STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARCY M. FABER,
Petitioner,

vs.

No: 08 WC 22105
14 IWCC 0707

STATE OF ILLINOIS/MENDOTA,
Respondent.

ORDER

This matter comes before the Commission on Petitioner's Motion to Recall Pursuant to Section 19(f), stating that an error exists in the Commission's order issued May 15, 2018. For the following reasons, Petitioner's motion is denied.

The Arbitrator's Decision in this case, issued February 5, 2013, included the following order:

> "Respondent shall pay reasonable and necessary unpaid medical services of $22,802.10, as provided in Sections 8(a) and 8.2 of the Act and as set forth more fully on the attached Memorandum of Decision. Respondent shall receive credit for any payments already made but not yet reflected on petitioner's medical bills exhibit offered at hearing."

The Memorandum of Decision refers to this sum as an amount due to Petitioner, but the order quoted above does not compel direct payment to Petitioner.

On August 21, 2014, the Commission's issued a Decision and Opinion on Review, affirming and modifying the Arbitrator's Decision. The Commission expressly ordered Respondent to pay "to Petitioner" the sum of $5,003.00 for certain disputed medical expenses, subject to a credit of $3,794.49, for a net award of $1,208.51.

On May 15, 2018, the Commission granted Petitioner's motion for penalties and attorney fees pursuant to Sections 19(k) and 16 of the Act, based on the Respondent's unreasonable and

vexatious failure to pay that net award directly to Petitioner as expressly stated in the Commission's Decision and Opinion on Review.

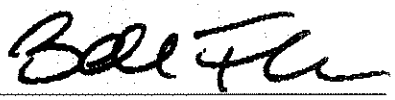
In the Motion to Recall Pursuant to Section 19(f), Petitioner argues that the Commission's award of penalties and attorney fees should have been based on the entire award of medical expenses, rather than the award specified in the Commission's Decision and Opinion on Review.

Section 19(f) of the Act provides for recall of an original award or decision on review by the Commission to correct clerical errors or errors in computation within 15 days after receipt of any decision on review. 820 ILCS 305/19(f) (West 2018). In this case, the Arbitrator's Decision did not expressly order that the entire award of medical expenses be paid directly to Petitioner. The Commission's Decision and Opinion on Review expressly ordered the payment of the net amount of $1,208.51. The Commission awarded penalties and fees based on Respondent's failure to directly pay Petitioner the award which it had expressly ordered to be paid directly to Petitioner. The recall motion does not allege that the award upon which the Commission based its assessment of penalties and attorney fees contains a clerical error or was improperly computed. Accordingly, Petitioner's motion does not fall within the scope of Section 19(f) of the Act.

IT IS THEREFORE ORDERED that the Motion to Recall Pursuant to Section 19(f) is hereby denied.

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

DATED: MAR 12 2020
o: 05/15/18
BNF/kcb
45



Barbara N. Flores

STATE OF ILLINOIS)
) SS
COUNTY OF WINNEBAGO)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JASMINE SANTOS,
Petitioner,

vs.

ANDROID INDUSTRIES,
Respondent.

No. 18 WC 008501
20 IWCC 0163

ORDER

This matter comes before the Commission on the Commission's own motion to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Decision should be recalled for failure to state the amount of bond required for an appeal by Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated March 9, 2020, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Marc Parker.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision shall be issued simultaneously with this Order.

Marc Parker

DATED: MAR 19 2020
MP/dk
068

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jasmine Santos,
Petitioner,

vs.

No: 18 WC 008501
20 IWCC 0163

Android Industries,
Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and prospective medical, and being advised of the facts and law, reverses the August 7, 2018 Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that Petitioner failed to prove that she sustained an accident that arose out of and in the course of employment on February 2, 2018 and denied all benefits. He found Petitioner to be not credible and denied her claim on the ground that she was engaged in horseplay at the time of her injury.

After considering the entire record, and for the reasons set forth below, the Commission reverses the August 7, 2018 decision of the Arbitrator and awards medical expenses and prospective medical benefits.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner was hired by Respondent as an assembler on December 16, 2016. She worked different positions on the production line assembling Chrysler engines. The line was oval-shaped, and the engines were moved by four-wheeled carts from station to station, with additional parts being affixed to the engines at each stop. The engines were moved to and from the carts by means of a hoist attached to two bridles, consisting of metal pieces screwed into the engine for that purpose.

On the date of her accident, February 2, 2018, Petitioner was assigned to the tear down position. She removed salvageable parts from defective engines which had been returned to Respondent by Chrysler. She then disseminated the parts to the appropriate stations on the line for re-use. In order to reach some of the engine parts, she was required to stand on a metal piece above the wheel on the cart and stretch out her arms over the top of the engine. When she had removed all usable parts, she used a hoist and the bridles to move the stripped-down engine to the green rack in front of the auto loader platform.

Petitioner testified that on February 2, 2018, she had completed work on an engine and was prepared to remove the engine from the cart and lift it onto the green rack to be returned to Chrysler. She realized at that time that she would require two bridles to make the transfer, as the bridles on her engine had been removed during the prior shift. Bridles were kept in bins on the auto loader platform and at two other stations along the production line. The auto loader bin was closest to her station.

Respondent's plant manager, Frederick Swain, testified that Respondent had installed multiple video cameras in the auto-loader system. The cameras are wide-lens, so the video shows more than just the engines, operator, and platform. Respondent has used the videos to show customers what is done or is not done to the product.

Respondent introduced a video filmed on the date of Petitioner's accident (RX5) that showed her co-worker, Richard Barragan, who was working the auto-loader position. He appears to speak with someone on the floor below his platform. Petitioner testified that she was asking Mr. Barragan to hand her two bridles from the bin on his platform at that time. Mr. Barragan recalled that Petitioner was returning two bridles to the bin, rather than requesting additional bridles. Petitioner testified that Mr. Barragan declined to hand her the bridles and advised her to obtain what she needed for herself.

Petitioner stepped onto the metal plate above the wheel of an empty cart on the line and from there to the auto-loader platform. Although there were stairs from the factory floor to the top of the platform, they were located on the side farthest from the tear down area. Petitioner spoke with Mr. Barragan again when she had ascended the platform, but before she could obtain a bridle from the bin, she realized that the cart in front of the platform was getting ready to move along the track. She testified that she moved to allow Mr. Barragan room to maneuver the incoming engine. She stepped back onto the top of the cart she had used to ascend to the platform, planning to hop down the 28 inches to the floor to return to the tear down area. However, the cart began to move down the line, causing Petitioner to lose her balance and fall onto her right knee.

Petitioner testified that she felt immediate knee pain and could not stand up. Co-worker Mr. Barragan, team leader Rubin Alonzo, and supervisor Danny Gutierrez all came to her aid. No one admitted to actually witnessing her fall, although Mr. Barragan was facing that direction at the time.

Petitioner reported her accident that day. She testified that because she was concerned about losing her job as a result of her work injury, she misrepresented the mechanism of her injury to her supervisor, on the first report of injury, and to her treating physicians. To each of these, she indicated that she tripped on a cart or the cart knocked into her as she was walking away. However, Brian Brown, Respondent's human resources manager, testified that he learned of the true mechanism of injury within eight to nine days of the accident, when Respondent became aware of the videotape (RX5) made on the date of accident.

The videotape shows Petitioner walking toward the auto-loader platform and talking to Mr. Barragan. Although his back is toward the camera, he appears to be engaging in a conversation with Petitioner. As they talk, she climbs onto the step above the wheel of a cart stopped in front of the platform and steps up onto the same level as Mr. Barragan. They chat briefly, then she notices the carts beginning to move on the track and steps back down onto the top of the cart she had used to ascend to the platform. Her back is toward Mr. Barragan, but he is facing her direction. As she is stepping down, Mr. Barragan reaches out to a control pad and presses a button. Both Petitioner and Mr. Barragan testified that the button released the cart to continue down the production line. While Petitioner was on top of the cart, it began to move, causing her to lose her balance, jump from the cart top, and land on her right knee.

Respondent submitted "Personnel Meeting Notes" dated February 27, 2018 into evidence. (RX3). Petitioner was disciplined for riding on the cart top on the date of accident, but no evidence regarding possible discipline of Richard Barragan was presented. Petitioner's behavior was characterized as "horseplay" by Respondent's personnel committee.

B. Medical Treatment

Petitioner was evaluated that same day by Dr. Borchardt at OrthoIllinois, where she told the doctor that she had twisted her knee when she tripped on a cart. X-rays of her right knee showed normal alignment, and Dr. Borchardt diagnosed Petitioner with a sprained right knee. He recommended that she wear a hinged brace but did not prescribe any work restrictions. He did advise Petitioner to notify her employer and his office if she had to miss work due to her injury.

Petitioner followed up with Dr. Borchardt on February 12, 2018 due to continued pain and an inability to flex her knee. She reported pain with prolonged standing and descending stairs. At this appointment, Petitioner reported working with the restriction of sit down work only. Dr. Borchardt ordered an MRI and continued her work restrictions.

On March 27, 2018, Petitioner underwent an MRI, which revealed a complete ACL tear. At her March 29, 2018 appointment with Dr. Borchardt, Petitioner's main complaints were pain and tightness, and Dr. Borchardt referred her to Dr. Whitehurst, also at OrthoIllinois, for surgical repair of her torn ACL.

Petitioner told Dr. Whitehurst that she was injured when she jumped off an engine cart and tripped over a cart. Petitioner reported that she was in pursuit of her normal duties at work

when she stepped off a moving platform and suffered the injury. She received conservative treatment from the medical staff at work. Due to her age and activity level, the doctor recommended surgery to avoid the development of arthritis as a young adult.

Dr. Whitehurst performed the surgery on May 17, 2018 and Petitioner followed up on May 24, 2018 and was prescribed physical therapy twice a week for 12-14 weeks. At the time of hearing, Petitioner was completing her course of physical therapy.

Petitioner's claim was denied by Respondent on the ground that she was engaged in horseplay at the time of her injury. Respondent concluded that Petitioner's accident did not arise out of her employment because she had willfully removed herself from the performance of her assigned duty.

C. Additional Information

On appeal, Petitioner seeks medical expenses, temporary total disability and prospective medical expenses. She argues that she was the victim of a practical joke perpetuated by a co-worker and was engaged in a business purpose when she was injured.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found Petitioner was not credible and cited to inconsistencies in her reports of the mechanism of her injury. In denying the claim, the Arbitrator noted that Petitioner and Mr. Barragan gave conflicting testimony as to the purpose of her visit to the auto loader platform: Petitioner testified that she needed additional bridles to complete her assigned task, and Mr. Barragan testified that she was bringing unneeded bridles to the bridle bin on the platform. The Arbitrator determined that Petitioner stepped onto a cart that is intended to hold an engine block, knew that those carts moved along the assembly line, and fell when she lost her balance attempting to jump off the moving cart. The Arbitrator then noted that "... it is apparent [P]etitioner had no business purpose in being on the auto loader platform or the top of the cart at the time of injury. This was an inherently dangerous risk and had nothing to do with her assigned duties of tear down on the date of injury. ... Petitioner assumed a personal and inherently dangerous risk unrelated to her employment duties."

After careful review of the evidence proffered at the hearing, including the video of the incident itself, the Commission views the evidence differently than the Arbitrator and concludes that Petitioner did sustain a compensable accident at work.

Petitioner explained that she was initially hesitant to provide an accurate report of her accident, because she did not believe that she was seriously injured. She also feared she might lose her job for being hurt at work. Petitioner reported the mechanism of her injury in different ways: as a result of tripping over a cart; being caught between two carts; and tripping when she hurried to get from between them and talking with a co-worker and not paying sufficient

attention to the movement of the carts. Petitioner's concerns regarding her continued employment were founded given that she was subjected to discipline for violation of Respondent's "horseplay" policy. No evidence was submitted to show that Richard Barragan was disciplined for his participation in the "horseplay." However, Respondent's internal safety policy is not dispositive relative to whether Petitioner was engaged in horseplay that would render her claim non-compensable under the law.

An employee who engages in horseplay resulting in injury is said not to have sustained the injury within the scope of the employment. *Payne v. Industrial Comm'n*, 295 Ill. 388, 391 (1920). Liability only attaches "where at the time of the accident the employee is performing service growing out of and incidental to his employment." *Payne*, 295 Ill. at 392. However, a non-participating victim of horseplay may recover. *Murray v. Industrial Comm'n*, 163 Ill. App. 3d 841, 843 (1987) (also citing *Health & Hospital Governing Comm'n v. Industrial Comm'n*, 62 Ill.2d 28 (1975) (injury compensable even where it is uncertain whether the act was horseplay or simply an act of negligence)).

The Arbitrator found that at the time of her accident, Petitioner was engaged in horseplay with Mr. Barragan and concluded that her accident did not arise out of her employment. He deemed her conduct "an unexpected and unnecessary deviation from her assigned duties of tear down" and denied all benefits. The Commission disagrees.

It is clear from the testimony of witnesses and the photos, video, and diagrams submitted by both parties that the tear down area to which Petitioner was assigned on the date of her accident was adjacent to the auto-loader platform. Petitioner testified that she had completed work on one engine and was preparing to move it to the green rack in front of the auto loader platform when she realized that her torn down engine was missing bridles. She would need to obtain two bridles and attach them to her engine before she would be able to use the hoist to move her engine to the appropriate rack. Petitioner testified that, although bridles were available at other stations along the production line, she was closest to the auto loader platform and elected to obtain a bridle from the bin at that location. Petitioner testified that she had climbed onto the auto loader platform, using a cart as a step up rather than the stairs provided, for the purpose of obtaining a bridle.

While Petitioner did not follow Respondent's prescribed manner of performing her work, she was engaged in some type of conversation with Mr. Barragan while at her station and on the platform; the video also shows that Mr. Barragan was not innocent in the dialogue on the floor or on the platform. The Arbitrator noted, "Mr. Barragan testified that [P]etitioner brought some bridles to him, while [P]etitioner testified that she went on the auto loader platform to get bridles." However, the video directly controverts this testimony. Petitioner did not bring anything to Mr. Barragan or onto the platform. Petitioner's hands appear to be empty. The foregoing supports Petitioner's version of events that she approached the platform to obtain bridles and was engaged in a service growing out of or incidental to her employment.

Moreover, the bridle bin is located on one side of the platform, along with two other bins. The video shows the bridle bin on a shelf on the left side of the platform. Petitioner testified that

after she had reached the platform, she spoke briefly with Mr. Barragan and then noticed that the carts on the line appeared ready to move. It is at this point that the video reflects Mr. Barragan facing Petitioner's direction, holding the control mechanism with his right hand, and pressing a release button causing the cart to begin to move. Notably, Petitioner was already on the cart at shoulder level with the bridle bin to her left. Had Petitioner had the opportunity to reach into the bin and retrieve the bridles she went to get, the accident may not have occurred. However, Mr. Barragan pressed a release button and the cart began to move down the line. It was at this point that Petitioner stepped down from the cart falling to the factory floor and injuring her right knee.

Mr. Barragan also testified that he did not realize he placed Petitioner in danger when he hit the release button, allowing the cart on which Petitioner was standing to move forward down the channel. The video shows quite the contrary. Mr. Barragan's head and face are tilted downward toward Petitioner and the cart. Simultaneously, Mr. Barragan's right hand held the control mechanism, and he pressed the release button causing the cart to move. Mr. Barragan's testimony is not credible and, paradoxically, supports Petitioner's explanation for the inconsistencies in her reports about the mechanism of her injury that the Arbitrator found persuasive to deny her claim. It is apparent that both Petitioner and Mr. Barragan had an interest in being untruthful to Respondent regarding their conduct at the time so that they would not be subjected to discipline for violation of Respondent's safety policy.

Given the foregoing, the Commission cannot conclude that Petitioner was a willing participant in horseplay rendering her claim non-compensable. Petitioner should have obtained bridles as directed by Respondent's policies, but she was nonetheless engaged in an employment activity that brought her to the platform. The person with the ability to operate the cart was Mr. Barragan, and he did so while Petitioner's back was turned to him. Petitioner was an unwilling participant in this horseplay or Mr. Barragan's negligent act.

Based upon its determination that Petitioner's accident occurred in the course of and arose out of her employment, and that she was not a willing participant in horseplay, the Commission concludes that Petitioner's accident is compensable under the Act.

B. Causal Connection

The Commission next considers whether Petitioner's current condition of ill-being is causally related to the accident. As explained herein, the medical records establish that Petitioner did sustain a work-related accident as claimed that resulted in a current condition of ill-being of her right knee. Given this record, the Commission concludes Petitioner's condition of ill-being is causally related to the accident.

C. Medical Benefits & Prospective Medical Treatment

As a result of her accident, Petitioner suffered an ACL tear that was surgically repaired. At the time of hearing, Petitioner had undergone surgical repair by Dr. Whitehurst of OrthoIllinois and was completing a course of physical therapy. Dr. Whitehurst's April 11, 2018 office note recites the mechanism of injury as "Patient states that she was jumping off an engine

cart, and tripped over a cart" (PX1, 4/11/18), resulting in a complete ACL tear and sprains of the medial and lateral collateral ligaments of the right knee.

Respondent did not have Petitioner examined and did not dispute that her treatment thus far was reasonable and necessary. Dr. Borchardt provided a hinged knee brace and ordered an MRI before referring Petitioner to Dr. Whitehurst, who performed a surgical ACL repair after concluding the following:

> Due to the patient's age and activity level, I discussed that the natural history of nonoperative treatment with [sic] likely lead to arthritis as a young adult. The patient has some collateral ligament injury, however I recommend that these be treated conservatively prior to surgical intervention. Ultimately I recommend surgical intervention for a right knee arthroscopy, ACL reconstruction with autograft, possible partial meniscectomy versus meniscal repair.

PX1, 4/11/18.

Based upon the MRI results, the absence of any prior knee complaints, and Dr. Whitehurst's recommendation for surgical repair of the ACL tear, the Commission finds that Petitioner proved that her current condition is causally related to her accident on February 2, 2018 and that her treatment to the time of hearing was reasonable, necessary, and causally related to her work accident. According to Petitioner's Exhibit 1, Respondent's insurer paid for the conservative treatment and testing rendered by Dr. Borchardt, although not for the hinged brace or MRI prescribed by the doctor. Respondent paid nothing toward Dr. Whitehurst's treatment, beginning on March 30, 2018 up through the date of hearing. PX1.

Based on the foregoing, the Commission awards Petitioner the medical expenses related to her treatment for her right knee injury. The bills are for reasonable and necessary treatment to alleviate Petitioner from the effects of her accident at work.

The Commission further finds that the post-operative physical therapy recommended by Dr. Whitehurst and being completed at the time of hearing is reasonable and necessary to alleviate Petitioner from the ongoing effects of her injury at work.

D. Temporary Total Disability

On the Request for Hearing, Petitioner claimed she was entitled to 11 and 4/7ths weeks of temporary total disability (TTD). Respondent denied liability for any and paid no TTD. Petitioner was denied short term disability benefits due to the insurer's determination that the injury was work-related.

Petitioner was injured on February 2, 2018. She saw Dr. Borchardt of OrthoIllinois that same day and returned to work the following day with her knee in a hinged brace. On February 12, 2018, Dr. Borchardt restricted her to sit-down work only. Petitioner's March 27, 2018 MRI revealed a complete ACL tear, and Dr. Borchardt on March 29, 2018 noted Petitioner was

working full-time with restrictions and referred her for surgery to Dr. Whitehurst, an orthopedic surgeon in his practice. Dr. Borchardt continued her restrictions, but at that point, Respondent discontinued Petitioner sit-down position. Dr. Whitehurst first saw Petitioner on April 11, 2018 and performed her surgery on May 17, 2018. At the time of hearing, Petitioner was still undergoing post-operative physical therapy. She had not worked or collected any temporary total disability or short-term disability from March 29, 2018 to the date of hearing. Thus, the Commission finds that Petitioner is entitled to the claimed temporary total disability benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the August 7, 2018 Decision of the Arbitrator is reversed. The Commission finds Petitioner sustained an accident on February 2, 2018 that arose out of and in the course of her employment, and Petitioner proved by a preponderance of the evidence that her current condition of ill-being is causally related to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay temporary total disability for a period of 11 4/7 weeks from March 29, 2018 to June 18, 2018. Respondent stipulated that it had not paid either temporary total disability or non-occupational indemnity disability benefits for which credit may be allowed under Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses contained in Petitioner's Exhibit 1 pursuant to §8(a) and §8.2 of the Act. Respondent shall receive a credit for medical bills, if any, paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for prospective medical treatment, as recommended by Dr. Whitehurst.

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 Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980), but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/dak
r-1/23/20

MAR 19 2020

068

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

SANTOS, JASMINE
Employee/Petitioner

Case# **18WC008501**

ANDROID INDUSTRIES
Employer/Respondent

20IWCC0163

On 8/7/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0000 GESMER & REYNOLDS PC
BRAD A REYNOLDS
526 E JEFFERSON ST STE 118
ROCKFORD, IL 61107

2027 WIEDNER & McAULIFFE LTD
JEFF SALISBURY
2990 N PERRYVILLE RD STE 4300
ROCKFORD, IL 61107

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jasmine Santos
Employee/Petitioner

v.

Android Industries
Employer/Respondent

Case # 18 WC 0008501

Consolidated cases: None

20IWCC0163

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Rockford**, on **June 18 and 19, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 _____

20IWCC0163

FINDINGS

On the date of accident, **2-2-2018**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$39,860.08**; the average weekly wage was **$766.54**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

The petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on February 2, 2018.

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

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

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

Signature of Arbitrator

August 7, 2018
Date

AUG 7 - 2018

ICArbDec19(b)

20IWCC0163

FINDINGS OF FACT

Frederick Swain testified for Respondent that before becoming Plant Manager, he was Operations Manager for six years and was responsible for production, safety and quality of team members and leadership staff. Approximately 70-80% of his time was spent on the manufacturing floor. (T. 2-22)

Mr. Swain testified that Android Industries manufactures engines for Fiat Chrysler Automobiles (FCA). The manufacturing process involves an oval assembly line consisting of metal "carts" which travel along a channel in the floor to various stations. The carts contained "tooling" or metal supports on top where the engine module sits, and operates as a foundation for the engine. Each cart measures 28 inches from the floor and has two axles and wheels, covered by orange bumpers or skirting surrounding the wheels that contain sensors within them that identify where each cart is located in the assembly process. The last station in the assembly line where the completed engines are removed from the carts is known as the "autoloader." The completed engines are hoisted or lifted onto a racking system with the aid of bridles, which are pieces of metal attached to the side of the engine where the hoist attaches. (T. 2-27) The racks of engines are then transported to the customer, FCA.

Part of the assembly process includes an area known as "tear down" where fully-built engine modules arrive on a rack and the person performing the tear down uses the bridles to attach the hoist and move the engine to a cart. Removed bridles are to be taken to one of two bridle locations, farther down the assembly line where they could be reattached. (T. 2-31)

Petitioner testified that she became employed as an assembly line worker with Android Industries on December 16, 2016. (T. 10) She testified that between 8:00 a.m. and 9:00 a.m. on February 2, 2018 she was working in the tear down area. He job duties included bringing bad engines—model GMET4—from the assembly line and taking off and separating good parts from bad, and taking the good parts back to the assembly line. (T. 11) At times, petitioner would stand on the orange bumpers at the bottom of the carts in order to reach the top of the engine to remove hoses or wiring harnesses that she could not reach from the ground.

Petitioner testified that on the date of injury, she needed to obtain a bridle in order to hoist an engine from the rack. Petitioner testified that she walked over to the autoloader station and asked Richard Barragan, an autoloader operator, for a bridle. After he refused, she climbed on top of a cart and mounted the autoloader platform herself. Petitioner admitted that she could have gone to other stations at ground level to get a bridle, but claimed that the autoloader was the closest station. (T. 2-84) She also testified that there were stairs near the autoloader that she could have used, but chose not to use the stairs. (T. 19) Petitioner testified that once on top of the autoloader, she briefly spoke to co-employee Richard Barragan. She testified that there was no physical contact between herself and Mr. Barragan. (T. 25) After a brief interaction with Mr. Barragan, petitioner testified that she turned around and stepped on top of another cart. She testified that she did not realize Mr. Barragan had activated the button to advance the carts down the line. Once she was on the cart and realized it was moving she "hopped down like I normally do." (T. 36) She landed on the ground she felt a "pop" in her right knee and felt immediate right knee pain. (T. 17)

Mr. Swain testified that when an employee reports an injury, it is the policy of Android Industries to investigate every incident. The process includes all team members involved in the incident in order to investigate

and determine the root cause of the injury and to put safety measures in place to prevent a reoccurrence. The final stage of the investigation resulted in compiling information so that long-term preventative measures or corrective action could be implemented.

Mr. Swain testified that following petitioner's injury on February 2, 2018, the resultant investigation lead to the discovery of a video which captured the incident. The camera that took the video was located on the autoloader platform, facing outwards. It was designed to capture team members loading engines to ensure that the engines were built correctly and are placed on the finished rack in sequential order. The camera was connected to a DVR system which stores footage for approximately 30 to 60 days. After viewing the video, Mr. Swain requested that the footage be taken from the source and saved. An IT member saved the approximately 1.5 minute video footage. Mr. Swain testified that RX5 was a true and accurate copy of the video clip he originally observed which included a date and time stamp. (T. 2-44) RX5 was admitted into evidence without objection.

Mr. Swain testified that on February 2, 2018 petitioner was working at the tear down station, which was completely performed on the floor level, and she would not have had any business purpose for being on the autoloader platform. He testified that RX5 did not show petitioner performing any business-related tasks on the autoloader. (T. 2-53)

Petitioner admitted that when she initially notified her employer of the incident immediately after her injury, she did not correctly describe how the accident occurred. She reported that the injury was the result of her walking and "tripping over [a] cart." (T. 26) Petitioner participated in at least two meetings regarding the incident investigation with several managers present including Fred Swain, the plant manager; William Sayvor, the operations manager; Brian Brown, the HR manager, Jessica Tirado, the quality manager, and Chad, an engineer. (T. 75-76) It was not until after the incident that petitioner admitted that her injury was the result of her jumping off the top of a cart. (T. 28) Petitioner testified that she told the union chair how it happened, but not anyone in management. (T.29)

When petitioner initiated treatment, she provided a history to Dr. Borchardt of Ortholllinois that her injury was the result of her walking and twisting her knee when she tripped over a cart. (T. 30) Following her injury, petitioner continued working until March 29, 2018 when work restriction were unable to be accommodated. (T. 33) No light-duty work accommodations were available after petitioner underwent surgery. (T. 34) She had not received any TTD benefits.

After viewing (RX5) petitioner identified herself and Mr. Barragan in the video and noted that she could be seen mounting the autoloader platform wearing a red sweater. (T.78) Petitioner admitted that the video showed that there was physical contact between petitioner and Mr. Barragan and that at no time did she retrieve a bridle from him. (T. 79,80) Petitioner testified that the video depicted an accurate representation of her standing on top of a cart and of how she fell on the date of injury. (T.79) Petitioner also admitted Richard Barragan pushes a button to control when the carts move. (T.80).

On June 19, 2018, the second day of trial, petitioner admitted that on the date of her injury, she climbed on top of the cart by first stepping on the orange skirting at the bottom of the cart, and then on top of the cart and onto the autoloader. She stated that she noticed that Mr. Barragan was getting ready to pick up an engine and there was not enough space so she decided to get out of his way by stepping on top of a cart, and jumping down. She testified that "the same way I got up on the autoloader is the same way I was going to get down." (T. 2-79) She admitted that she did not retrieve any bridles from the autoloader platform. When asked why she did not use the stairs along the side of the autoloader she responded "it was quicker for me to hop down." Petitioner testified that while she had never jumped off a moving cart before February 2, 2018, she had previously jumped off the top of a cart near the autoloader several times without being disciplined. (T. 2-81)

Rubin Alonzo testified that he had been employed by Android Industries for approximately six years and held the position of a Team Leader for Zone 4, which encompassed the autoloader station. (T. 2-6) Mr. Alonzo testified that RX6 was a photo which depicted an autoloader operator dropping an engine onto a rack on top of the autoloader platform. Mr. Alonzo testified that that the autoloader operator is responsible for advancing the carts down the line by pushing a button. (T. 2-16) He noted that RX6 also depicted a cart in front of the autoloader and stairs on the side of the platform which he observed employees regularly use to mount and dismount the autoloader platform. He testified that he had never observed anyone standing on top of or riding on a cart. (T. 2-12)

Mr. Alonzo testified that on February 2, 2018 he found petitioner laying on the ground near the autoloader and helped her up once he noticed she was injured. She informed him that her right knee began to hurt although she did not describe how the injury occurred.

Richard Barragan testified that he had been employed as an assembly line worker with Android Industries for a little over three years and worked as an autoloader operator. He knew petitioner and considered her a friend. (T. 84) He described his duties as pressing a button to lift an engine off of a cart, turning the engine and hitting the button again to release the engine on a rack. He testified that "it's just like one quick, two or three second" process. He then presses a button to advance the carts down the assembly line. He testified that he did not witness petitioner's injury, but recalled that something had happened to her on February 2, 2018. He testified that petitioner approached him to bring him bridles that she had taken off an engine, and when he turned around from placing an engine on the rack, he noticed petitioner was on the ground holding her knee. (T. 85) He claimed to be unaware of how petitioner got to the ground. He could not recall the content of their discussion before she fell and denied any physical contact between himself and petitioner. (T. 86)

On cross examination, Mr. Barragan testified that he was currently on parole and regularly reported to a parole officer stemming from a past crime. He testified that on the day of incident, February 2, 2018, he saw petitioner approach him with two bridles in her hands when she climbed up onto the autoloader platform and placed them in a bucket. He testified that he was not facing petitioner when she got down off the autoloader platform and was not aware of how she got down. When asked whether she used the stairs on the side of the autoloader, he responded "I wasn't looking. I had to turn around with the engine to do what I had to do." (T. 91)

After reviewing RX5, Mr. Barragan testified that the video depicted the autoloader station and he identified himself and petitioner in the video. He testified that he did not see anything in petitioner's hands when she climbed on top of the autoloader. (T. 94 and 96) He admitted that at no point in the video did he turn his back on petitioner. When asked whether he saw petitioner jump off of a cart, he responded "I guess." He admitted that petitioner did not bring any bridles to him, and that he was responsible for pushing the button which advanced the carts. (T. 97)

On re-cross Mr. Barragan admitted he was in very close proximity to Ms. Santos when he pushed the button to advance the cart, but did not recall if he warned her. (T. 98)

On cross examination, petitioner admitted that on the day of her injury, she never picked up a bridle from Mr. Barragan. Also, she admitted that her injury was the result of falling off the top of a cart and hitting the floor. She admitted there were metal fixtures on top of the cart. (T49, 50) She testified that the First Report of Incident was completed in her own handwriting and signed on February 2, 2018. (RX1) On the incident report, she indicated the cause of injury as tripping over a cart. She also listed Richard Barragan as a witness to the incident. She had an opportunity to explain the cause of her injury to her supervisor Danny Gutierez before he completed Incident Report. With regard to Exhibit #9, Petitioner also placed an "X" on the spot where she fell. (T. 53)

Petitioner testified that she indicated on the UNUM Short-Term Disability Form her injury was the result of her falling from the top of a cart. (RX2) (T. 54)

Petitioner testified that since her injury she had spoken to Richard Barragan several times, including the morning of trial. The following is the text message exchange between petitioner and Richard Barragan from the morning of trial.

Ms. Santos - "They are trying to say we were horseplaying and that is how I got hurt."

Mr. Barragan - "I never said we horseplayed and you didn't either so as long as we keep it like that, you should be okay."

Ms. Santos - "I wonder what Rubin is going to say. He didn't see me get hurt."

Mr. Barragan - "He said he only know (sic) of when he came to pick you up from the ground."

Mr. Barragan - "Dude, they might not even call us depending on what you said."

Ms. Santos - "Lol, really."

Mr. Barragan - "Yup." (T. 72)

Henrietta Washington testified that she had been employed by Android Industries for 11 years; 8 of which she had been a Union representative. Ms. Washington testified that she had previously worked as an Assembler and was familiar with the tasks of the "tear down" station. She testified that while performing the tasks of tear down, it was sometimes necessary for an Assembler to stand on top of the metal cart that the engines rest on to take things off the top of the engine if they are too short to reach above. (T. 101) She stated that the employees would stand "maybe a foot" off the ground, and then "just step down off of it." (T. 102)

Ms. Washington identified on a photo of the cart the part of the cart she had earlier testified to seeing people jump or hop off. The Arbitrator stated she "is pointing to a part of the cart that has an orange oval around it which is not on the top of the cart ..." (T.110)

On cross examination, Ms. Washington clarified that she had never observed an employee standing on top of a cart, and that she had been referring to the orange skirting that covered the wheels and that was about 1 foot of the ground. She identified the orange skirting area in RX6. (T. 106) She was asked once more whether she has ever seen anyone standing on or jumping off the *top* of a cart and she answered "no." (T. 111)

Brian Brown testified that he had been employed with Android Industries for eight years as the Human Resource Manager. (T. 2-58) His responsibilities include everything from staffing the plant to payroll, safety, and workers' compensation matters. In regards to workers' compensation program, Mr. Brown testified that when an injury or illness is reported in the plant, as soon as he is notified about it he tries to make sure that the accident is fully investigated and he is responsible for following the case through closure. Mr. Brown also testified he took the photos contained in RX6-10, including the measurements observed in RX8.

Mr. Brown was notified on February 2, 2018 that petitioner was injured in a work-accident. He testified that RX1 was the First Report of Injury which was to be partially filled out by the injured employee. The remainder of the form was to be completed by the Shift Leader while speaking with the injured employee to learn exactly what happened and to get more details regarding the incident. (T. 2-60). He testified that RX1 was completed by

Danny Gutierrez, petitioner's team leader, who signed page two of the document.

Mr. Brown testified that following petitioner's injury the investigation included going out to the production floor where petitioner alleged the injury to have taken place to try to recreate how the incident occurred and learn how to avoid a repeated injury. During the course of the investigation Mr. Brown noticed a few "red flags" with how petitioner described the accident such as the location she initially stated she was in was not consistent with her description of getting her foot caught between two carts. Despite having three conversations with petitioner following the injury, she did not explain to Mr. Brown that she was injured after standing on top of a cart. (T. 2-66)

Petitioner's Exhibit 1 contained the records of Orthollinois. Mr. Brown testified that he completed the personnel meeting notes (RX3), also known as a disciplinary notice. He met with with petitioner along with the Union rep chair, Damarcas Griffin. He read the document to petitioner and all three parties involved in the meeting signed the document. Petitioner was disciplined as a result of the February 2, 2018 incident for a violation of Rule 3, Category 3—engaging in "horseplay". (RX3) Mr. Brown testified that information regarding the policy against horseplay is contained on the back of the contract of the collective bargaining agreement.

SUMMARY OF MEDICAL TREATMENT & PETITIONER'S OTHER EXHIBITS

Petitioner presented to Dr. Borchardt of OrthoIllinois on February 2, 2018 complaining of a right knee injury sustained earlier that morning. X-rays were negative for any acute fractures and petitioner was diagnosed with a possible knee sprain. Dr. Borchardt provided petitioner with a hinged knee brace and suggested a follow up. An MRI of petitioner's right knee was taken March 27, 2018 at OrthoIllinois and showed a complete ACL tear. Dr. Borchardt referred petitioner to Dr. Whitehurst for surgery. Dr. Whitehurst performed arthroscopic surgery to repair petitioner's ACL tear on May 17, 2018. At the time of hearing, petitioner was four or five weeks into physical therapy post-surgery. She stated that she had a follow up scheduled with Dr. Whitehurst in July but was unsure of the exact date. Petitioner's Exhibit 1.

Petitioner's Exhibit No. 2 consisted of a denial letter from UNUM Life Insurance Company of America denying petitioner's claim for group disability benefits.

Petitioner's Exhibit No. 3 was a March 14, 2018 letter from Phemy Lim at Gallagher Bassett Services, Inc. denying disability benefits for the alleged accident of February 2, 2018.

SUMMARY OF RESPONDENT'S EXHIBITS

Respondent's Exhibit No. 1 consisted of the five page First Report of Incident dated February 2, 2018. Petitioner acknowledged filling out in her own handwriting page one of the report and signing that report on February 2, 2018, the date of accident. In describing what led up to the incident, petitioner wrote: "I was talking to Richard. Noticed the carts about to move, so as I was walking away the cart caught my leg and I went down landing on my knee." At the time of the incident, petitioner wrote that she was "talking to Richard then getting out of way of cart." With regard to how the incident could have been prevented, she wrote: "Should have never been standing in the middle of two carts." The remainder of the form constitutes the shift manager's investigation generally restating what petitioner indicated on page one of the report.

Respondent's Exhibit No. 2 is the UNUM short term disability claim form prepared by petitioner and submitted to UNUM and dated April 4, 2018. That form signed by the petitioner in part indicates the injury occurred from getting down from the auto loader. Petitioner specified: "I was getting down off the auto loader, the cart took off, I lost my balance, I jumped off and landed on my knee."

Respondent's Exhibit No. 3 consisted of the March 1, 2018 personnel meeting notes, indicating that petitioner was disciplined for engaging in horseplay. Respondent's Exhibit No. 4 was the February 2, 2018 consultation note prepared by Dr. Borchardt from Rockford Orthopedic Riverside. The history of incident contained within the medical record is: "Patient states that she twisted the knee when she tripped over a cart." Under the treatment section, it was also indicated: "The patient states while walking, she twisted her right knee when she tripped over a cart."

Respondent's Exhibit No. 5 consisted of a video of the incident comprising of approximately one and a half minutes of video from 8:44:01 to 8:45:25 on February 2, 2018. Both Jasmine Santos and Richard Barragan agreed the video portrays the incident in question. The video appears to be one second interval photos of the auto loader platform. Witness Richard Barragan is seen on the auto loader platform leaning against a rail. There is no audio with the video, but it appears he may have been talking with a coworker on the plant floor. The auto loader platform is approximately two feet or more off the floor of the plant. At 8:44:35, petitioner approaches and steps up onto the platform. She is wearing a red sweatshirt and dark or black pants. From the testimony at trial with regard to the location of the steps up to the platform, it is apparent that Ms. Santos did not use the steps to get up on the platform. After a short discussion with Mr. Barragan, claimant steps off the platform onto a cart. At approximately 8:44:57/58, the petitioner is observed falling off the cart. At no time did Mr. Barragan turn his back on the petitioner, and it appears that he saw the entire event. At 8:44:10/11, Mr. Barragan gets down off the platform, walking in the direction claimant fell, presumably to assist her or check on her. The video ends at 8:44:25.

Respondent's Exhibits 6 through 10 are photographs of the auto loader station, cart top, measured height of the cart top, open carts, and area petitioner originally identified as location of the fall. All photos were taken by witness Brian Brown.

CONCLUSIONS OF LAW

On the disputed issue C, whether an accident occurred that arose out of and in the course of petitioner's employment by respondent, the Arbitrator finds as follows:

It is axiomatic that the petitioner bears the burden of proving all elements of the claim. Among those are whether the injury arose out of and in the course of petitioner's employment by respondent. In this case, petitioner stepped onto a cart that is intended to hold an engine block and contains tooling on the top of the cart upon which she stood, petitioner knew that those carts moved along the assembly line and petitioner fell when she lost her balance attempting to jump off the moving cart. Petitioner stepped onto the cart from the auto loader platform and based on the credible testimony, it is apparent petitioner had no business purpose in being on the auto loader platform or the top of the cart at the time of injury. This was an inherently dangerous risk and had nothing to do with her assigned duties of tear down on the date of injury. Evidence established that she never worked on the auto loader platform during the course of her employment by respondent. Petitioner assumed a personal and inherently dangerous risk unrelated to her employment duties.

In the Supreme Court case of Orsini v. Industrial Commission, 117 Ill.2d 38, 509 N.E.2d 1005 (1987), benefits were denied when an auto mechanic suffered an injury while working on his own personal automobile during the regular hours of his employment and with the knowledge of the employer. While adjusting a carburetor, the car suddenly lurched forward injuring the claimant's legs. The Court noted that an injury arising out of one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. The risk must be peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by

reason of employment. An injury is not compensable if it results from a personal risk to the employee rather than a risk incidental to employment. Even acquiescence to the task being performed by the employee is insufficient to bring that task within the arising out of context. The Supreme Court specifically noted as follows: "Employer acquiescence alone cannot convert personal risk into an employment risk. [citation deleted]. A similar result was upheld in Hatfill v. Industrial Commission, 202 Ill.App.3d 547, 560 N.E.2d 369 (1990) when an employee jumped over an accumulation of water at the base of an incline on his way to his car in the respondent's parking lot and suffered injury. In affirming the Commission's denial of benefits, the Court noted that the Commission could have inferred the claimant's injuries resulted from a personal risk assumed by the claimant. Claimant was engaged in an activity which only benefitted himself and not his employer. This line of reasoning was further confirmed in Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275 (1999) when a waitress and cocktail server leaving work walked across a slippery, sloping grassy path, slipped and caused injury to her ankle. The Court noted an injury arises out of employment where its origin stems from a risk connected with or incidental to employment or is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of the employment. (citing Orsini, supra.) The Court further noted that under either approach, an injury does not arise out of the employment where an employee voluntarily exposes himself or herself to an unnecessary personal danger solely for his own convenience. (citing Orsini, supra.) It was further noted by the Court that the fact that some people may choose to leave the workplace in an unsafe manner did not make such voluntary act compensable, nor was respondent required to police exits routes to prevent all unsafe voluntary acts.

In the instant case, witness Fred Swain provided testimony that petitioner had no business purpose on the auto loader platform. Both Mr. Swain and Richard Barragan verified that Mr. Barragan was the only operator on the auto loader platform that day. Mr. Barragan did not need anything on the platform to do his job. Mr. Barragan testified that petitioner brought some bridles to him, while petitioner testified that she went on the auto loader platform to get bridles. She also admitted that she could have gotten the bridle from other stations not far away from her tear down station. Petitioner's conduct was an unexpected and unnecessary deviation from her assigned duties of tear down. Furthermore, the video evidence offered by respondent (RX 5) clearly shows no work-related activity performed by the petitioner on the auto loader platform when she apparently went up on that platform to chat with Mr. Barragan. Specifically, the petitioner neither brought bridles to Mr. Barragan nor did the petitioner retrieve any bridles from the auto loader platform. The Arbitrator notes that the petitioner had a safer way to enter and exit the auto loader platform in the form of the stairs, but the petitioner chose not to use the stairs.

Witness Ruben Alonzo, who worked as a team leader in Zone 4, the area in which this incident occurred, testified that he had never seen an employee stand or ride on top of a cart. Henrietta Washington, called in petitioner's case in chief, contradicted petitioner's testimony about stepping or riding on top of the cart. Ms. Washington testified that in her many years of employment for Android Industries, she had never seen anyone on top of the cart.

Both witnesses, Fred Swain and Richard Barragan, testified that no tear down of a bad engine was performed on the auto loader platform. Petitioner was not assigned to work on the auto loader platform. Furthermore, the auto loader platform can be accessed by steps, which petitioner chose not to use in getting up onto the auto loader platform or getting off the auto loader platform. Witness Fred Swain testified that all tear down activity that would have been performed by petitioner takes place at floor level and not the raised level of the auto loader platform.

The Arbitrator specifically finds that neither Jasmine Santos nor Richard Barragan were credible witnesses, for a variety of reasons. Petitioner admitted at the start of her testimony that she did not correctly describe to the employer how she actually fell on the date of injury. Petitioner in her own handwriting filled out a First Report of Injury indicating that she tripped over a cart. Petitioner acknowledged that she participated in an investigation of the incident and never told the team of investigators how the accident actually happened.

According to witness Brian Brown, this deception was repeated in three different conversations after the alleged injury. Petitioner finally admitted to the Union representative how she claims the incident happened, but never told anyone in a supervisory capacity, in management or in HR, this version of how the incident happened. The progress notes of Dr. Robin Borchardt dated February 2, 2018 contain an inaccurate history of alleged injury, confirming that petitioner held to this deception even when she saw a treating physician. It was not until she filled out a UNUM short term disability claim form on April 4, 2018 that she changed her story and acknowledged her new version of how the incident actually happened.

Petitioner's sworn testimony regarding her second version of how the incident happened is contradicted in key parts by the video offered by respondent. This video depicts the approximate one and a half crucial minutes showing petitioner stepping up onto the auto loader platform, conversing with Mr. Richard Barragan, getting onto the top of the cart, and then falling off the top of the cart onto the shop floor. The video contradicts petitioner's initial history given to Danny Gutierrez as recorded in the First Report of Injury, RX 1 and signed by the petitioner. The video contradicts the petitioner's sworn testimony that she went to pick up a bridle when she climbed on to the auto loader platform. Petitioner also testified there was no physical contact between herself and Richard Barragan, although that is contradicted by the video when Mr. Barragan makes physical contact with the petitioner. Petitioner stated that Mr. Barragan was getting ready to pick up an engine to put on the auto loader platform but none is observed in the video. The video demonstrates that petitioner carefully stood on top of the cart and did not just use it to jump down to the shop floor.

The video contradicts Mr. Richard Barragan sworn testimony on several key points. Mr. Barragan testified the petitioner approached him to bring bridles up to his station; however, the video shows nothing in petitioner's hands, which Barragan later acknowledged after reviewing the video. Mr. Barragan testified he did not witness the fall, having turned his back to place an engine on the auto loader. Nothing of that sort is depicted on the video and it is clear that he was facing the petitioner at all times. Mr. Barragan also denied any physical contact, yet the video reveals physical contact.

In addition, the Arbitrator notes that petitioner and Barragan communicated via text messages before trial on the morning of trial in an apparent effort to coordinate their testimony. Ms. Santos texted to Mr. Barragan, "They are trying to say we were horse playing and that is how I got hurt." Mr. Barragan texted back, "I never said we horse played and you didn't either so long as we keep it like that, we should be okay." The Arbitrator also noted that while Mr. Barragan was present at trial pursuant to a subpoena served upon him by respondent, he was initially called to testify in petitioner's case in chief. The Arbitrator finds that neither Jasmine Santos nor Richard Barragan were credible witnesses at trial and therefore the Arbitrator views all testimony presented by them to be extremely suspicious.

Finally, although respondent disciplined petitioner for horseplay in a written Personnel Meeting Note dated March 1, 2018, the Arbitrator concludes this incident went far beyond horseplay into the realm of personal risk and that petitioner is not an innocent victim of horseplay by another employee. All witnesses understood that carts move around the assembly line as a routine part of the assembly process. Petitioner testified she knew that Richard Barragan controlled the movement of the carts at his station, the auto loader platform. Mr. Barragan assisted Ms. Santos onto the top of the cart as clearly depicted in the video, and by her own testimony, petitioner knew that cart would ultimately move. She may not have anticipated falling from that cart when it moved, but she clearly would have known there was risk inherent in standing on the top of the cart at the time of the incident. This may be the reason petitioner failed to accurately report the manner in which the incident occurred.

The Arbitrator notes petitioner's attorney claim that petitioner is the innocent victim of horseplay committed by Mr. Barragan. In response to this argument, the Arbitrator notes that the petitioner went to the auto loader platform of her own volition and not for any purpose to further the interests of the respondent. The

petitioner chose to enter and exit the auto loader platform by climbing onto and subsequently jumping off a cart designed to carry engines through the facility as opposed to utilizing the stairs right next to the auto loader platform. The Arbitrator also finds that under these circumstances the petitioner was clearly not an innocent victim of horseplay but rather a willing participant in it.

Based on all the above, the Arbitrator finds that the petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on February 2, 2018. The Arbitrator further finds that the petitioner's injuries arose out of a personal and inherently dangerous risk that had absolutely nothing to do with petitioner's assigned duties and that petitioner was not engaged in any activities to benefit the respondent's interests at the time of her injury. Accordingly, all benefits are denied.

On the disputed issue F, whether petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds this issue moot based on the finding of no accident.

On the disputed issue J, whether respondent has paid for reasonable and necessary medical services, the Arbitrator finds this issue moot based on the finding of no accident.

On the disputed issue K, whether the petitioner is entitled to prospective medical care, the Arbitrator finds this issue moot based on the find of no accident.

On the disputed issue M, whether petitioner is entitled to TTD benefits, the Arbitrator finds this issue moot based on the finding of no accident.