shoulder and the Arbitrator finds that Petitioner's current condition of ill-being in his right shoulder remain causally related to his accidental work injury on September 12, 2017.

With respect to Petitioner's left shoulder, Petitioner did sustain a second accident on 6/6/20 that changed his condition of ill-being. Dr. Bradley credibly testified that the injuries Petitioner sustained to his left shoulder were distinct and severable and apportioned which surgical procedures were attributable to each accident. Dr. Bradley testified he was aware Petitioner suffered symptoms and complaints from his previous work injury that required surgical. Consequently, the Arbitrator finds that Petitioner's condition of ill-being in his left shoulder is in part related to the accidental work injury of 6/6/20.

Regarding Petitioner's left elbow, he reported numbness/tingling in both hands on 9/19/17 when examined by orthopedic surgeon, Dr. James Goris. On 9/26/17, Dr. Goris noted numbness/tingling down Petitioner's arm but did not specify the right or left. An EMG/NCS was performed on Petitioner's left and right upper extremities that revealed bilateral median nerve abnormalities. On 12/11/17, Section 12 examiner, Dr. Russell Cantrell, noted numbness/tingling in Petitioner's bilateral hands. On 1/20/18, Dr. Gornet reported Petitioner suffered pain down both arms to the elbows, forearms, and hands. On 5/7/18, Dr. Paletta noted bilateral pain radiating from Petitioner's shoulders below the elbows as well as numbness in his hands. On 5/29/18, Petitioner underwent cervical disc replacement surgery at C5-6 and C6-7 that improved his radiating pain and numbness/tingling in his hands. On 7/29/19, Dr. Gornet released Petitioner at MMI with regard to his cervical spine with no restrictions. At that time Petitioner had some restricted motion in his neck and a rash on his left arm and chest, with no noted radiating complaints or hand numbness/tingling.

Petitioner did not treat again until after his work-related accident of 6/6/20. Petitioner reported to the emergency room on 6/14/20 and provided a history of a "pop" in his left shoulder and elbow while putting a press together at work on 6/6/20. Pain and numbness from his

shoulder to his left hand was documented, specifically numbness to the little and ring fingers. Physical examination revealed tenderness to palpation at the ulnar groove on the left upper extremity, as well as a positive Tinels and elbow flex test. Decreased sensation in the fourth and fifth digits was also documented. Petitioner was diagnosed with damage to the left ulnar nerve following an injury. On 8/7/20, Dr. Bradley performed a left shoulder SLAP repair, subacromial decompression, injection, and manipulation under anesthesia. On 9/10/20, Dr. Bradley noted a positive Tinel's sign at the ulnar nerve of the left elbow with numbness/tingling in the left small and ring fingers which have been present since Petitioner's injury and pop at work. Dr. Bradley noted some radicular symptomatology and cervical etiology in the past and opined it was possible to have a double crush type phenomenon where he does have some cervical and elbow etiology creating an over exacerbation of the symptomatology. Therefore, Dr. Bradley ordered an EMG nerve conduction study.

The EMG/NCS performed on 11/23/20 was negative for cubital tunnel syndrome and cervical radiculopathy, and incidentally positive for left carpal tunnel syndrome. On 11/23/20, Dr. Bradley placed Petitioner on light duty work of no use of the left upper extremity with a diagnosis of left medial epicondylitis. On 12/17/20, Dr. Bradley ordered a left elbow MRI due to Petitioner's persistent complaints and continued his work restrictions. The left elbow MRI was performed on 1/6/21 that revealed some mild to moderate soft tissue inflammation without obvious tear noted to the medial flexor wad.

Dr. Bradley testified that the need for the EMG/NCS was related to Petitioner's first work accident of June 2017 because that is when his symptoms started. He noted that Petitioner complained of numbness and tingling down his arms following the first accident. Dr. Bradley did not related Petitioner's left elbow inflammation to the 9/12/17 accident.

Therefore, the Arbitrator finds that Petitioner's condition of ill-being in his left elbow is not related to the accidental work injury of 9/12/17.

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

Issue (K): **Is Petitioner entitled to any prospective medical care?**

Based upon the uncontroverted evidence and the prior decision of the Workers' Compensation Commission, the Arbitrator finds Petitioner entitled to recover reasonable and necessary medical expenses for treatment and surgery to his right shoulder, which condition of ill-being is causally connected to Petitioner's work accident of 9/12/17.

With regard to Petitioner's left shoulder, Dr. Bradley made a reasonable attempt to delineate Petitioner's injuries as he attributed the surgical repair of the SLAP tear to the 2020 injury; the subacromial decompression and manipulation to remedy the loss of range of motion to both injuries, more so to the older injury; and the subacromial decompression to standard surgical procedure for both injuries. The Arbitrator sees no equitable way to divide the expenses pertaining to the left shoulder treatment surgery based on the testimony provided. Based on the testimony of Petitioner and Dr. Bradley, Petitioner described a very different pain in his left

shoulder following his 6/6/20 accident and the pain was in a different location that limited his ability to use his shoulder. Dr. Bradley testified that prior to June 2020 Petitioner could move his shoulder around but it was painful. Based further on the fact that the most significant portion of Petitioner's current complaints was related to the repair of the SLAP tear, the Arbitrator relates and awards medical expenses for the care and treatment of Petitioner's left shoulder from 9/12/17 through 6/5/20, the day prior to sustaining a second left shoulder injury.

Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 1 as provided in Section 8(a) and Section 8.2 of the Act as they relate to Petitioner's right shoulder and pay the expenses as they relate to Petitioner's left shoulder for the period 9/12/17 through 6/5/20, as well as payment for the EMG/NCS ordered prior to Petitioner's right shoulder surgery ultimately performed on 11/23/20, as Dr. Bradley recommended this test to diagnostically rule out any lingering cervical spine issues. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's right shoulder until Petitioner reaches maximum medical improvement.

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

Based upon the above findings as to causal connection, the Arbitrator awards and orders Respondent to pay temporary total disability benefits from October 1, 2020, the date of Petitioner's right shoulder surgery, through November 23, 2020, a period of 7-5/7 weeks.

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

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/29/21

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017780
Case Name	NORRIS, KEVIN v. CONTINENTAL TIRE NORTH AMERICA
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0617
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Aaron Chappell
Respondent Attorney	James Keefe, Jr.

DATE FILED: 12/29/2021

/s/Kathryn Doerries, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN NORRIS,

Petitioner,

vs. NO: 20 WC 17780

CONTINENTAL TIRE
NORTH AMERICA,

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, 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 5, 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 $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.

December 29, 2021

o- 12/7/21
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
NOTICE OF 19(b) ARBITRATOR DECISION

21IWCC0617

NORRIS, KEVIN
Employee/Petitioner

Case# **20WC017780**

17WC031437

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 4/5/2021, 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:

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

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KEVIN NORRIS
Employee/Petitioner

v.

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

Case # 20-WC-17780

Consolidated cases: 17-WC-31437

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 **January 11, 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

ICArbDec19(b)

Signature of Arbitrator

3/29/21
Date

APR 5 - 2021

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KEVIN NORRIS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-17780
	)	
CONTINENTAL TIRE NORTH AMERICA,	)	Consolidated Case No. 17-WC-31437
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 11, 2021 pursuant to Section 19(b) of the Act. On December 21, 2018, Petitioner filed an Amended Application for Adjustment of Claim against Respondent Alliance Coal-Hamilton County Mine alleging injuries to his neck, back, bilateral shoulders, and body as a whole as a result of a boulder falling from the roof of a mine on September 12, 2017. (Case No. 17-WC-31437). On July 28, 2020, Petitioner filed an Application for Adjustment of Claim against Respondent Continental Tire North America alleging injuries to his left shoulder, elbow, arm, and body as a whole as a result of tightening a clamp on June 6, 2020. (Case No. 20-WC-17780). The cases were consolidated for the purpose of trial due to an overlapping injury to Petitioner's left shoulder.

On May 7, 2019, Arbitrator William R. Gallagher entered a Decision in Case No. 17-WC-31437 pursuant to Section 19(b) of the Act with regard to temporary total disability benefits, medical expenses, and prospective medical care. On January 23, 2020, the Commission affirmed and adopted the Arbitrator's Decision awarding TTD benefits, medical expenses, and prospective medical treatment, specifically bilateral shoulder surgeries recommended by Dr. Paletta, as well as payment of medical expenses for a cervical disc replacement surgery performed by Dr. Gornet. The Arbitrator takes judicial notice of the Commission's Decision. (Petitioner's Ex. 5).

The issues in dispute in Case No. 20-WC-17780 are accident, causal connection with regard to Petitioner's left and right shoulder and left elbow conditions, medical bills, temporary total disability benefits, and prospective medical treatment. The parties further stipulate that Petitioner is not seeking any benefits at this time related to any other body part, including but not limited to, a cervical condition, and Petitioner is in no way precluded by the stipulation from

seeking benefits in the future for said conditions at a future date pursuant to Section 19(b) of the Act. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act in Case No. 17-WC-31437.

TESTIMONY

Petitioner was 32 years old, single, with two dependent children at the time of accident. Petitioner testified he began his employment at Hamilton County Coal in 2013 and worked there until he was discharged in 2018 due to his inability to return to work following his work-related injuries. Petitioner thereafter obtained full duty employment with Continental Tire North America in January 2020.

On 9/12/17, Petitioner sustained injuries when a boulder fell from the ceiling of the mine and struck him while he was down on his hands and knees. Petitioner reported injuries to his head, neck, and upper back with radiation into both shoulders and hands, as well as numbness/tingling in both hands, stiffness, weakness, popping/catching, and limited range of motion.

Petitioner testified that the cervical disc replacement performed by Dr. Gornet improved his symptoms, but he continued to have discoloration/redness in his left arm and advised Dr. Gornet of same. Petitioner was recommended for bilateral shoulder surgery with Dr. Paletta. His shoulder treatment, however, was put on hold pending an appeal of Arbitrator Gallagher's 19(b) Decision. Petitioner testified that following the favorable Commission Decision he contacted Dr. Paletta's staff and attempted to move forward with treatment but expressed concern over a severe rash he was experiencing on his left arm. He inquired if he needed to have the rash addressed before proceeding with surgery. Petitioner testified that at that time he was having pain in both shoulders and wanted to move forward with treatment. He expressly denied refusing further care. Petitioner testified he always returned phone calls from Dr. Paletta's office and was not allowed to speak to the doctor. After learning that Dr. Paletta would no longer treat him he began looking for another provider. Petitioner came under the care of Dr. Matthew Bradley on 7/1/20 for persistent pain in both shoulders.

Petitioner testified he sustained injuries to his left shoulder and elbow on June 6, 2020 while working for Continental Tire North America. Petitioner testified he was tightening bolts overhead with a four-way lever wrench and felt a pop in his left shoulder and elbow. He testified he had no prior injuries to his left elbow before 6/6/20. Petitioner stated he did not sustain any new injuries to his right shoulder since his injury on 9/12/17 while working for Alliance Coal. He testified that the incident on 6/6/20 worsened his left shoulder symptoms as the pain was sharper, more severe, and in a different location. Petitioner testified that he was primarily focused on treating his left shoulder following the June 2020 accident, but he continued to have right shoulder pain. He agreed that his right shoulder was not mentioned in his initial visit with Dr. Bradley.

Petitioner testified that Dr. Bradley took him off work, ordered a new MRI, and ultimately performed a left and right shoulder surgery that improved his symptoms. Petitioner is currently treating with Dr. Bradley for left elbow pain.

Petitioner testified he reviewed a surveillance video dated 7/7/20 depicting him lifting a bag of ice into the bed of his truck using his left arm. He stated the bag of ice was the smallest bag sold in stores. The video also depicted Petitioner resting his left arm on his truck while pumping gas. He testified he did not injure his shoulders or elbow performing either of these activities and they were not beyond his physical restrictions ordered by Dr. Bradley. He agreed he told Dr. Bradley he could not raise his left arm.

Petitioner testified he is satisfied with the results of his shoulder surgeries. He is currently on light duty restrictions of no pushing greater than 10 pounds and no lifting greater than 5 pounds with his left arm, which is not accommodated by his employer Continental Tire North America.

Petitioner testified he experienced numbness/tingling in his left hand prior to becoming employed by Continental Tire. He agreed that Dr. Bradley did not examine or recommend any testing or treatment for his left elbow at his first two visits on 7/1/20 and 7/14/20. He stated that Dr. Bradley did not address his left elbow symptoms until 9/10/20. He underwent a nerve conduction study in November 2020 that revealed no abnormalities. He underwent an MRI of the left elbow and two injections which did not provide relief. Petitioner testified that his current symptoms are most significant in his left elbow and he has more pain in his right shoulder than the left. He feels he could return to work with his left shoulder condition.

Petitioner agreed that on 7/14/20 Dr. Bradley recommended left shoulder surgery which was performed on 8/7/20, despite Continental Tire scheduling a Section 12 examination with Dr. Gross on 8/13/20. Petitioner admitted he had symptoms in his left elbow prior to the 6/6/20 accident, but they were limited to numbness and discoloration. His left elbow symptoms became much worse. Petitioner testified he intended to undergo shoulder surgery after he qualified for FMLA with his employer Continental Tire. However, following his 6/6/20 accident he could no longer postpone his care and treatment because his symptoms became such that he required surgery on both of his shoulders.

MEDICAL HISTORY

Following the Section 19(b) hearing on March 7, 2019, Petitioner returned to Dr. Matthew Gornet on 3/9/19, at which time Dr. Gornet noted Petitioner was waiting on potential shoulder surgery and carpal tunnel surgery with Dr. Paletta. Dr. Gornet noted Petitioner had a little more redness or discoloration of his left arm compared to his right, possibly caused by increased sympathetics and blood flow. Dr. Gornet placed Petitioner at maximum medical improvement with respect to his neck on 7/29/19. Dr. Gornet noted at that time Petitioner still had discoloration of the left arm. A venous Dopplers ordered by Dr. Paletta showed no evidence of DVT in Petitioner's upper extremities. Dr. Gornet also noted a rash on Petitioner's chest for which he suggested management tips.

Following the January 23, 2020 Commission Decision, Petitioner spoke with the office of Dr. Paletta on 2/6/20. Dr. Paletta indicated Petitioner had no intent of coming in and discharged Petitioner from his care at maximum medical improvement without restrictions.

Petitioner presented to the emergency room at Good Samaritan Hospital on 6/14/20 reporting an injury to his left arm on 6/6/20 while he was putting a press together at work and felt a "pop" in his left shoulder and elbow. Pain and numbness from his shoulder to his left hand was documented, specifically numbness to the little and ring fingers. His pain was noted to be 6 or 7 out of 10 and he had no improvement in symptoms since the injury occurred. Physical examination revealed tenderness to palpation at the ulnar groove on the left upper extremity, as well as a positive Tinels and elbow flex test. Decreased sensation in the fourth and fifth digits was also documented. X-rays of the left shoulder and elbow were taken to rule out fracture. Petitioner was diagnosed with damage to the left ulnar nerve following an injury. He was given Naproxen and advised to follow up with a local orthopedic specialist.

Petitioner thereafter came under the care of Dr. Matthew Bradley on 7/1/20. Petitioner reported his second accident that occurred on 6/6/20 during which he felt a popping sensation with pain in his left shoulder radiating to the anterior aspect of his left elbow. Petitioner reported significant pain in his shoulder since and difficulty lifting objects away from his body, along with significant pain and spasm in his bicep muscle belly. Dr. Bradley noted Petitioner's past bilateral shoulder pain from his prior work injury in the mines for which he received care under Dr. Paletta, who recommended bilateral shoulder surgeries. Petitioner reported that his most recent work injury produced pain in a significantly different location with increased intensity from what it was prior to the June 2020 injury.

Physical examination demonstrated significantly reduced range of motion, positive impingement testing of Neer's and Jobe's, positive bicep exam with provocative maneuvers of Speed's and Yergason's with significant weakness on resisted supination. Dr. Bradley believed Petitioner's exam and mechanism of injury were consistent with a SLAP type injury of the left shoulder and recommended an MRI for comparison. Based on the increased pain and change in character of Petitioner's symptoms, Dr. Bradley believed the injury on 6/6/20 was a causal factor in Petitioner's current condition of ill-being with respect to his left shoulder and elbow. He took Petitioner off work pending the results of the MRI.

Petitioner returned to Dr. Bradley on 7/14/20 and physical examination was mostly unchanged with AC joint pain noted with cross-chest testing. Dr. Bradley reviewed the MRI and noted continued acromioclavicular degenerative disease with undersurface osseous hypertrophy and a subacromial impingement type syndrome, which was not a significant change from Petitioner's previous MRI. However, there was tracking of the contrast into the biceps anchor along with thickening of the biceps tendon near the insertion, which was indicative of tendinopathy vs. a SLAP type tear. Dr. Bradley noted Petitioner was scheduled for bilateral distal clavicle excisions by Dr. George Paletta. Dr. Bradley stated that following Petitioner's second accident his physical examination was consistent with a biceps tendon injury or SLAP type tear. Although the recent MRI was not felt by the radiologist to show a significant labral tear, Dr. Bradley noted extravasation and cleft type formation of the dye into the labrum near the anchor. Dr. Bradley noted Petitioner had significant pain likely related to both acute injury of the biceps tendon and labrum in combination with subacute/chronic AC joint pain creating some subacromial impingement type syndrome. Dr. Bradley felt Petitioner failed nonoperative treatment with regard to his AC joint under the care and direction of Dr. Paletta and surgery was recommended on both of Petitioner's shoulders prior to his new injury. Dr. Bradley opined

continued nonoperative treatment would not be successful and recommended arthroscopic distal clavicle excisions, subacromial decompression and inspection of the labrum for a suspected nondisplaced SLAP type tear. Petitioner was kept off work pending surgery.

Dr. Paletta reviewed the MRI and believed it demonstrated tendinopathy involving the supraspinatus and infraspinatus, but no evidence of a labrum tear. It was his opinion the MRI was unchanged from the previous study he viewed in May 2018.

On 8/7/20, Dr. Bradley performed a left shoulder SLAP repair, subacromial decompression, injection, and manipulation under anesthesia. Intraoperative findings confirmed the presence of a Type II SLAP tear with intraarticular synovitis along with subacromial bursitis. Petitioner was restricted to no use of his left arm following surgery. Petitioner followed up with Dr. Bradley on 9/10/20 and Petitioner had tightness and stiffness to impingement testing of Neer's, Jobe's, and Hawkins, along with some pain. He also noted a positive Tinel's sign at the ulnar nerve of the left elbow. Dr. Bradley also examined Petitioner's right shoulder, noted as "unchanged from previous" examination, which showed reduced range of motion and a significant amount of pain with cross-chest testing directly at the AC joint, which was reproducing Petitioner's chief symptomatology. Dr. Bradley recommended continued restrictions and physical therapy for the left shoulder. With respect to Petitioner's left elbow, Dr. Bradley noted numbness and tingling in the left small and ring fingers which have been present since Petitioner's injury and pop at work. Dr. Bradley noted some radicular symptomatology and cervical etiology in the past. His physical examination was not consistent with that of radicular pain as Petitioner had some numbness in the small and ring fingers and a positive Tinel at the elbow. Dr. Bradley stated it is possible to have a double crush type phenomenon where he does have some cervical and elbow etiology creating an over exacerbation of the symptomatology. Dr. Bradley ordered an EMG nerve conduction study.

With respect to Petitioner's right shoulder, Dr. Bradley agreed with Dr. Paletta's impression of osteolysis of the distal clavicle, which he stated was "not at all typical with the hypertrophic normal degenerative type changes seen with the AC joint." Dr. Bradley noted that Dr. Paletta previously recommended an arthroscopic decompression and distal clavicle excision, and he agreed that said procedure would address Petitioner's complaints and symptomatology. He recommended that the surgery be performed once the diagnostic testing was completed for his left elbow and more recovery time for his left shoulder.

On 10/1/20, Dr. Bradley performed a right arthroscopic subacromial decompression, open distal clavicle excision, labral debridement, and right shoulder injection. Intraoperatively, slight fraying of the anterior labrum was noted without a definitive tear and bursitis with a Type II acromial was appreciated along with undersurface hypertrophy to the distal clavicle. Petitioner was kept on restrictions and referred to physical therapy.

The EMG was performed on 11/23/20 and was negative for cubital tunnel syndrome and cervical radiculopathy, but positive for left carpal tunnel syndrome. On follow up, Dr. Bradley noted complaints of right shoulder catching and clicking with certain movements. Dr. Bradley diagnosed left elbow medial epicondylitis secondary to overuse from the bilateral shoulder

surgeries. He recommended home exercises and administered a corticosteroid injection into the left elbow.

Petitioner returned to Dr. Bradley on 12/17/20 with reports of stabbing and burning pain between his shoulder blades near the base of his neck along with continued complaints of medial sided elbow pain and numbness and tingling in his left index and ring fingers. He also reported catching within his neck and pain between his scapulae. He denied any interval trauma or fall. Since Petitioner failed to improve with injection of his elbow, Dr. Bradley recommended a left elbow MRI to evaluate the soft tissues about the medial aspect. Dr. Bradley recommended Petitioner follow up with a spine surgeon to address the stabbing pain between his shoulder blades.

Dr. Bradley last saw Petitioner on 1/6/21 at which time he reviewed the MRI films and identified moderate soft tissue inflammation without obvious tear noted to the medial flexor wad. Dr. Bradley administered another left elbow injection. He referred Petitioner to Dr. Kevin Rutz for continued neck and periscapular pain.

Counsel for Alliance Coal had Petitioner examined by Dr. Richard Lehman, who testified by way of deposition on 11/5/20. Dr. Lehman testified he reviewed the records provided to him by Respondent subsequent to his last review to determine whether Petitioner's current condition in his bilateral shoulders remains causally connected to his 2017 work injury. He testified that he does not causally relate Petitioner's current left shoulder condition or his current need for treatment to his 2017 work accident. He continued to believe that the mechanism of Petitioner's injury, namely being struck in the head by a rock, was not consistent with his shoulder injuries. He also remained of the opinion that the accident did not aggravate or exacerbate his AC joint hypertrophy. He held the same belief with respect to Petitioner's right shoulder.

Dr. Lehman testified that despite the Commission's findings as to causation and prospective medical care, including bilateral shoulder surgeries recommended by Dr. Paletta, Petitioner's condition was no longer related to the injury given the release by Dr. Paletta, the gap in treatment, and the MRI findings, which he did not believe demonstrated a SLAP tear. Though the operative report of Dr. Bradley identified a SLAP tear, Dr. Lehman neither believed same existed based on the arthrogram study, nor did he believe it related to the 2017 work accident. He testified that Petitioner's left and right shoulder conditions were degenerative in nature which were no longer symptomatic since so much time elapsed until Petitioner had surgery. When asked whether any part of Petitioner's left or right shoulder surgeries were related to the 2017 accident, Dr. Lehman testified that Dr. Bradley did not address Petitioner's left shoulder AC arthritis during his arthroscopy, and that Petitioner's right shoulder surgery addressed longstanding pathology unrelated to his accident.

On cross-examination, Dr. Lehman testified he did not review the Commission's Decision. He testified that the last time he examined Petitioner was in 2018 and he did not examine Petitioner in conjunction with his 2020 report following Petitioner's June 2020 work accident. Dr. Lehman acknowledged that his original opinion with respect to Petitioner's bilateral shoulders following the 2017 accident was based in part on the fact that Petitioner did not see Dr. Paletta until eight months after his injury. He made the same presumption with regard

to Petitioner's second accident, stating, "Well, my opinion would be the same, and that is if you go a long period of time and you're not having symptoms, you're not seeking medical care, then your situation has abated. . ." He acknowledged that outside of the subsequent left shoulder injury in June 2020, the records contained no evidence of an intervening accident.

Dr. Lehman acknowledged that various circumstances make it difficult to obtain surgical clearance, such as litigation, and that he lacked any personal information about why Petitioner did not seek treatment until he saw Dr. Bradley. He also acknowledged that AC joint pathology could be asymptomatic. Although he did not appreciate the SLAP tear on the MRI studies, he acknowledged that Dr. Bradley diagnosed and identified same intraoperatively and agreed that such a tear would be related to the June 2020 work accident. He felt that the 2020 accident was a viable mechanism of injury "more in keeping with stressing the shoulder." Dr. Lehman acknowledged that a person can have a SLAP tear that does not show on an MRI. He also acknowledged that preexisting asymptomatic degenerative changes can be made symptomatic by an accident without a concurrent change on imaging studies, though he still believed the condition overall would be the natural history of arthritis. He initially admitted that his opinion that Petitioner got better since there was a gap in treatment was a mere assumption on his part from his records review since he had not seen or spoken to Petitioner since 2018, but later recanted his answer that it was not an assumption since it was based on the medical records. He testified that he was unaware of the events that transpired during Petitioner's treatment gap, such as his termination from Alliance Coal due to prolonged convalescence, his hire date at Continental Tire, and the date of the Commission's Decision.

Dr. Lehman testified he has performed surgery where the operative photos could not be downloaded due to technical issues. Dr. Lehman believed that a SLAP tear could be caused by falling on an outstretched arm or throwing a ball motion. He testified that loosening an object could cause a tear. Dr. Lehman testified that he had no reason to disbelieve Dr. Bradley's operative findings of a SLAP tear of the superior labrum.

Counsel for Continental Tire took the deposition of its retained Section 12 records reviewer, Dr. Lyndon Gross, on 12/10/20. Dr. Gross testified that he completed his report after reviewing records and films on 10/20/20. He testified that his impression of Petitioner's diagnostic films from 7/14/20 was tendinopathy of the rotator cuff without tear, degeneration of the acromioclavicular joint giving rise to impingement of the underlying rotator cuff, a small area of osteolysis of the inferior aspect of the clavicle, and fluid of the AC joint with no discrete labral tear. He appreciated no significant change from Petitioner's 2018 non-arthrogram study.

Dr. Gross reviewed the operative report and photographs from Petitioner's left SLAP repair surgery showing the suture anchor underneath the biceps tendon in the superior labrum. He testified that photos showing the pathology prior to the repair were standard practice. He acknowledged there were no indications in Dr. Paletta's records that Petitioner had any problem with his labrum prior to 6/6/20. Dr. Gross was also provided with surveillance video clips of Petitioner taken after his 6/6/20 accident but before his surgery with Dr. Bradley.

Dr. Gross testified he did not believe the surgery performed by Dr. Bradley on 8/7/20 was reasonable or necessary or that Petitioner suffered a SLAP tear. Dr. Gross opined that

Petitioner's remaining pathologies were preexisting conditions unrelated to his work accident. He did not believe the mechanism of Petitioner's accident was sufficient to cause a superior labral tear. He testified he would not believe Petitioner suffered a labral tear unless there were photographs showing same.

On cross-examination, Dr. Gross admitted he has never met or examined Petitioner. He disagreed with Dr. Bradley's and Dr. Lehman's belief that Petitioner's mechanism of injury in June 2020 was consistent with a superior labrum injury. He acknowledged that his opinion could have been different if he had the opportunity to examine Petitioner and Petitioner had been able to show him something more consistent with a traction type injury. He testified that from his review of Dr. Bradley's examination he believed Petitioner's condition was consistent with adhesive capsulitis.

Dr. Gross admitted that labral tears are not always seen on an MRI scan, though the majority of labral tears would be visible with arthrogram studies. He testified he was not privy to any specific information outside of Dr. Paletta's treatment note as to why Petitioner stopped treating with Dr. Paletta and began treating with Dr. Bradley. He was also unaware of Petitioner's right shoulder surgery and rendered no opinions as to Petitioner's right shoulder.

Dr. Gross did not believe that Dr. Bradley lied about identifying and repairing a SLAP repair, but he hypothesized that perhaps Dr. Bradley mistook a sublabral foramen or a superior labral overhang over the glenoid for a labral tear. He maintained that he did not think there was a labral tear based on the information provided him outside of the operative report. Dr. Gross agreed that the left shoulder arthroscopy and subacromial decompression and distal clavicle resection, which was initially recommended by Dr. Paletta and awarded by the Commission, was a reasonable and necessary procedure based on the objective findings of AC osteoarthritis and impingement. He testified that he also had difficulty in the past retrieving surgical photos but he was able to recover them. Dr. Gross agreed that if a patient refused further treatment, he would place them at maximum medical improvement.

Dr. Bradley testified by way of evidence deposition on 11/4//20. Dr. Bradley testified he is a board-certified orthopedic surgeon with expertise in evaluating and treating both acute and chronic injuries. One-third of his practice is devoted to shoulder injuries. Dr. Bradley testified that Petitioner related the history of his prior shoulder injuries and his continued symptoms therefrom, but noted Petitioner initially presented for treatment on his left shoulder. Dr. Bradley testified that Petitioner described a very different pain in his left shoulder following his 6/6/20 accident and the pain was in a different location that limited his ability to use his shoulder. Dr. Bradley testified that prior to June 2020 Petitioner could move his shoulder around but it was painful.

Dr. Bradley testified that Petitioner never denied treatment for his shoulders and actively pursued surgery. He testified that Petitioner always verbalized he had pain in both shoulders and Petitioner was unable to move the right shoulder around and do activities of daily living. He testified that it was the new injury that debilitated the left shoulder that caused Petitioner concern.

Dr. Bradley stated that his suspicion of a SLAP tear was confirmed by the MR arthrogram that showed a nondisplaced SLAP tear, which was a new finding compared with the MRI performed in May 2018. He testified that SLAP tears, particularly smaller nondisplaced tears, can be very difficult to see on studies given the fact the patient is in the at-rest position when the MRI is performed that does not displace the tear to make it visible. He testified it is not uncommon for a physical examination to suggest a SLAP tear but the MRI is normal. Dr. Bradley opined that the mechanism of Petitioner's June 2020 injury was consistent with the tear visualized on the MRI and the tear was causally connected to Petitioner's accident on 6/6/20.

Dr. Bradley testified he was aware Petitioner was still dealing with symptoms from his previous work injury and they required surgical intervention. He attributed the surgical repair of the SLAP tear to the 2020 injury; the subacromial decompression and manipulation to remedy the loss of range of motion to both injuries, but more so to the older injury; and the subacromial decompression to standard surgical procedure for both injuries. He testified that Petitioner suffered no injuries outside of his work-related accidents in 2017 and 2020, and that he exhibited no signs of exaggerating or malingering. Dr. Bradley testified that as Petitioner's more recent left shoulder injury was treated he was more vocal about his right shoulder injury. He recommended that Petitioner's right shoulder be addressed while he was off work recovering for his left shoulder surgery. He noted that Petitioner's right shoulder symptoms remained unchanged during his course of treatment. Most of Petitioner's restrictions, however, pertained to his SLAP tear in his left shoulder.

With respect to the nerve conduction study, Dr. Bradley testified that he could not opine as to the etiology of the symptoms necessitating same, since he does not treat the spine; but he stated Petitioner reported no such problems prior to his work accident in 2017. Dr. Bradley also attributed Petitioner's need for right shoulder surgery to the first work accident in 2017.

Dr. Bradley disagreed with Dr. Lehman's assessment that Petitioner must have been asymptomatic since he did not return to Dr. Paletta for surgery. He did agree with Dr. Lehman's assessment that the June 2020 accident resulted in Petitioner's SLAP tear. He disagreed with Dr. Gross, who did not believe Petitioner sustained injury to his left shoulder on 6/6/20 because he did not see the tear in intraoperative photos prior to sutures. Dr. Bradley stated that Dr. Gross obviously did not look closely at the picture as a suture is present in the labrum. He stated that Dr. Gross did not discuss that Petitioner's labrum obviously has some tearing that is shown on the photos. He disagreed with Dr. Gross that just because there is no picture that shows a clearly displaced labral tear that that means there was not a labral tear present.

Dr. Bradley testified they were not able to retrieve intraoperative photos due to technical issues. He confirmed that the charges for Petitioner's surgeries were reasonable, necessary, and related to his accidental work injuries.

On cross-examination, Dr. Bradley testified that although he did not begin treating Petitioner's right shoulder immediately on 7/1/20, Petitioner did advise him of his history of bilateral shoulder pain. He was aware of Petitioner's gap in treatment between February 2019 through his current injury in June 2020. When asked whether the fact that Dr. Paletta released Petitioner to work full duty with respect to both shoulders and that Petitioner resumed working

full duty until his most recent accident impacted his causation opinion with respect to the 2017 accident, he stated the diagnosis prior to June 2020 was AC joint pain, arthropathy, edema, and inflammation which is typically treated nonoperatively. Dr. Paletta recommended bilateral shoulder surgery. It does not suggest that Petitioner was pain free or that he no longer required surgery when he did not undergo the recommended surgeries.

Dr. Bradley testified he was aware Petitioner was receiving treatment, including injections and surgery with Dr. Gornet, which further compounded his treatment options. He agreed that Petitioner's neck should be fixed before addressing his shoulders which were not as pressing as the AC joint injuries are more of a nuisance and pain than limiting. However, if you tear your rotator cuff or your labrum you are not able to use your shoulder. Dr. Bradley testified that if Petitioner was able to do a full manual labor job it does not change his opinion as to whether he required surgery on his AC joint or his AC joint was symptomatic. He testified that Dr. Paletta related both shoulder injuries to Petitioner's accident and recommended surgery, but now that he performed the surgeries Dr. Paletta has changed his opinion as to causation.

Dr. Bradley opined that the need for the EMG nerve conduction study was related to Petitioner's first work accident because that is when his symptoms started. Petitioner complained of numbness and tingling down his arms following the first accident. Dr. Bradley confirmed that the labral tear in Petitioner's left shoulder was not present on the 2018 MRI taken prior to the 2020 injury. Dr. Bradley testified that the location of Petitioner's tear in the superior labrum lent itself to injury through overhead activities. He stated that if Petitioner had been injured while catching himself with outstretched arms during a fall, he would have anticipated a posterior labral tear rather than tearing of the superior labrum.

CONCLUSIONS OF LAW

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

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' Comp. Comm'n*, 236 Ill. 2d 132, 149 (2010). In order for a claimant to be entitled to workers' compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. 820 ILCS 305/1(d) (West 2014). Both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini v. Indus. Comm'n*, 117 Ill. 2d at 44-45; *Illinois Bell Telephone Co. v. Indus. Comm'n*, 131 Ill. 2d 478, 483 (1989); *Free King Oil Co. v. Indus. Comm'n*, 62 Ill. 2d 293, 294 (1976); *Wise v. Indus. Comm'n*, 54 Ill. 2d 138, 142 (1973). Therefore, 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. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003) (collecting cases).

The dispute in the present case centers on whether Petitioner's injuries arose out of his employment. "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*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58); *see also Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 194 (2002) ("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."). 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.

The Arbitrator finds the Supreme Court's most recent decision in *McAllister v. Illinois Workers' Comp. Comm'n* dispositive of the question at issue. In *McAllister*, the claimant injured his right knee while working as a sous-chef for his employer. *McAllister v. Illinois Workers' Comp. Comm'n*, 2020 IL 124848. He sustained a knee injury when he was looking for a pan of carrots and stood from a kneeling position. *Id.* Though the claimant was initially denied benefits because it was believed that he "was subjected to a neutral risk which had no particular employment or personal characteristics" at the time of injury, the Supreme Court held that the injury arose out of his employment as a result of a work-related risk. *Id.* The Court made it plain that a risk is compensable and "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." *McAllister v. Illinois Workers' Comp. Comm'n*, 2020 IL 124848, ¶ 46-47. The Court noted that although the claimant was injured by a mundane activity, namely his "kneeling down on the floor in the walk-in cooler to look for a pan of carrots misplaced by a coworker and then standing up from the kneeling position injuring his knee," his injury arose out of an employment-related risk "because the evidence establish[ed] that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef," and such activities "were acts his employer might reasonably expect him to perform in fulfilling his assigned job duties as a sous-chef." *Id.*

In the instant matter, Petitioner was injured while tightening bolts overhead in the course of his employment. Petitioner's testimony was not rebutted that this activity was incidental to his employment. Therefore, the Arbitrator sees no basis for a dispute of accident and finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent.

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

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 888, 864 N.E.2d 266, 272 (2007). Accidental injury need only be 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, 673 (2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003) Employers are to take their employees as they

find them. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

Though the Commission has already determined that Petitioner's condition of ill-being in his bilateral shoulders was causally related to his initial accidental injury on September 12, 2017, Petitioner experienced complications in trying to resume his treatment, including a second work accident resulting in injury to his left shoulder and elbow.

Though Petitioner had preexisting complaints in his left shoulder and left elbow, the record leaves no doubt that Petitioner's conditions were aggravated by his injury on June 6, 2020. Petitioner sustained a new injury, a SLAP tear, which was not present before his June 2020 accident, as well as dramatic and significant change in the type and level of his symptoms in the left shoulder. The Arbitrator notes that while there was doubt as to the presence of the SLAP tear based on the MRI studies, any such doubt was resolved at the time of surgery when Dr. Bradley identified same intraoperatively. The Arbitrator finds no sound basis for questioning a reputable eyewitness account of Petitioner's intraoperative findings.

The Arbitrator finds it significant that Dr. Lehman agreed a labral tear would be related to Petitioner's second accidental injury on 6/6/20, in support of Dr. Bradley's causation opinion. Moreover, Petitioner testified that the 6/6/20 incident worsened the symptoms in his left shoulder as the pain was sharper and more severe. Dr. Bradley credibly testified that the injuries Petitioner sustained to his left shoulder were distinct and severable and apportioned which surgical procedures were attributable to each accident. Dr. Bradley testified he was aware Petitioner suffered symptoms and complaints from his previous work injury that also required surgical intervention.

Regarding Petitioner's left elbow, he reported numbness/tingling in both hands on 9/19/17 when examined by orthopedic surgeon, Dr. James Goris. On 9/26/17, Dr. Goris noted numbness/tingling down Petitioner's arm but did not specify the right or left. An EMG/NCS was performed on Petitioner's left and right upper extremities that revealed bilateral median nerve abnormalities. On 12/11/17, Section 12 examiner, Dr. Russell Cantrell, noted numbness/tingling in Petitioner's bilateral hands. On 1/20/18, Dr. Gornet reported Petitioner suffered pain down both arms to the elbows, forearms, and hands. On 5/7/18, Dr. Paletta noted bilateral pain radiating from Petitioner's shoulders below the elbows as well as numbness in his hands. On 5/29/18, Petitioner underwent cervical disc replacement surgery at C5-6 and C6-7 that improved his radiating pain and numbness/tingling in his hands. On 7/29/19, Dr. Gornet released Petitioner at MMI with no restrictions with regard to his cervical spine. At that time Petitioner had some restricted motion in his neck and a rash on his left arm and chest, with no noted radiating complaints or hand numbness/tingling.

Petitioner did not treat again until after his work-related accident of 6/6/20. Petitioner reported to the emergency room on 6/14/20 and provided a history of a "pop" in his left shoulder

and elbow while putting a press together at work on 6/6/20. Pain and numbness from his shoulder to his left hand was documented, specifically numbness to the little and ring fingers. Physical examination revealed tenderness to palpation at the ulnar groove on the left upper extremity, as well as a positive Tinels and elbow flex test. Decreased sensation in the fourth and fifth digits was also documented. Petitioner was diagnosed with damage to the left ulnar nerve following an injury. On 8/7/20, Dr. Bradley performed a left shoulder SLAP repair, subacromial decompression, injection, and manipulation under anesthesia. Despite left shoulder surgery, on 9/10/20, Dr. Bradley noted a positive Tinel's sign at the ulnar nerve of the left elbow with numbness/tingling in the left small and ring fingers which have been present since Petitioner's injury and pop at work. Dr. Bradley ordered an EMG/NCS to rule out radicular symptomatology and cervical etiology.

The EMG/NCS performed on 11/23/20 was negative for cubital tunnel syndrome and cervical radiculopathy, and incidentally positive for left carpal tunnel syndrome. On 11/23/20, Dr. Bradley diagnosed left medial epicondylitis and placed Petitioner on light duty work of no use of the left upper extremity. On 12/17/20, Dr. Bradley ordered a left elbow MRI due to Petitioner's persistent complaints and continued his work restrictions. The left elbow MRI was performed on 1/6/21 that revealed some mild to moderate soft tissue inflammation without obvious tear noted to the medial flexor wad.

Petitioner testified he did not sustain injury to his left elbow prior to 6/6/20. The medical records suggest Petitioner's bilateral upper extremity numbness/tingling resolved following the cervical disc replacement surgery performed by Dr. Gornet. Petitioner did not seek treatment for his left elbow/arm symptoms from 7/29/19 until his second accident on 6/6/20 when he reported a "popping" sensation in his left elbow and shoulder. Petitioner returned to work for Respondent following his cervical disc replacement surgery.

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982).

Based upon the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being in his left shoulder is in part related to the accidental work injury of June 6, 2020. The Arbitrator further concludes that Petitioner's current condition of ill-being in his left elbow is causally related to his accidental injury on June 6, 2020.

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

Issue (K): **Is Petitioner entitled to any prospective medical care?**

With regard to Petitioner's left shoulder, Dr. Bradley made a reasonable attempt to delineate Petitioner's injuries as he attributed the surgical repair of the SLAP tear to the 2020 injury; the subacromial decompression and manipulation to remedy the loss of range of motion to both injuries, more so to the older injury; and the subacromial decompression to standard surgical procedure for both injuries. The Arbitrator sees no equitable way to divide the expenses pertaining to the left shoulder treatment surgery based on the testimony provided. Based on the testimony of Petitioner and Dr. Bradley, Petitioner described a very different pain in his left shoulder following his 6/6/20 accident and the pain was in a different location that limited his ability to use his shoulder. Dr. Bradley testified that prior to June 2020 Petitioner could move his shoulder around but it was painful. Based further on the fact that the most significant portion of Petitioner's current complaints was related to the repair of the SLAP tear, the Arbitrator relates and awards medical expenses for the care and treatment of Petitioner's left shoulder and left elbow on and subsequent to 6/6/20.

Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 1 as provided in Section 8(a) and Section 8.2 of the Act as they relate to Petitioner's left shoulder and left elbow for the period 6/6/20 through 1/11/21, excluding the medical bill for the EMG/NCS ordered prior to Petitioner's right shoulder surgery that was ultimately performed on 11/23/20, as Dr. Bradley recommended this test to diagnostically rule out any lingering cervical spine issues. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The record reflects that Petitioner has not reached maximum medical improvement with respect to his left elbow injury. Petitioner last saw Dr. Bradley on 1/6/21 at which time he was placed on work restrictions of no use of the left upper extremity. Respondent shall provide further reasonable and necessary prospective medical care with regard to Petitioner's left elbow until he reaches maximum medical improvement.

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

Based upon the above findings as to causal connection, the Arbitrator awards and orders Respondent to pay temporary total disability benefits of **$547.76** from **July 1, 2020 through September 30, 2020, and from November 23, 2020 through January 11, 2021**, a period of **20-2/7** weeks.

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

Arbitrator Linda J. Cantrell

3/29/21
DATE